

THE NCPO *e*-FORUM

A COLLECTION OF INTERNET TOPICS

2007 - 2008

This collection represents inquiries and responses to a wide variety of Client Protection Issues which were posted on the NCPO *e*-Forum. The queries and responses are unedited and appear just as they were written by NCPO members. NCPO hopes that you find this resource helpful and we intend to continue to offer similar publications of interest to the Client Protection Community.

For further information or questions, please feel free to e-mail info@ncpo.org

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TRUSTEES FOR INCAPACITY OR ABANDONED PRACTICE

Sent: Thursday, February 01, 2007 8:42 AM
To: CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject: Trustee Programs

Does your state bar have a program where trustees are appointed to oversee the closing of lawyer's office when the practice is abandoned, the lawyer dies or becomes medically incapacitated? Thanks.

Kris Wenzel
Outreach Coordinator

We have one but it is rarely used. Typically, the Professional Liability Fund (our mandatory malpractice provider) steps into these situations and handles the wind up of the office.

Sylvia Stevens

We have a provision in our Rules for Enforcement of Lawyer Conduct for appointment of a custodian to protect clients' interests, ELC 7.7. In one case, the custodian discovered that there was \$70,000 in the lawyer's trust account. The lawyer's records were a shambles, and our auditor could not determine who the money belonged to. We had numerous applications to the fund from this guy's former clients, so with the cooperation of the bank, we got an order from the Supreme Court authorizing the bank to transfer the funds to the Fund to be used to help pay the clients' claims. We're about to do this again regarding \$23,000 that a now disbarred lawyer gave to his lawyer, saying he didn't know who's money it was.

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ELC&ruleid=gaelc0707.07

Bob Welden
General Counsel
Washington State Bar Association

Florida has a procedure and the attorney is called an "inventory attorney." This is a link to our rule:

<http://www.floridabar.org/divexe/rrtfb.nsf/FV/4A31D2835FF12AD685256EA7005B3860>

John Anthony Boggs
Director
Clients' Security Fund, Intake & ACAP

-----Original Message-----

From: Paul.Wieckll@jb.state.ia.us [mailto:Paul.Wieckll@jb.state.ia.us]
Sent: Thursday, February 01, 2007 11:04 AM

To: Holtaway, John
Subject: Re: Trustee Programs

Yes. Two separate Iowa court rules address these situations - see rules 35.16 and 35.17 in the attached pdf file:

(See attached file: Pages from Court Rules 02-01-07.pdf)

Paul H. Wieck II
Executive Director & Assistant Court Administrator Iowa Supreme Court

-----Original Message-----

From: Blanchard, Christopher [mailto:Christopher.Blanchard@jud.ct.gov]
Sent: Thursday, February 01, 2007 11:12 AM
To: Holtaway, John
Subject: RE: Trustee Programs

Connecticut doesn't have a "program" as such, although our superior court rules (Practice Book Section 2-64) provide for the appointment of a trustee in the event of a suspension, disbarment, or resignation of an attorney from the bar. Pursuant to the same section, a court may appoint a trustee upon the death of an attorney, as well.

Christopher G. Blanchard
Staff Attorney
Judicial Branch Client Security Fund Committee

-----Original Message-----

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Thursday, February 01, 2007 11:29 AM
To: Holtaway, John
Subject: Re: Trustee Programs

Kris:

In New York, court rules allow for the appointment of an attorney(s) when a lawyer is disbarred, suspended or incapacitated in order to inventory client files and "take appropriate action to protect the interests of clients".

I believe most local bar associations maintain a list of attorneys to perform this function. The problem usually is finding someone and compensating them.

Please let me know if you need more info.

Tim O'S

Yes. In Nova Scotia, we have legislation authorizing the appointment of a Receiver (where a member has been suspended or disbarred) or a Court application for appointment of a Custodian, in circumstances where:

(a) a member of the Society is no longer authorized or able to practice law;

- (b) a law corporation through which of member of the Society is or has been practising is no longer authorized to practice law;
- (c) a member of the Society has absconded or is otherwise improperly absent from a location at which the member ordinarily practices;
- (d) the practice of a member of the Society has been neglected for an undue period of time;
- (e) a member of the Society, or a law corporation through which the member is or has been practising, has insufficient trust money to meet the trust liabilities of the member or corporation; or
- (f) other sufficient grounds exist for making the order.

The Society incurs all costs in relation to these 'trusteeships', and only attempts to recover them if the lawyer seeks to return to practice.

I attach a copy of our Guidelines for Receivers and Custodians, in case this is of any value, as well as our Guidelines for Suspended and Disbarred Lawyers which sets out what a lawyer can and cannot do under those circumstances.

Hope this helps.

Regards,
Victoria Rees

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Thursday, February 01, 2007 11:33 AM
To: Holtaway, John
Subject: RE: Trustee Programs

In Massachusetts, Supreme Judicial Court Rule 4:01, section 14 permits the Office of Bar Counsel (disciplinary counsel) to seek from the Supreme Judicial Court the appointment of Commissioners to oversee an abandoned law practice. Just recently on behalf of the Clients' Security Board, I requested the appointment of a Commissioner where an atty had died leaving no one to wind down the practice. Two former clients came forward alleging misuse of funds. The Commissioner took control of all of the files found at the law office and bank statements and reviewed everything. Each year there are approximately 3 or 4 Commissioners appointed. They are paid \$50/hr. from the funds of the Board of Bar Overseers.

-----Original Message-----

From: Tonya Herring [mailto:THerring@nmbar.org]
Sent: Thursday, February 01, 2007 12:11 PM
To: Holtaway, John
Subject: RE: Trustee Programs

New Mexico does not have any formal program, although our Disciplinary Board occasionally assigns a superintending attorney to oversee the closing of an attorney's law office.

Tonya Noonan Herring
Client Attorney Assistance Program Manager Client Protection Fund

Administrator

-----Original Message-----

From: David Shearon [mailto:dave.shearon@cletn.com]
Sent: Thursday, February 01, 2007 12:33 PM
To: Holtaway, John
Subject: RE: Trustee Programs

Yes, but it doesn't operate under us and I don't have details.

David N. Shearon, JD, MAPP
Executive Director

-----Original Message-----

From: Irwin Gilbert [mailto:IGilbert@BizLit.net]
Sent: Thursday, February 01, 2007 12:18 PM
To: Holtaway, John
Subject: RE: Trustee Programs

In Florida the Bar can seek the appointment of an "Inventory Attorney". These are selected from the locale where the deceased or disbarred attorney was located.

Irwin Gilbert

Kris:

Ohio's response is identical to New York's: Ohio has a rule authorizing the appointment of an attorney under these circumstances to inventory the files and take other action necessary to protect the interests of clients of the attorney.

Janet

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

The Law Society of British Columbia's program allows us to apply to court for the appointment of a custodian in the described circumstances to terminate a law practice (or to maintain it in the case of less than permanent incapacitation). In appropriate circumstances we forebear from applying for the appointment of a custodian, such as where a wind-up solicitor has been retained by an executor.

Custodianships are dealt with in Part 6 of our Legal Profession Act, and Part 6 of the Act's Rules. Links to the relevant portions of both our Act and Rules are:

http://www.lawsociety.bc.ca/publications_forms/act/lpa_part06.html
http://www.lawsociety.bc.ca/publications_forms/rules/rules_part06.html

Although we have sought the appointment of outside lawyers to act as custodians in the past, we are in the process of restructuring the program to allow our staff lawyers to be appointed as custodians to terminate practices. If you're interested in more information

on this restructuring, please see:

http://www.lawsociety.bc.ca/publications_forms/bulletin/2006/06-02-05_custodianship.html

For more information on our custodianship program, please feel free to contact me.

