

THE NCPO *e*-FORUM

A COLLECTION OF INTERNET TOPICS

JUL2003-AUG2004

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 webmaster@ncpo.org.



ACTUARIAL STUDIES	<u>3</u>
ADVANCE LEGAL FEES IV	<u>4</u>
ASSESSMENT ON INACTIVE ATTORNEYS	<u>6</u>
AUTOMATIC STAYS	<u>8</u>
BONDING	<u>11</u>
CAPS AND PER ATTORNEY LIMITS	<u>13</u>
COMMISSIONERS' FEES	<u>16</u>
CLOSED FILE RULES/RECORDS RETENTION	<u>18</u>
DEMENTIA vs. MALPRACTICE CLAIMS	<u>21</u>
DISCIPLINARY INFORMATION IN PURSUIT OF SUBROGATION	<u>26</u>
DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE	<u>29</u>
DISCRETION OF TRUSTEES	<u>29</u>
EXHAUSTION OF REMEDIES	<u>32</u>
FUND FILING TAX RETURNS	<u>38</u>
INSURANCE COVERAGE FOR CSF	<u>40</u>
LOSS PREVENTION METHODS	<u>41</u>
MALPRACTICE NOT RECOVERABLE	<u>43</u>
MRPC 5.7	<u>44</u>
NO APPEAL RULE	<u>45</u>
OVERDRAFT NOTIFICATION	<u>54</u>
PER LAWYER LIMIT	<u>60</u>
PRIVATE PRACTICE FOR FUND ADMINISTRATORS	<u>63</u>
PROHIBITION ON OVERDRAFT PROTECTION FOR ATTORNEY TRUST ACCOUNTS	<u>65</u>
PURSUIT OF SUBROGATION	<u>67</u>
RECEIVERS/MISSING CLIENT FUNDS	<u>71</u>
REQUIREMENT OF CRIMINAL OR CIVIL COMPLAINT	<u>72</u>
SPECIAL ASSESSMENT	<u>76</u>
STRUCTURE OF OTHER FUNDS	<u>80</u>

ACTUARIAL STUDIES

From: Busch, Susan [mailto:busch@vsb.org]
Sent: Thursday, June 10, 2004 5:04 PM
To: Holtaway, John
Subject: Posting for CPF list serve

The Virginia State Bar's executive director received a letter today from the Chief Justice of the Supreme Court of Virginia, directing us to retain an actuary to evaluate the Clients' Protection Fund. What timing, since this topic was covered at the forum last week!

I have a call in to Chuck Faerber, who gave the presentation at the forum last Friday.

I need to know if any fund has done an actuarial study; if so, how much did it cost? The Chief Justice wants us to add an amount to our budget sufficient to cover an actuarial study. I need a good estimate to put in the proposed budget before I leave next Tuesday, June 15, for our annual meeting!

I appreciate any answers, thoughts, or ideas anyone has,

Susan Busch
Assistant Executive Director
Virginia State Bar

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

From: Chris Janku [mailto:cjanku@mobar.org]
Sent: Monday, June 14, 2004 10:12 AM
To: Holtaway, John
Subject: RE: Posting for CPF list serve

Missouri had one done in 1991 for \$10,000 by "Tillinghast a Towers Perrin company". It basically said that as the number of lawyers would increase in the future, there would be more defalcations, leading to more claims, resulting in more being paid out. There were some formulas developed based upon the past history of claims in Missouri.

To be able to have a high confidence level, the fund's history will need to have a significant number of claims, which Missouri didn't have. "The volume of loss information available for this analysis was insufficient to estimate future funding amounts with precision."

There are factors that are difficult to control in a study, including the discretion of the trustees and the level of disciplinary enforcement, that limit its usefulness. "Due to the nature and degree of uncertainty involved in projecting these amounts, no assurance can be given as to the adequacy of any funding level."

Depending upon the records you keep, you may need to devote a lot of staff time responding to the actuary's requests for information.

Frankly, I thought it would have been better to put the \$10,000 into the fund since at the time I believe the Bar's annual contribution was only \$40,000.