Graeme

Graeme Keirstead
Acting Manager
Special Compensation Fund & Custodianships
Law Society of British Columbia

Set forth below is Delaware's response:

The manner of procedure is laid in Delaware Lawyers Rules of Disciplinary Procedure. Procedural Rule 24(a) provides that if a lawyer has been suspended, disbarred, transferred to disability status, has died, has abandoned the lawyer's law practice and there is evidence that the lawyer has not complied with Procedural Rules 21 and 23, and no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist, the Supreme Court, upon proper application by the Office of Disciplinary Counsel (ODC), shall appoint a receiver with such powers and authority as are appropriate and necessary. The ODC then petitions Chancery Court for the appointment of a receiver. The Receiver is a member of the Delaware bar in good standing and acts in a volunteer capacity.

In California the superior courts of the state have jurisdiction over an attorney incapable of practicing or harming clients for any reason. Under 6180 and 6190 of the Cal. Bus. and Professions Code the State Bar may apply for assumption over the practice to obtain client files and trust accounts, etc.

Martha Gonzales

ESCROW FUNDS DEPOSITED TO CLIENT PROTECTION FUND

The Maryland Client Protection Fund receives money from the escrow accounts of lawyers to hold pending claims from clients. Usually this occurs when the lawyer has died or become disabled and the clients cannot be found or identified. It also occurs when, in real estate transactions or in decedent's estates, money is held in an attorney's escrow account, but the claimant's - despite the best efforts of counsel to locate them - are not identified. In this later case, counsel simply wants, after the passage of a large portion of time, rid his or her escrow account of this money. In all of these situations, Bar Counsel (the group in Maryland that brings disciplinary actions against attorneys) recommends that the lawyer (or the person winding up the affairs of the dead or disabled lawyer) deliver the escrowed money to the Client Protection Fund for safekeeping pending claims.

Do other Funds have this experience.

What, if any, rules or regulations do other Funds have relating to this question.

What is the practice of other Funds relating to the disposition a) of the principal amount of this money that comes into the hands of the Fund; and b) of the interest on that principal amount. Is the money simply held by the Fund for a set period of time (some 5 years, perhaps) and, assuming no claims thereon, simply transferred to the operating account of the Fund?

Leo W. Ottey, Jr.

From: millerfg@aol.com [mailto:millerfg@aol.com]
Sent: Wednesday, April 18, 2007 9:47 AM
To: Holtaway, John
Subject: Re: Query: Escrow Funds Deposited Into Client Protection Fund

Dear Mr. Ottey. I recall that the procedure in Maryland was adapted from procedures that I arranged for New York. Our good friend Isaac Hecht was a shameless mimic, God bless him. The New York rules and procedures was implemented to avoid having law client funds escheat to the treasury of the State of New York as abandoned property. Tim O'Sullivan (tos@nylawfund.org), the fund's current administrator, can certainly brief you on the rules, procedures and experience safeguarding law client funds from escheat.

I like the idea of avoiding the escheat to the benefit of the Fund, but in Illinois our disciplinary agency's Trust Account Handbook advises attorneys with unidentified funds in trust accounts to follow the procedures for abandoned property and our Client Protection Program (which is part of the disciplinary agency) won't accept such money, either as a contribution or to hold as escrowee.

Eileen Donohue

Under Indiana's (and maybe most) escheat statutes (we don't call it that, but it is essentially the same concept), the escheated funds are not actually claimed by the state as the state's own. Instead, the attorney general administers the fund (or other property) as a trustee, publicizes the process for claiming funds, and happily turns over the funds to their rightful owner. Using this process is a nice compromise between getting the money off the lawyer's trust account books, but still having them available for the missing client to claim if he/she appears in the future.

Turning "abandoned" funds over to the Client Protection Fund would be a poor substitute for this process if the Client Protection Fund then claimed ownership (rather than trusteeship over the funds).

Don Lundberg

See, http://www.iardc.org/clienttrusthandbook_toc.html

John Holtaway

PARALEGAL THEFT

I would like to know what other states have done in situations where a lawyer's employee stole client funds, and the lawyer was guilty only of negligent supervision. Although I don't have all details yet, a lawyer has reported to our disciplinary agency that his paralegal stole over \$700,000 from several probate estates. Criminal charges are pending against the paralegal. At this point there is no indication that the lawyer knew or benefitted in any way from the paralegal's conduct. I am told that the lawyer's malpractice carrier is denying coverage, though I am not sure of the basis for the denial. Although we have seen employee thefts before, the lawyer was always able to make good, but the amounts involved here make it impossible for him to pay. Although the clients can sue, I don't think recovery is likely unless the insurer can be made to pay. The disciplinary agency is not even sure it will pursue discipline against the lawyer, although it would if Client Protection was inclined to favorably view the estates' claims (discipline being necessary to claim eligibility).

Have other Funds had similar scenarios, and how did you deal with claims?

Thanks for any help you can give us.

Eileen Donahue
Illinois

-----Original Message-----

From: Irwin Gilbert [mailto:IGilbert@BizLit.net]

Sent: Friday, March 23, 2007 1:06 PM

To: Holtaway, John

Subject: RE: Listserve Inquiry - Paralegal Theft- Lawyer Negligence

The Florida Client Security Fund has distinguished thefts by non-lawyers and found that such thefts are not covered claims.

I should note that Attorney's who purchase multi-peril commercial office insurance policies normally also obtain coverage for "fidelity" losses. This effectively insures lawyers (within the limits of coverage) when dishonest employees steal client funds.

I also note that firm's with malpractice coverage may also have coverage for such losses based upon negligent supervision.

Of course it is little comfort for a client Security Fund to tell the victim/client that they have a great lawsuit they can bring against the law firm. The client must retain counsel and expend resources and time battling an insurance company whose main goal is to pay out as little as possible. The client may eventually settle for far less than the amount of the loss.

Irwin Gilbert

-----Original Message-----

From: Jones, Pete [mailto:FJones@morrisjames.com]

Sent: Saturday, March 24, 2007 8:04 AM

To: Holtaway, John

Subject: RE: Listserve Inquiry - Paralegal Theft- Lawyer Negligence

Delaware's response:

Our rules do not require payment from the fund unless the loss was due to attorney dishonesty or defalcation. I know we have had other scenario's where employees stole but the attorney paid the money back so the Fund did not see the claims. In Anker both the attorney and employee were found to be at fault and to have received the funds. I would think that the client could still sue the attorney for negligence.

From: millerfg@aol.com [mailto:millerfg@aol.com]
Sent: Friday, March 23, 2007 5:21 PM
To: Holtaway, John
Subject: Re: Listserve Inquiry - Paralegal Theft- Lawyer Negligence

Sometimes we have to say, "sorry", and provide an explanation. Lawyers can sometimes work miracles, but not always.

Eileen:

In New York, we have reimbursed in a few cases where the lawyer's paralegal or office manager was the thief - but only when the lawyer was guilty of professional misconduct or worse in connection with the theft. Two situations where we did pay:

(1) a lawyer practiced after his suspension, and abdicated responsibility for his escrow account thus allowing his paralegal to steal escrow funds.

(2) lawyer allowed his paralegal wife total control over his escrow account - lawyer abdicated any responsibility for the account - this allowed wife to steal from the account - thefts benefitted the lawyer b/c the money was used to pay the lawyer's business and personal expenses.

Hope this is helpful.

Tim O'Sullivan

Hi Eileen,

In BC, we would only respond through our defalcation compensation program if the funds were stolen by a lawyer.

We also insure our lawyers for negligence, and the malpractice insurance we provide would respond to a claim seeking recovery from a lawyer on the basis of negligent supervision of a thieving employee (whether or not such a claim would succeed, however, is another question). A number of firms here also purchase fidelity coverage to protect themselves and their clients from the risk of employee theft.

Regards, Margrett

JUDICIAL CHALLENGE

Has any Fund had a "dishonest attorney" successfully judicially challenge an award against him/her?

If so, what was the relief given to the respondent?

A Fund as a quasi judicial agency is immune from a defamation action - what relief would a court then give?

Thanks,
Tim O'Sullivan

In Illinois, we have never had a lawyer challenge an award in any kind of judicial proceeding, not even a reinstatement proceeding.

Eileen Donohue

-----Original Message-----

From: Irwin Gilbert [mailto:IGilbert@BizLit.net]
Sent: Tuesday, March 27, 2007 2:36 PM
To: Holtaway, John
Subject: RE: List Serve Inquiry - Judicial Challenge

In some states attorney's are required to reimburse the CSF for sums paid out as a condition of obtaining reinstatement. It could be argued that due process considerations require that the attorney be permitted to challenge his liability for the debt.

Irwin Gilbert

JUDICIAL APPEALS

Has a decision of any Client Protection Fund been appealed to a court within the past 3 years? From my work with Fred Miller back in '03 on reviewability of Funds' decisions, I know of applicable cases through '03.

The background is as follows: A Massachusetts claimant gave her lawyer (now disbarred) over a 10-year period \$565,000 to hold in trust. During this period, the lawyer performed various legal services for claimant. For 20 years, claimant received what she thought were interest payments earned on her principal of \$565,000. In fact, the lawyer was using claimant's principal as his own personal funds. Claimant's "interest" payments totaled \$912,000. Upon learning that her principal, \$565,000, had been stolen, claimant applied to the Board for reimbursement. The Board determined that since claimant received back from her lawyer MORE than she had given him over the years, there was no reimbursable loss. Given all of the circumstances of the matter, however, including that the former atty. assured claimant that her principal was intact, the Board made a \$150,000 award under its hardship provision. Claimant sued the Board in the Mass. Supreme Judicial Court despite the Board's rule that no decision to grant or deny reimbursement is subject to judicial review. A Single Justice denied claimant's request for relief. Claimant has now appealed to the Full Court. It might be helpful to inform the Court of any recent cases where Funds were sued following the grant or denial of an award.

Many thanks for your responses.

Karen D. O'Toole
Board of Bar Overseers/Clients' Security Board

-----Original Message-----

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Thursday, March 01, 2007 11:35 AM
To: Holtaway, John
Subject: RE: Judicial appeals

Karen,

We have not had any appeals in PA, however, we have an attorney who is attacking our procedures in Bankruptcy Court as a result of our filing a complaint in nondischargeability. There has been no resolution to date.

Kathryn J. Peifer, Esquire
Executive Director
PA Lawyers Fund for Client Security

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Thursday, March 01, 2007 11:54 AM
To: Holtaway, John
Subject: RE: Judicial appeals

Kathy,

Thanks for your response. I would VERY much like to have a copy of the final decision/outcome in the bankruptcy matter. Although, the actions of the Mass.CSB have not been challenged in recent years, it is only a matter of time before another a debtor raises some issue.

Karen

We had a case appealed to the Arkansas Supreme Court following denial of the claim by the Client Security Fund Committee in 2005. The decision was affirmed on appeal on June 30, 2005. For some reason, I can't find a reporter number for the case. The case is styled Healthcare Recoveries, Inc. as Agent for United Healthcare of Arkansas v. Arkansas Client Security Fund, Arkansas Supreme Court Case No. 2005-78. Lexis has given it the following Lexis No. 2005 Ark. LEXIS 438, if that helps any.

Here is a link to the opinion on our court's website (if this attempt is successful!)
<http://courts.state.ar.us/opinions/2005a/20050630/05-078.html>

Let me know if this is of assistance.

Michael Harmon

-----Original Message-----

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Thursday, March 01, 2007 2:04 PM
To: Holtaway, John
Subject: Re: Judicial appeals

Karen:

Yes. In New York, we have had several. In fact, we have two now pending.

We have never lost. What would you like?

Tim O'S

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Thursday, March 01, 2007 3:05 PM
To: Holtaway, John
Subject: RE: Judicial appeals

Tim,

I like your track record! I would like the most recent decision and/or the decision that in your opinion best sets out the scope or the type of review conducted by the court.

Karen

From: tonimoss@aol.com [mailto:tonimoss@aol.com]

Sent: Friday, March 02, 2007 1:08 PM

To: Holtaway, John

Subject: Re: Judicial appeals

Karen, maryland has had two recent appeals because of denials of claims. We have won both of them. Neither of them are similar in facts to yours, but we do not pay interest and any interest payments are looked at as payments towards the principal. i would assume, given the facts of your case that our trustees would not pay on this claim either. if you need further information please let me know.

janet moss

CONFIDENTIAL RECORDS

-----Original Message-----

From: Robin Lawnichak [mailto:RLAWNICHAK@mail.michbar.org]
Sent: Wednesday, January 03, 2007 9:13 AM
To: Holtaway, John
Subject: Client Protection Fund - Confidential Records

Michigan has proposed a rule granting the Client Protection Fund internal records confidential status. The proposed rule is currently being considered by the Michigan Supreme Court and has been published for comment.

We are running into some opposition and are requesting that any State Client Protection Fund Program that has a rule granting their internal records confidential status, please forward a copy of the pertinent rule or website link. We would like to hearing from you, even if your rule is a general, broad bar rule that covers more than just the CPF programs.

We are preparing for a January 17th hearing.

Thank you in advance for your assistance with this topic.

-----Original Message-----

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Thursday, January 04, 2007 10:04 AM
To: Holtaway, John
Subject: RE: Client Protection Fund - Confidential Records

Just so you know, Oregon is the opposite. Our records are all open (disciplinary included) with few exceptions. We have never had any problem with the open records.

-----Original Message-----

From: Blanchard, Christopher [mailto:Christopher.Blanchard@jud.ct.gov]
Sent: Thursday, January 04, 2007 10:05 AM
To: Holtaway, John
Subject: RE: Client Protection Fund - Confidential Records

Robin- In Connecticut, our superior court rules (referred to collectively as the "Practice Book") govern the confidentiality of our materials. The new version of our confidentiality rule appears in the link below- the specific rule can be found in Practice Book Section 2-76, on page 117B. If you have trouble getting the text, please let me know.

http://www.jud.ct.gov/Publications/PracticeBook/pblj_072506.pdf

Christopher G. Blanchard
Staff Attorney
Judicial Branch Client Security Fund Committee

In Florida, the claims, responses and hearings are confidential. There is no requirement for confidentiality with respect to the decision of the CSF, but generally,

CSF decisions are not made public.