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Monday, June 14, 2004 11:13 AM
To: Holtaway, John
Subject: RE: Posting for CPF list serve

California contracted with William M. Mercer, Inc. in 1996 for \$18,000 plus expenses. It was a very comprehensive report. In 2001 California contracted with Milliman USA for a flat \$10,000, it was needed quickly and no time to be as as comprehensive but did help us update the 1996 report.

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

thought at the conference they said from one to two thousand up to \$5000.

"Holtaway, John" <JHoltaway@staff.abanet.org 06/14/04 10:21AM

ADVANCE LEGAL FEES IV

Dear NCPO Colleagues:

I need your assistance again on the issue of advance legal fees.

In New York, lawyers do not have to segregate in an escrow account a legal fee paid in advance. The advance fee is considered the lawyer's property and can be maintained in his operating or business account. A lawyer though does have the professional obligation to refund any unearned fee. I believe our view is the minority view.

Our Trustees are considering proposing that this fee policy be changed in New York so that advance fees would have to be treated as client property and placed in escrow and drawn upon only when earned.

In 20 years, over 11,000 claims have been filed in New York - 36% of these filed claims sought reimbursement of legal fees. There have been nearly 5,500 awards paid by our Fund - 28% of all our awards have reimbursed legal fees. Roughly 33% of fee claims which have been filed have resulted in awards. Our standard for a fee award has been there must be evidence that the lawyer falsely promised to provide legal services, or was dishonest in some fashion.

My Board wants to know the experience other Funds have had in this area.

(1) For States where advance fees are to be maintained in escrow, do you see a larger percentage of fee claims to your Fund, or a larger percentage of awards involving fees?

(2) If your State has changed from the minority to the majority view, did your Fund experience an increase in filed fee claims or awards involving fees?

I appreciate your assistance.

Tim O'Sullivan
1-800-442-3863

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

From: Sylvia Stevens

To: 'info'

Sent: Thursday, August 21, 2003 12:56 PM

Subject: RE: Advance Legal fees

Oregon's DRs don't really address this other than to require that "client funds" be held in trust until earned. We have quite a bit of case law and a formal opinion, however, that allow lawyers to take advance fees into their own accounts only if the client agrees in writing that the fee is "earned in advance."

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

From: MillerFG@aol.com

To: info@nylawfund.org

Sent: Thursday, August 21, 2003 1:13 PM
Subject: Re: Advance Legal fees

The ABA last year amended Model Rule 1.15 of the Lawyer's Code of Professional Conduct to require that advance legal fees be deposited in the attorney trust account, to be withdrawn as earned. The amendment expresses the majority view in the United States, and was proposed by NCPO. Client protection funds should be lobbying their disciplinary authorities to adopt this amendment. The text of the rule can be found at: <http://www.abanet.org/cpr/e2k-rule115.html>. Regards to everyone! -- Fred Miller

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

From: Karen O'Toole
To: 'info'
Sent: Thursday, August 21, 2003 2:47 PM
Subject: RE: Advance Legal fees

Tim,

In Mass., fees have had to be segregated until earned for many, many years. In most of the claims heard by the Board, fees are NOT properly segregated in accordance with the Mass. Rules for Professional Conduct. A slight exception are those claims for unearned criminal defense fees. Although such fees are too supposed to be segregated, the vast majority of criminal defense lawyers do not do so. They deposit the fee into their operating accounts and hopefully perform all of the legal services for which they were contracted to perform. The failure to properly handle fees in criminal cases are not investigated by the disciplinary staff.

The Board analyses unearned fee cases, by attempting to determine the value of services performed. An award is usually for the balance of unearned fees that should have been returned to the client. Where the funds are not on deposit in the attorney's trust account, the Board infers that any unearned portion was converted by the attorney.

[Karen O'Toole]

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

Ohio does require that attorneys place unearned legal fees, i.e. retainer fees, in a separate, identifiable account. The funds cannot be transferred to or commingled with the lawyer's personal or general business account until they are earned. Unearned Fee claims are the largest category of claims reimbursed by the Ohio CSF. However, the awards paid in unearned fee claims are typically low, and the amount paid per fiscal year is usually the lowest of all loss categories.