Please note that the Florida Bar Board of Governors review certain CSF decisions and the actions of the BOG are not confidential, but likewise are not reported.

Irwin Gilbert

Washington's Find rules include this:

RULE 13. CONFIDENTIALITY

A. Matters Which Are Public. The facts and circumstances which generated the loss, the Committee's findings of fact and recommendations to the Trustees with respect to payment of a claim, the amount of claim, the amount of loss as determined by the Committee, and the amount of payment authorized and made, shall be public. After payment is authorized, the name of the lawyer causing the loss shall be public.

B. Matters Which Are Not Public. The Committee's investigation and deliberations of any application; the name of the applicant, unless the applicant consents; or the name of the lawyer unless the lawyer consents or unless the lawyer's name is made public pursuant to these rules, shall not be public.

Bob Welden
General Counsel
Washington State Bar Association

As Mr. Gilbert said, Florida's records are not public.

This is the rule:

7 CLIENTS' SECURITY FUND RULES

7-5 RECORDS

RULE 7-5.1 ACCESS TO RECORDS

(a) Confidentiality. All matters, including, without limitation, claims proceedings (whether transcribed or not), files, preliminary and/or final investigation reports, correspondence, memoranda, records of investigation, and records of the committee and the board of governors involving claims for reimbursement from the client's security fund are property of The Florida Bar and are confidential.

(b) Publication of Payment Information. After the board of governors has authorized payment of a claim, the bar may publish the nature of the claim, the amount of the reimbursement, and the name of the lawyer who is the subject of the claim. The name, address, and telephone number of the claimant shall remain confidential unless specific written permission has been granted by the claimant permitting disclosure.

(c) Response to Subpoena. The Florida Bar shall, pursuant to valid subpoena issued by a regulatory agency (including professional discipline agencies) or other law enforcement agencies, provide any documents that are otherwise confidential under this rule unless precluded by court order. The Florida Bar may charge a reasonable fee for the reproduction of the documents.

(d) Response to False or Misleading Statements. The Florida Bar may make any disclosure necessary to correct a false or misleading statement made concerning a claim.

(e) Statistical Information. Statistical information and/or analyses that are compiled by the bar from matters designated as confidential by this rule shall not be confidential.

John Anthony Boggs
Director
Clients' Security Fund, Intake & ACAP

In British Columbia, we respond to defalcation claims through Part B of our compulsory insurance policy, rather than through a hearing process. Under our Law Society Rules, our insurance records for Part B claims are confidential, subject generally to the following exceptions:

We publish periodic reports that compile statistical information on the program (e.g. number of claims received, number of claims paid and denied, amounts paid, number of lawyers involved). We may also publish the lawyer's name and circumstances of a claim where: a hearing report or Reasons for Judgment deal with the matter and find that the lawyer misappropriated the claimant's property; where the claim is part of a larger scheme considered in a hearing report or Reasons for Judgment or the facts are not disputed or are admitted by the lawyer or former lawyer; or if the lawyer's misappropriation is known to the public. With the consent of our Benchers (our Board of Governors), we can deliver to a law enforcement agency any information or documents that the Benchers reasonably believe may be evidence of an offence.

Here's a link to the relevant Rule (3.27.1):

http://www.lawsociety.bc.ca/publications_forms/rules/rules_part03.html#3-27-1

- Margrett George

CLAIMS BY CRIMINAL DEFENDANTS

Billy King <bking@LSBA.ORG>

Sent by: Administrators of Lawyers Funds for Client Protection
<CPR_LAWYERSFUND@MAIL.ABANET.ORG>

06/04/2008 03:41 PM

Please respond to

Billy King <bking@LSBA.ORG>

To: CPR_LAWYERSFUND@MAIL.ABANET.ORG

Claims by criminal defendants query

Dear Friends:

An issue has arisen in Louisiana that I would greatly appreciate your help with.

The LSBA's Client Assistance Fund Committee generally meets quarterly to discuss the claims of clients that have been the victim of attorney defalcation. Recently, a sizeable minority of the committee has indicated a problem with paying the claims of certain criminal defendants based on a number of factors - one of which is presumably the claimant has committed a felony, remains in prison, and the Fund would be wasting resources better utilized elsewhere.

- 1) Is there any Fund that does not pay criminal defendants? If so, what is the rationale? If you do pay convicted felons, what is your rationale?
- 2) If the Respondent attorney steals the fee and an Indigent Defender is appointed who subsequently completes the case, is that a factor in not paying the defendant?
- 3) If a third party pays the fee, for instance the lovable Grandmother, is that a reason to pay the claim?
- 4) Do any jurisdictions look at the crime itself? For instance, even if the defendant is a child molester, would you pay when there is an egregious crime involved?
- 5) Do any jurisdictions look at the overall record of the Claimant? Would a career criminal be treated differently?

I would love responses from all the states if at all possible as my Committee is really wrestling with the issues involved. I enjoyed the Forum and thank you very much for helping us out on these issues.

William N. King
Practice Assistance Counsel
Louisiana State Bar Association

See responses in blue:

- 1) Is there any Fund that does not pay criminal defendants? If so, what is the rationale? If you do pay convicted felons, what is your rationale? [This sometimes happens, a Trustee or two might genuinely be offended at paying a felon for a loss,](#)

just because the person is a felon.

However, that in-and-of itself is not a reason under NJ Fund policy to reject what is otherwise a compensable claim.

2) If the Respondent attorney steals the fee and an Indigent Defender is appointed who subsequently completes the case, is that a factor in not paying the defendant? Absolutely! The theft by a member of the Bar is already "compensated" by another member of the bar who steps up to do it at no cost to the Claimant, so there is no "loss" to the Claimant.

Oftentimes the argument goes, "but I PAID for THAT person to represent me" or "I want to be reimbursed so that I can hire a lawyer of MY choice" The arguments are good, but not good enough for the Fund because our job is to make victims whole AND preserve the integrity of the money that we collect from the Bar. We are not a substitute for civil courts in which those arguments would succeed, but from where we stand, the Bar is already taking care of the victims by providing representation.

3) If a third party pays the fee, for instance the lovable Grandmother, is that a reason to pay the claim? Confusing question. Do you mean under the circumstances in #1 or #2 above or in general? In general, yes, they would join the claim and we pay them if the claim is compensable. Under #2, probably not.

4) Do any jurisdictions look at the crime itself? For instance, even if the defendant is a child molester, would you pay when there is an egregious crime involved? Maybe yes, we would pay IF THE CLAIM IS COMPENSABLE. But we most likely would look at the liens of the criminal defendant before any payment is made, ie. Victim Compensation Award he/she must pay, civil judgment, etc. Some trustees have found it appropriate to forward the money to the victim in those cases to avoid unjust enrichment.

5) Do any jurisdictions look at the overall record of the Claimant? Would a career criminal be treated differently? Generally no, but of course all factors make for the closest possible scrutiny of any claim by the Trustees. They may apply strict measures of the rules for one class of claimants than they may for others to protect the money they are holding for the Bar. One method is to measure if the award will enure to the benefit of the claimant. For example, if there is a likelihood that the claimant will spend the rest of his life in jail or a substantial amount of time in jail, and the award will not make a bit of difference in his life, what benefit accrues to that claimant?