I hope this addresses the issues raised by your Trustees.

Janet

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

From: Kenneth.Bossong@judiciary.state.nj.us
To: info
Sent: Thursday, August 21, 2003 3:17 PM
Subject: Re: Advance Legal fees

Tim,

NJ is in exactly the same boat. The Commission appointed in NJ to study Ethics 2000 did not recommend to the Supreme Court that this provision be adopted. We (the Fund) respectfully disagreed and urged the Court to adopt it - though one Trustee dissented. We are waiting to hear. IMO, the majority view here is clearly the better rule. When a client entrusts a lawyer with a matter and pays the fee up front, there is something more than simple contract at work. Ken

Kenneth.Bossong@judiciary.state.nj.us

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

Only so far as our IOLTA rule (RSCH 11) and ethics rules (HRPC 1.15) mandate that the trust account can only contain client funds, a small sum to cover account charges, and disputed funds. If a bank loans funds to an attorney to cover bad checks, it would be the attorney's money - which cannot be in the trust account. Our banks do not provide overdraft protection on trust accounts.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii

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

Mike,

As in Ohio, the unearned retainer claims in Mass. are in 2nd or 3rd place in terms of number of claims and are usually among the lowest in terms of dollar amounts of awards i.e. the unearned retainer claims usually involve relatively small amounts of \$\$ - \$5,000, \$10,000.

Karen.

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

In Illinois, like New York, lawyers do not have to place advance fees in trust or escrow accounts. Over the last 5 years, fee claims have constituted 56% of approved claims and 28% of fund payouts.

Eileen Donahue

ASSESSMENT ON INACTIVE ATTORNEYS

A question has arisen in California: Do any jurisdictions impose a client protection fund assessment on voluntarily inactive attorneys? If so, is it the full amount of the assessment charged to active attorneys or only a partial assessment? Thanks.

Matthew G. Zawol
Senior Counsel
Client Security Fund
State Bar of California
(213) 765-1167

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

From: Root Edmonson [mailto:REdmonson@NCBAR.com]

Sent: Friday, January 07, 2005 1:51 PM

To: Holtaway, John

Subject: RE: Assessment on Inactive Attorneys

In NC, inactive attorneys pay no dues and no CSF assessment.

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

In Oregon inactive attorneys pay a CSF assessment, at the same rate as everyone else.

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

From: John S. Gleason [mailto:john.gleason@arc.state.co.us]

Sent: Monday, January 10, 2005 8:50 AM

To: Holtaway, John; 'CPR_LAWYERSFUND@MAIL.ABANET.ORG'

Subject: RE: Assessment on Inactive Attorneys

Not in Colorado.

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Monday, January 10, 2005 8:39 AM
To: Holtaway, John
Subject: RE: Assessment on Inactive Attorneys

In Massachusetts, attorneys on "Inactive Status" pay 1/2 the registration fee. Attys admitted 5 or fewer years pay \$165.00 If on inactive status, they pay \$82.50. Attys admitted for more than 5 years pay \$220; inactive attys pay \$110. The portion of the annual registration fee is approximately 22% of the fee paid.

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

From: Christopher Blanchard
[mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Monday, January 10, 2005 7:42 AM
To: Holtaway, John
Subject: RE: Assessment on Inactive Attorneys

In Connecticut, attorneys who have retired from the bar (by filing notice of their retirement with the clerk of the Superior Court for the Hartford Judicial District), attorneys who have resigned from the bar, attorneys who have been disbarred, and attorneys on active duty in the military for six months or more during the calendar year do not pay. Attorneys who did not engage in the practice of law as an occupation, and earned less than \$450 in compensation for services involving the practice of law may claim a fifty percent exemption from the fee.

Christopher G. Blanchard
First Assistant Bar Counsel/Staff Attorney Judicial Branch Client
Security Fund Committee

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Monday, January 10, 2005 7:37 AM
To: Holtaway, John
Subject: Re: Assessment on Inactive Attorneys

In Pennsylvania, while an attorney is on inactive status, no fees are paid. If the attorney desires to become active again, he/she must pay all unpaid assessments, which would include the CSF assessment.