Dan Hendi

"Kathy Peifer" <kpeifer@palawfund.com>
06/06/2008 09:15 AM
To<CPR_LAWYERSFUND@MAIL.ABANET.ORG>,
<DanielHendi@JUDICIARY.STATE.NJ.US>

Subject Re: Claims by criminal defendants query

Good morning Dan,

It's Friday and I've already had 3 cups of coffee, so I'm going to play a little devil's advocate this morning. You had indicated that if another member of the bar comes to the plate and represents the criminal defendant at no charge, then there is no loss to the claimant and an award should not be paid and the criminal defendant/claimant should recover the fee via civil means. (Which may be difficult from jail and would require an outlay of costs.)

At the Forum, we heard about the ABA's project to have senior attorneys represent claimants with their underlying legal matters that were either caused by the "thieving" attorney not disbursing the client funds properly (such as paying off the mortgage in a real estate settlement) or the matters that have been abandoned by the "thieving" attorney (not filing that bankruptcy petition, not filing the appeal, not filing the divorce.....), which services, I believe, would be provided either pro bono or at a low cost. Would this mean that these claimants should also not receive an award?

When I first started in client protection, two wise men, Art Littleton and Ken Bossong, both told me that client protection funds should not look for ways/excuses not to pay claims that are valid. I took those words to heart, which has resulted in PA being a "bleeding heart" state.

Kathy Peifer

-----Original Message-----

From: Daniel.Hendi@judiciary.state.nj.us
Date: 6/6/2008 1:00:19 PM
To: Kathy Peifer
Cc: CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject: Re: Claims by criminal defendants query

I am not certain about the actual question. Are you asking if a Claimant who is serviced by a pro bono lawyer should also be reimbursed by the Fund?

If so, then the answer is "no". What loss did that person actually have?"

Follow my example:

Claimant Jean goes to Respondent for a divorce and borrows money from her mom and dad to pay a \$7,500 retainer. The Respondent prepares a minimalist complaint and files it, but then drops the ball for the rest of the case.

He then gets disbarred and the Claimant finds herself without a lawyer. Another lawyer steps up, but Claimant has no more money to pay him or her so the new lawyer says, "just pay any costs, I will represent you for free" or "legal aid will pay me". The divorce is handled to completion. Now, the mom and dad want to be re-paid because the money was only a loan, should the Fund consider the claim and pay it on the fact that the Respondent was given money but failed to use all of it for its intended purpose; or deny the claim because the "loss" is the loan that had to be repaid regardless of the outcome of the divorce and who handled it to completion? How you view the "loss" is how your Fund will decide the claim.

By the way, when I said get "civil relief" from the courts, I know the reality of that. But

I said it in the CONTEXT that some claimants raise incredibly good arguments in order to be paid by the Fund and these are good "civil" arguments, they are not binding on the trustees who act more in an equitable manner to do 2 jobs: reimburse victims; and preserve the funds they manage in order to maximize the value to all claimants and the bar.

Of course the size of the reserves dictates flexibility as to how a claim is considered.

I need coffee!

Daniel R. Hendi, Deputy Director
New Jersey Lawyers' Fund for Client Protection

[mailto:CPR_LAWYERSFUND@MAIL.ABANET.ORG]

On Behalf Of Kathy Peifer

Sent: Friday, June 06, 2008 1:47 PM

To: CPR_LAWYERSFUND@MAIL.ABANET.ORG

Subject: Re: Claims by criminal defendants query

Dan,

I love and respect you NJ folks, but I think we will have to agree to disagree on this one.

In your scenario, Respondent, who I prefer to dub "Bad Guy Attorney," has converted client money. Absent a respectable member of the Bar stepping up to the plate and making sure that claimant Jean does not suffer any additional harm, there is probably no question that you would want to see Jean receive an award.

Under your position, I would have to go to Jean and say "Sorry, you really didn't suffer any loss since Good Guy Attorney represented you." I'm sure Jean would ask, "So Bad Guy Attorney gets away with taking my money??!!"

To which I would respond, "Not if you expend more of your time, effort and money in suing him or pressing criminal charges, provided the local authorities will prosecute." Jean's opinion of the legal profession is, in my opinion, damaged beyond repair. What she will remember is that she paid \$7,500 to Bad Guy Attorney and we let him get away with it because someone else covered for him.

I much prefer the scenario where Good Guy Attorney saves the day and helps Jean, the Fund reimburses Jean the unearned fee that Bad Guy Attorney converted and the Fund pursues Bad Guy. Jean will be left with a much better opinion of the legal profession. The Fund is expending the time, effort and costs to recover, except that Jean will testify if needed, which she will be glad to do in order to see that justice is served, especially since she has found justice through the client protection fund. If there are no assets to recover from, well, we, meaning client protection funds, are used to that.

I agree that an argument exists that Jean may not have suffered a "loss" if someone else represents her, but I truly feel under your scenario the profession loses big time.

It is now approaching 2:00 PM in the afternoon on a Friday. We should no longer be thinking about coffee but rather Happy Hour.

Kathy Peifer

Agreed. I say Kathy wins this one, on the merits and on the happy hour!

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

-----Original Message-----

From: Administrators of Lawyers Funds for Client Protection
[mailto:CPR_LAWYERSFUND@MAIL.ABANET.ORG]
On Behalf Of Daniel R. Hendi
Sent: Monday, June 16, 2008 10:36 AM
To: CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject: Re: Claims by criminal defendants query

I wasn't going to respond until Janet made this a "WIN/LOSE" game.

First, it is important to note that in my initial response, it is implied that the client got the same service from the legal services lawyer than he/she would have received from the "dishonest lawyer" in the criminal representation. Therefore, in the end, the client got the service he bargained for in his jurisdiction which is why I suggested that the client should not be reimbursed; because the client ultimately got the service at no extra cost. The only question in issue from my perspective was the client's "LOSS" and not the attorney's conduct. Now here is my reason ...

Suppose James goes to Pontiac Dealership A to buy a Grand Prix and makes a deposit of \$15,000 for a \$20,000 car. The dealership shuts down the next day and goes out of business. The Pontiac Dealer Reimbursement Fund collects \$150/annually from every dealership to protect against such dealership failures to keep clients' confidence in the Pontiac product alive and well. The FUND appoints Dealership B to give James new Grand Prix in place of the failed promise of Dealership A. Using this analogy, should James REALLY get the car AND the deposit back because the first Dealership was a dirt bag and knew it was going under even at the time it took the deposit?

The practice of law is in reality a business, and is continuing down that road more so annually. You must look at the time spent no differently than any other "product" to follow my reasoning. To paraphrase old Abe, our only asset as lawyers is our time, and to minimize or discredit the work of a public defender by paying the victim in spite of the work of the public defender is plain wrong and is tantamount to the same type of unjust enrichment as in the above analogy involving James. A "free" lawyer's time should be no less valuable than any other lawyer - paid or unpaid, and certainly no less valuable than one's whose conduct is in the cross-hair of Ethics who is subsequently disbarred.

Of course, our Client Protection Funds can do anything they want and pay anyone

they like as "equitable" Boards. But let's not hear those who double pay victims in kind or in cash later complain that they don't have enough assets to take care of real victims who have no recourse at all outside of the Fund.

Great discussion but I am getting a nose-bleed from this tall soap box.

Dan

Holtaway, John" <JHoltaway@STAFF.ABANET.ORG>
Sent by: Administrators of Lawyers Funds for Client Protection
<CPR_LAWYERSFUND@MAIL.ABANET.ORG>
06/16/2008 12:23 PM
Please respond to
"Holtaway, John" <JHoltaway@STAFF.ABANET.ORG>
To CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject Re: Claims by criminal defendants query

Dan:

Client hires lawyer to handle legal matter and pays \$1500. Lawyer does nothing. Client files claim and Fund pays \$1500. You believe client is now "whole".

Client has been waiting and waiting for first lawyer to complete matter. No contact with lawyer for months. Underlying legal matter left hanging. Client has to spent time filing claim. Client has to go out and find second lawyer. Client has to wait again to have legal matter completed. Client may now believe wild rumors that all lawyers are dishonest.

Reputation of legal profession as a whole has been diminished and client will probably tell family and friends about the bad experience.

Does the Fund's payment of \$1500 restore the client's faith in the legal profession and compensate for all the delay and frustration the client has experienced?
Probably not.

If the Fund reimburses the original legal fee and provides pro bono legal services, is the client not made more "whole"?

Without diverting the discussion too far, a component of damages in a personal injury action is "pain and suffering". Realizing the limitation on lawyers' funds for client protection, doesn't the provision of pro bono legal services address the claimant's "pain and suffering" and the damage done to the reputation of the legal profession?

-----Original Message-----

From: Daniel R. Hendi 01456377
Date: 6/16/2008 2:09:26 PM
To: CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject: Re: Claims by criminal defendants query

Everything you say is correct but not within the Fund's LIMITED jurisdiction. We are

not here to make clients "WHOLE" because there are financial and jurisdictional limitations within our existence in what we do. Regardless of how laudable our purpose, all Funds are Bodies with

limited jurisdiction and purpose. I wish it weren't so, but it is. I do not get a commission to deny a claim, or find ways not to pay, but the reality is that we are not a substitute for Civil Court actions where all those "make whole" arguments come in. And I also know about the real limitations and serious problem of resources that a victim might have to get into court in the first place, and you know what, it isn't limited to indigent claimants, many folks can not afford to go to Court. If we, as Funds, are to act in substitution of courts to address such needs, then we need a major rule change and resource allocation to so act.

Opportunity, economic costs and other consequential losses can not be addressed within Client Protection Fund rules. Perhaps, the Canada approach is best. Each lawyer pays \$4 to \$5 thousand dollars per year and we can cure all kinds of losses caused by lawyers

Dan

-----Original Message-----

From: Administrators of Lawyers Funds for Client Protection
[mailto:CPR_LAWYERSFUND@MAIL.ABANET.ORG] On Behalf Of Kathy Peifer
Sent: Monday, June 16, 2008 2:27 PM
To: CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject: Re: Claims by criminal defendants query

I think we have our "point/counterpoint" discussion for next year's Forum!

I understand where Dan and those with the same opinion are coming from. Again, I think we must agree to disagree. For me, I look at the conduct of the attorney...the one who took the money and did not render the legal services. Clearly, this conduct falls within the Fund's limited jurisdiction. Our definition of a "reimbursable loss" does not qualify the definition with an exception to recovery if the claimant is able to obtain substitute legal representation.

If another member of the Bar steps up to the plate and agrees to provide the representation, either pro bono, at a reduced fee or at an agreed upon fee only if the client is successful in obtaining reimbursement from the client protection fund, is not an issue for me, personally.

I look at the mission statement for our fund:

The mission of the Pennsylvania Lawyers Fund for Client Security is to reimburse victims of attorney dishonesty in the practice of law; to preserve the integrity and protect the good name of the legal profession; and, to promote public confidence in the legal system and the administration of justice in Pennsylvania.

Given that mission statement, for me, there is only one course of action... recommend/argue for an award to be approved. Sometimes I will be successful; sometimes I will not be successful. It all depends upon the personality of the Board at

that particular time. But I know I give it my all in trying to convince the majority that an award should be approved.

Kathryn J. Peifer, Esquire
Executive Director

Once again, Kathy is correct on this one. Ohio's rule does not require its victims to bring a civil action against the wrongdoer. The lack of such a requirement does not make us a substitute for civil court actions, but rather it enables us to fulfill the mission and purpose of the fund - to reimburse victims of attorney theft.

I'm ready for a full debate on this one!

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

-----Original Message-----

From: Administrators of Lawyers Funds for Client Protection
[\[mailto:CPR_LAWYERSFUND@MAIL.ABANET.ORG\]](mailto:CPR_LAWYERSFUND@MAIL.ABANET.ORG)
On Behalf Of Fred Miller
Sent: Monday, June 16, 2008 5:08 PM
To: CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject: Re: Claims by criminal defendants query

Do you all have written rules which enunciate your fund's policy in this area? If not, how do claimants know how their claims will be evaluated?

Fred Miller

We do not - which is part of the problem we are having and are trying to solve. One part of the Committee would vote one way and another segment has another world view.

William N. King
Practice Assistance Counsel
Louisiana State Bar Association

Fred Miller <MillerFG@AOL.COM>
Sent by: Administrators of Lawyers Funds for Client Protection
<CPR_LAWYERSFUND@MAIL.ABANET.ORG>
06/17/2008 11:16 AM
To CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject Unearned legal fees

Dear Billy: When I was steering the New York Lawyer's Fund, I put my hand to a codification of our Trustees' evolving policies with respect to unearned legal fees. Here's what emerged. If I remember correctly, when we screened claims upon

receipt, the claimants in all those that involved unearned legal fees were routinely sent the text of this regulation as a heads up, of sorts. If there was one thing I hated in administrative law were agencies that had "secret policies". I know that Tim O'Sullivan and/or Mike Knight will be glad to elaborate on the fund's more recent experience. I hope this is helpful. As you will see, the regulation is about as flexible as you can get in this very difficult area of client protection. -- Fred Miller

(1) In a loss resulting from an attorney's refusal or failure to refund an unearned legal fee as required by the Lawyer's Code of Professional Responsibility, "dishonest conduct" shall include an attorney's misrepresentation, or false promise, to provide legal services to a law client in exchange for the advance payment of a legal fee.

(2) An attorney's failure to perform or complete a legal engagement shall not constitute, in itself, evidence of misrepresentation, false promise or dishonest conduct.

(3) Reimbursement of a legal fee may be allowed only if: (i) the attorney provided no legal services to the client in the engagement; or (ii) the legal services that the attorney actually provided were, in the trustees' judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee conciliation bureau, or an accounting acceptable to the trustees that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.

(4) In the event that a client is provided equivalent legal services by another attorney without cost to the client, the legal fee paid to the predecessor attorney will not be eligible for reimbursement, except in extraordinary circumstances

Fred, your written points below are not policy, they are a guiding GEM! I especially like No. 4

This should be the written policy in every jurisdiction that is inclined to pay unearned fees. Very helpful.

Dan

Thanks Dan. But let me remind you, "It all depends on what 'policy' means."

Fred Miller

REQUEST FOR FEES

----- Original Message -----

From: Bob Welden <bobw@wsba.org>

To: Holtaway, John

Sent: Fri Nov 14 16:56:45 2008

Subject: request for fees

John: Can you please post this on the client protection fund list serve? Thanks.

In the 20+ years I have been administering the WSBA Fund, we have received only the second request from a lawyer who represents a Fund applicant that the Board approve his clients' agreement to pay him a 1/3 contingent fee. If you have dealt with such requests before, are there any criteria that you apply? Do you generally approve or disapprove such requests? Our rule reads which is the Model Rule language:

No lawyer shall charge or accept any payment for prosecuting an application on behalf of an applicant, unless such charge or payment has been approved by the Trustees.