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

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

From: Jane Schoenike [mailto:JSchoenike@nebar.com]
Sent: Friday, January 07, 2005 4:55 PM
To: Holtaway, John
Subject: RE: Assessment on Inactive Attorneys

In Nebraska, a disciplinary assessment is charged to inactive. It is 1/2 of what active members pay.

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

From: Robin Lawnichak [mailto:RLAWNICHAK@mail.michbar.org]
Sent: Monday, January 10, 2005 8:09 AM
To: Holtaway, John
Subject: Re: FW: Assessment on Inactive Attorneys

In Michigan members choosing to go inactive are required to pay 1/2 of the yearly Client Protection Fund assessment.

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

There is no client protection fund (special fund) assessment for inactive (non practising) lawyers in British Columbia.

Mary Ann Cummings
Manager
Special Compensation Fund & Custodianships
Law Society of British Columbia

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

From: Carla Freudenburg [mailto:CFreudenburg@dcbar.org]

Sent: Tuesday, January 11, 2005 12:04 PM
To: Holtaway, John
Subject: RE: Assessment on Inactive Attorneys

All D.C. Bar members pay some portion of their dues to the Fund, whether active, judicial, etc. But there is no specific-dollar amount, per-lawyer separate assessment. So yes, a voluntarily inactive Bar member's dues are going to the Fund.

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

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]
Sent: Wednesday, January 12, 2005 8:57 AM
To: Holtaway, John
Subject: RE: Assessment on Inactive Attorneys

In Minnesota there isn't really any "voluntary inactive" status as a defined group. All licensed attorneys are considered to be active and expected to pay the annual attorney registration fee, including the portion for the client protection fund. Failure to do so results in automatic administrative suspension until the fee is paid. Reinstatement includes a \$50 penalty plus all unpaid fees. The only exception is if the lawyer certifies that she is retired from any gainful employment or permanently disabled. Otherwise the attorney would have to resign their license permanently to avoid either paying or being suspended. Sorry for the delay in responding.

AUTOMATIC STAYS

Dear Mr. Holtaway- I reviewed the materials that you forwarded to me. Unfortunately, it doesn't appear that the cases cited deal with the question of whether the automatic stay provision of the bankruptcy code acts to stay the consideration of a claim filed with a client protection fund. We have a claim pending before our committee, and the respondent attorney has filed a bankruptcy petition, which, as I understand the bankruptcy code, operates as a stay on the continuation of judicial and administrative proceedings to recover claims against the attorney. The question is whether our committee (our trustees) can go ahead and consider the claim, and render a decision on whether or not to reimburse the claimant, in the face of the automatic stay. If any other fund administrators have considered this issue, I'd appreciate their input. If you have any further information on this issue, or if this question can be dealt with on the listserve, I'd appreciate it. Thanks again for all of your assistance.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

Chris, This is Dan Hendi from NJ. We'll be touching upon this in New Orleans next week.

With the limited facts given, I think you are on good grounds to proceed. Don't let the Federal Bankruptcy code affect your Fund's State regulatory right to do what it needs to do, especially if its powers were derived from the State's highest court as part of its inherent constitutional power to administer the admission, practice, and discipline of lawyers. Otherwise, you have a classic constitutional conflict of powers.

Would you please call me on Friday at 609-292-8008. You have complete ability to consider and pay claims for many reasons because paying a claim is not the same as demanding collection from the respondent, which you might be barred from doing under ordinary circumstances. If you pay based on theft, the Fund should be suing respondent anyway under 523 (a)(4) of the Bankruptcy Code to have the debt deemed non-dischargeable as loss arising from theft or misappropriation while acting in a fiduciary capacity. There are a few issues to consider, too long to get into at this time of night. Also, it is important to consider what Chapter the debtor is in, 7 or 13. Different rules apply and I would be glad to speak to you ...