Thanks.

Bob Welden
General Counsel
Washington State Bar Association

Bob- Connecticut's language is similar to yours. We have never approved a fee of 1/3. The committee has on rare occasions approved a modest fee, particularly if the attorney's efforts have reduced the committee's exposure on the claim.

Christopher G. Blanchard
Staff Attorney
Judicial Branch Client Security Fund

Colorado is the same.
John Gleason

In 1985, the California Supreme Court held (inter alia) in Saleeby v. The State Bar of California (30 Cal.3d 547) that the State Bar could not interfere with a client's decision to have and pay counsel. The decision states that a member of the State Bar who represents an applicant in pursuing an application before the Commission may contract with the applicant for an attorney fee." Prior to this decision, the State Bar prohibited attorneys from charging Applicants. Our rules, however, encourage attorneys to represent applicants to the fund on a pro bono basis whenever possible to maximize benefits to the Applicants. Our application materials also advise Applicants that although they may hire counsel, counsel is not needed to file an application with this fund.

Thankfully, we do not get that many.

Martha Gonzales

Bob,
NJ's Rule 1:28-3(f) is also similar:

Attorney's Fee. No attorney representing a claimant shall receive a fee for services unless authorized by the rules and regulations of the trustees and upon their express direction.

In my 27 years with the Fund, I have never seen the Trustees direct that a lawyer receive a fee for helping a claimant prosecute a Fund claim. There have been, I would say, three or four requests. Distinguish, however:

(1) Nothing precludes a lawyer from charging for any other services rendered, just because the client is a Fund claimant.

(2) A couple of times over the years, the Fund has allowed a claimant's lawyer to complete recovery from a collateral source and keep a portion of the recovery as a fee. This has been only where (a) the lawyer has nearly completed the job by the time the Trustees get a chance to pay the claim and (b) the lawyer is obviously doing a good job. In accepting the assignment from the claimant while paying the claim, the Fund in effect hires claimant's lawyer as outside counsel to complete the recovery for the Fund.

Ken
Kenneth.Bossong@judiciary.state.nj.us

RECORDS RETENTION

From: Michael D. Miyahira [mailto:miyahira@hawaiiintel.net]

Sent: Tue 5/27/2008 7:57 PM

To: Holtaway, John

Subject: Records Retention

John,

Can you put this question on the List Serve for us? We would like to find out how long other Funds keep their records? We're in the process of doing our 'Late Spring Cleaning' and were curious of how long others kept their records.

Thanks.

Michael D. Miyahira

In Connecticut, we destroy files of denied claims after 5 years, although we maintain a copy of the final decision letter and also keep an electronic record of the decision. Approved claims may be destroyed five years after restitution is received.

Christopher G. Blanchard
Staff Attorney
Judicial Branch Client Security Fund

Microsoft Access database and document management system by InfoDynamics,
<http://www.infod.com>.

David N. Shearon, JD, MAPP
Executive Director
Tennessee Commission on Continuing Legal Education and Specialization

In Massachusetts, we keep our records forever. After about 2 years, they go offsite. On several occasions, having the old records has been very helpful when the disbarred/suspended lawyer seeks reinstatement.

We are always asked whether the Clients' Security Board paid claims and if so what were the circumstances of the claim and did the disbarred lawyer reimburse the Board. The records have proven to be most useful when the Board did NOT pay a claim and the former client is still trying to convince people that the lawyer stole his money.

Karen

Michael, in Oregon we keep records of claims permanently (they are scanned and kept electronically). We also keep minutes of the Committee (Fund) permanently. Miscellaneous correspondence and the like is destroyed after three years.

Sylvia Stevens

This is from the WSBA's record retention schedule:

Lawyers' Fund for Client Protection

Lawyer's Fund for Client Protection files -- gift awarded
Permanent

Lawyer' Fund for Client Protection files -- gift not awarded
6 years

Lawyers' Fund for Client Protection Annual reports
Permanent

Bob Welden
General Counsel
Washington State Bar Association

-----Original Message-----

From: Kris Wenzel [mailto:kwenzel@wisbar.org]
Sent: Monday, June 09, 2008 3:23 PM
To: Campbell, Susan
Subject: RE: Records Retention

Mike,

In Wisconsin, we permanently save those files where we have approved and paid claims. All files are kept for seven years, after which those that were denied are destroyed.

Kris

As my office demonstrates, I have a problem with throwing stuff out. Sometimes it works out well; most of the time, it seems more a character flaw.

Anyway, nothing gets thrown away in less than 7 years. Claim files, master files for respondents, policy files, and summary reports are specifically not to be destroyed. Most other things can be destroyed after the 7 years.

Ken
Kenneth.Bossong@judiciary.state.nj.us

Why seven? Anything to do with the seven deadly sins? Or the seven cardinal virtues? Or the seven days of the week?

Fred Miller

From: Robin Lawnichak [mailto:RLAWNICHAK@mail.michbar.org]

Sent: Thursday, June 05, 2008 12:39 PM

To: Campbell, Susan

Subject: Re: FW: Records Retention

Susan,

Michigan keeps all files in complete paper format for one year after all activity is complete; i.e. investigation, committee review, payment plan or subrogation. After one year of inactivity:

Claims that are closed without payment are gleaned and then sent to be imaged.

Claims that are paid are gleaned of duplicate information and then imaged. These files can remain in paper format for several years as subrogation is pursued or payments are being made.

Robin Lawnichak

CORPORATE CLAIMANTS

The Idaho State Bar Board of Commissioners recently approved, begrudgingly, payment of several Client Assistance Fund claims made by corporate or organizational (collection agencies) clients. Idaho currently does not have a rule prohibiting such claims. Does your jurisdiction allow claims made by these types of clients? I am preparing a report for the Board on several client protection issues, including this one, and would appreciate any input or reference to rules that you can share. I have already received this information from Leo Ottey in Maryland. Thank you in advance for your assistance.

Julia A. Crossland
Deputy Bar Counsel
Idaho State Bar

Was this a situation where the collection agency hired a lawyer to collect the debt, and the lawyer misappropriated the funds?

Bob Welden
General Counsel
Washington State Bar Association

In Arizona, we would not pay that type of claim. Our Declaration of Trust Rule 3(F) states,

"Except as provided in Paragraph G of this Rule, the following claimants shall not be eligible for reimbursement:

- 3) any insurer, surety, or bonding agency or company which seeks reimbursement for payment made under an insurance or surety contract or bond covering the risk involved in the lawyer's dishonest conduct;
- 6) medical providers or other third parties with claims against the lawyer pursuant to law; or
- 7) any business entity unless considered pursuant to Subparagraph G of this Rule."

Karen Weigand
Client Protection Fund Administrator
State Bar of Arizona

Connecticut has no rule specifically prohibiting corporate clients from receiving reimbursement from the fund, so although it hasn't happened very often, corporations have received payments from the fund.

Christopher G. Blanchard
Staff Attorney

Judicial Branch Client Security Fund

-----Original Message-----

From: Carol Green [mailto:greenc@kscourts.org]

Sent: Wednesday, July 23, 2008 11:37 AM

To: Holtaway, John

Subject: Re: question for listserve - corporate claimants

Kansas recognizes corporate claimants although a business entity controlled by the lawyer is not covered. See Rule 11.D.(3).

In Oregon we will consider any claim from a client, regardless of whether it is a corporation or some other entity. On the other hand, we have rejected claims from the trustee of the bankrupt client's estate or other successors-in-interest. The only corporate client claim that we have denied in the last few years was an insurance carrier whose lawyer acknowledged in a fee arbitration to billing \$50,000 for work not done.

The CSF Committee voted to pay \$25,000 on the grounds that the carrier was partially at fault for not monitoring the case and also because it questioned the stipulation that the unearned fee matched precisely the claim limits of the CSF. The recommendation was submitted to the Board of Governors (which approves payment of all CSF claims), which denied the claim, apparently on the ground that the carrier's negligence disqualified it from recovering? This may not be helpful to your analysis, but it was an interesting response from our board.

Sylvia Stevens

Illinois has recognized and paid claims by corporate clients, including collection agencies. If the lawyer was hired to and collected funds belonging to the collection agency (or the agency's client) and then converted the funds, we would pay the agency (or the client directly).

In general, the fact that the claimant is a corporation or organization has not been viewed as affecting eligibility.

Eileen Donahue
Illinois Client Protection Program

California has handled these cases similar to Illinois. It has been rare and we usually pay the clients if the clients are no longer responsible for the debt we have paid the agency if the money was their money.

Martha Gonzales

British Columbia does not preclude payments to corporate claimants per se, although the lawyer's interest in the corporation, if any, will affect the amount of the payment.

- Margrett George

North Dakota has no provision that would bar payment to a corporation.
Justice Daniel J. Crothers

I would say that Washington applies a higher scrutiny on these types of claims. In general, the Fund committee considers the level of responsibility the business or corporation exercised over what is essentially their employee. A lawyer who is hired on a regular basis to act as a debt collector is in a different relationship from a lawyer hired by an individual for a specific case.

Bob Welden
General Counsel
Washington State Bar Association

Tim O'Sullivan of the NY Fund can elaborate, but I believe there is a regulation of the Empire State's Board of Trustees that limits awards to business organizations (clients) that have fewer than 20 employees. My recollection is that the policy reflects the economic reality that large business organizations, including corporations, can protect themselves with insurance, including self-insurance.

Fred Miller

CLAIMANTS AS BANKRUPTS

Claimants hire an attorney to file a bankruptcy petition. Attorney files a Chapter 7 for the claimants, and advises them to turn over to him all non-payroll funds (such as moneys received from inheritance, refunds, etc.) for the benefit of the bankruptcy estate. Claimants turn \$20,000 over to the attorney. The attorney absconds with the funds. The claimants have filed a claim with the fund. Their current attorney has entered into an agreement with the bankruptcy trustee that the claimants are entitled to \$13,500.00 in available exemptions and therefore would be entitled to retain that amount from any award made by the client security fund. The question is whether your fund would pay the full amount of the loss (\$20,000), with the balance after \$13,500 distributed to the trustee and general creditors of the bankruptcy estate, or would your fund only pay the amount that the claimants would have received, the exempt amount of \$13,500? Its an issue of first impression for our fund. Hopefully I've articulated the issue well enough, and would appreciate any input or opinions. Thank you!

Christopher G. Blanchard
Staff Attorney
Judicial Branch Client Security Fund

-----Original Message-----

From: Peter H Sutton [mailto:PSutton@riemerlaw.com]
Sent: Tuesday, December 02, 2008 10:34 AM
To: Holtaway, John
Subject: RE: How would your fund deal with this claim?

Upon the date of the filing, the claim against the attorney for 20k belongs to the Trustee in Bankruptcy. Thus, he technically is the claimant, not the debtors. Now that the Trustee has either assigned or abandoned his right to \$13,500(subject to Bankruptcy court approval or the assignment and the exemptions) the debtors now are proper claimants before the Board and should be paid.

The Trustee and only the Trustee would be the appropriate claimant for the balance, and I assume that he has not filed a claim, nor would such a claim be entertained.

Now if the trustee "abandons" his claim to the balance of the loss as well , then a thorny issue arises as to whether you would reimburse the claimants for that portion of the loss. You probably would not, as that money was earmarked for the bankruptcy estate, and thus was not an out of pocket loss and would be a windfall to them.

-----Original Message-----

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Tuesday, December 02, 2008 10:32 AM
To: Holtaway, John
Subject: RE: How would your fund deal with this claim?

We are dealing with a similar issue right now. I think our fund would award the entire \$20K as the amount the lawyer misappropriated, but would require that payment of \$6,500 go to the trustee so that the client doesn't get a windfall at the expense of his

creditors.

-----Original Message-----

From: Root Edmonson [mailto:REdmonson@ncbar.gov]

Sent: Tuesday, December 02, 2008 3:40 PM

To: Holtaway, John

Subject: RE: How would your fund deal with this claim?

NC's Fund recently reimbursed 100% of the amount stolen by the bankrupt debtor's lawyer to the bankruptcy trustee. Even if the bankrupt doesn't get any direct benefit for part of the amount paid, it helps prevent innocent creditors from being victims.

Chris,

This is tricky, isn't it? I'll try not to repeat all the good points already made, but just add a couple thoughts:

(1) Claimants have the requisite attorney-client relationship with Attorney; claimants' creditors and the Bankruptcy Trustee do not.

(2) NJ Fund has an "inure to the benefit" rule. That is, if payment of all or a portion of an otherwise compensable claim will not inure to the benefit of a proper claimant, the Fund will not pay that claim/portion. Although we have not had this exact case, I'm pretty sure we would pay the \$13,500 UNLESS paying the full \$20,000 would take claimants out of Bankruptcy altogether (not the case here, apparently). Paying claimants' creditors \$.23 on the dollar rather than \$.17 makes no difference in claimants' lives; sparing them the stigma of bankruptcy would.

(Here's another application: In NJ, welfare liens are not really liens. They are agreements to repay. So, if a recipient gets into an accident, and has agreed to repay, the obligation to do so extends only as far as the claim value. If a jury trial results in a verdict for the defendant, the welfare recipient does nothing. Where Attorney has stolen a PI award that is less than or equal to what is owed to Welfare, it makes no difference to claimant whether claim is paid or not, and the Fund rejects the claim. If we can work it out to extract some value for the client/claimant, we pay.)

Ken

P.S. The question and a summary of the suggestions would make a good Webb article. Please consider doing it. Perhaps it should be a regular feature of the newsletter: "How Would Your Fund Deal With This Claim?"

I put this question to my Trustees and this was the answer agreed upon by the majority who responded:

"I would only vote to pay whatever amount went to the benefit of the claimant. Since it is a Chapter 7, all the debts should be discharged, so paying the creditors anything would not benefit the claimant unless there was non-dischargeable debt. If that was the case, and if we had a way of making sure the money went to the payment of that debt and not

to the trustee or other creditors, I would be inclined to vote to pay the claimant the \$13,500 and pay the debt up to the total of the difference between the amount paid to the claimant and \$20,000 stolen."

Karen Weigand, CP
Client Protection Fund Administrator
State Bar of Arizona

My guess is that the \$13,500 is a statutory exemption (in other words not a "settlement") . If I am correct, then it means that the Fund can pay the \$13,500 and be done with it and not worry about any other issues with the Bankruptcy trustee. The exemptions are in the rules and I am sorry that I do not have them in front of me at this time. By the way, the Trustee can not "settle" but can suggest to the Court for its approval.

Dan Hendi