Dan Hendi

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

Chris:

In New York, we would proceed as the other Funds have indicated. We have never been confronted with a bankruptcy stay while we were considering claims vs a lawyer, but we would proceed. The stay applies to proceedings v the debtor. I would argue that a Fund's proceedings are for reimbursement of the client which should not be impeded by the stay. It is my understanding that claims vs a debtor can be freely assigned. Once the awards are paid, and assignment made to the Fund, we would then be in the shoes of a creditor and be subject to the stay. Good luck. I would be interested in hearing how your matter is resolved.

Tim O'Sullivan
NY Lawyers' Fund

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

That is exactly correct. And I am not certain why you would not step into the shoes of the claimant and file the complaint and agree to prosecute it even if your investigation is pending if you aren't certain if the claim is compensable or not. either way, you are helping the victim within the bounds of your existence and preserving your rights.

But what I don't understand is that if it is a BIG claim as one person wrote, why aren't we doing all we can to work with the prosecutor and have the respondent ordered to pay restitution. Then, the timeliness as to a governmental entity is irrelevant under Kelly v. Robinson, a US Supreme Court case that makes restitution non-dischargeable. A judgment under a Criminal restitution order can also be filed as a judgment (We ask for it all the time) and guess what, its not suppose to be affected by the bankruptcy because it is a reflection of a non-dischargeable debt ... criminal restitution! See Code section 523 under fines, penalties and forfeitures...

I disagree that your hands are tied. The collection continues but simply under the bankruptcy court and not general collection tactics. Preservation may be requested by motion to the court for permission to extend time to file the complaint or by listing the claim in the initial complaint as pending matters and seek permission to amend the complaint in the future. I do admit that was a tact I used before the Code revision but I am not certain it would not apply still.

Dan Hendi

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Thursday, March 11, 2004 3:49 PM

To: Holtaway, John
Subject: Re: Client Protection Funds- Effect of Automatic Stay

John,

We have not dealt with this issue in PA, however, I would argue that the stay does not affect a claim being made with the Fund. I would base this argument on the basis that the claimant is seeking funds belonging to the client protection fund, not money or property belonging to the former attorney (bankruptcy petitioner). Ultimately, if an award is approved and paid, the client protection fund would have a subrogated interest in trying to recover the amount of the award from the attorney, which collection efforts would be stayed by a bankruptcy.

I'm not sure if the argument would hold much weight with a bankruptcy judge, but I would like to make it to try to get recovery to a claimant. The client protection fund would then assume the risk of eventually being able to recover from the bankrupt attorney's estate. We have always filed a complaint in nondischargeability when a former attorney who owes an obligation to our fund has filed bankruptcy.

I have no case law or legal precedent to pass along - only a gut argument for continuing to process a claim.

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

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

From: Peter H Sutton [mailto:PSutton@riemerlaw.com]
Sent: Friday, March 12, 2004 7:05 AM
To: Holtaway, John
Subject: RE: Client Protection Funds- Effect of Automatic Stay

John: The latest scam by disbarred attorneys is to file a Chapter 13, list their victims as creditors, then enter into a payment schedule of 5cents on the dollar, and, since it is virtually impossible to block a discharge in a Chapter 13, upon petition for reinstatement, claim the attorney has made "full restitution" under the bankruptcy act. That being said, it would seem that your fund can do what it wants with its funds, but you would be "stayed" from attempting to assert any subrogation rights . The automatic stay provisions probably dont apply, but whats the problem of seeking an emergency motion for relief just to be safe, so that you can inform the court that you will be stepping into the shoes of the victim(s), and thus want notice an an opportunity to be vote on any plan, etc.

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

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]
Sent: Thursday, March 11, 2004 4:32 PM
To: JHoltaway@staff.abanet.org
Subject: Re: Client Protection Funds- Effect of Automatic Stay

the maryland fund considers the claim anyway and then files for non dischargeability of the debt in the bankruptcy court. we have never had a problem, handling it this way.

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

From: Robert Minto [mailto:rminto@alpsnet.com]
Sent: Thursday, March 11, 2004 5:16 PM
To: Holtaway, John; Christopher.Blanchard@jud.state.ct.us
Subject: RE: Client Protection Funds- Effect of Automatic Stay

Dear Christopher:

Montana has faced this situation, and we have separated the process in two parts. The stay doesn't impact our board's right to make a decision as to whether or not to reimburse the client. That determination rises and falls on the facts of the case and the board willingness to expend Fund money to make the re-imbusement. The other side of the equation is the recoverability from the lawyer involved (problematic at best in any case). Clearly any action that the fund would take against the attorney would have to be handled within the rules and processes of the Bankruptcy Court rather than within the discipline system or the Courts of Common Jurisdiction.

Armed with an assignment from the client you should (if facts support you) be able to make a case for non-discharge of the debt on the basis of fraud and criminality of the lawyers actions. Timing of the process may be critical and you may have to help the client directly make the case for objecting to discharge while you process the claim.

Sorry about the answer being so short, but without more specific facts it is the best I have to offer,

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

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]
Sent: Thursday, March 11, 2004 3:46 PM
To: JHoltaway@staff.abanet.org
Subject: Re: Client Protection Funds- Effect of Automatic Stay

Michigan takes the position that the automatic stay does not foreclose consideration of the claim and payment by the Fund. Payment of a claim is not an action against the attorney but rather a decision by the Fund as to whether it wishes to reimburse, from it's own funds, a claim made against the fund by a third party. However, any efforts to collect against the attorney under subrogation rights would be stayed, and perhaps foreclosed forever, if the claim is discharged in bankruptcy. I don't have a citation in support of this position, but I can say that we have yet to be challenged on it. Good luck.

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

Washington takes the same position. We would pay the claim and then consider our subrogation rights in light of the bankruptcy proceeding.

Bob Welden
General Counsel
Washington State Bar Association

BONDING

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

From: Holtaway, John [mailto:JHoltaway@staff.abanet.org]
Sent: Tuesday, May 25, 2004 6:57 AM
To: CPR_LAWYERSFUND@MAIL.ABANET.ORG
Subject: list serve request-bonding/excess insurance coverage

I know this subject has been raised many times before, but I'm not sure how up to date my information is, so...which states have either successfully obtained either a bond or excess insurance for their fund, or attempted to obtain a bond or insurance but were unable to obtain it? What was your experience making any claim against a bond or insurance, or why were you unable to obtain it? Our Court would like some additional information on this topic. Only those states that have some experience with this issue need reply. Thanks.

Marty Cole
Minnesota Client Security Fund

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

Hi Marty -- I'll be interested to see whether there is anything new in any of the jurisdictions. Like others you have heard from, several years ago Washington explored various alternatives including insurance and bonding. Both were deemed either prohibitively expensive or unavailable. We learned that in Washington, there were certain statutory bonding requirements for professional licenses that the Department of Licensing had decided not to enforce because people could not get the bonding.

Bob Welden
General Counsel
Washington State Bar Association

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

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]
Sent: Tuesday, May 25, 2004 9:17 AM
To: JHoltaway@staff.abanet.org
Subject: Re: list serve request-bonding/excess insurance coverage

Marty:

Michigan is seriously exploring this alternative. We sent all our CPF data to an underwriter working with Traveler's Insurance and never heard back from them, despite several follow up telephone calls. One of the things hampering a viable bonding program is the lack of long term data on which a serious and adequate actuarial study could be based. This point is being addressed at the Conference in Naples, and we are eager to hear what the presenters have to say. If you'd like any more information, I'll share what I can. Good luck.

Victoria V. Kremski
Deputy Regulation Counsel
State Bar of Michigan

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

Prior to petitioning the NC Supreme Court seeking to have the court impose an assessment for a Client Security Fund, the State Bar looked into the possibility of having lawyers bonded. An insurance company submitted a proposal to provide a bond, but the premium amounted to \$200 per NC lawyer, including all lawyers who were not in private practice. Thus, the State Bar asked for the CSF to be created instead. The Supreme Court imposed a \$50 per lawyer assessment for the first two years of the Fund's existence, and no assessment was necessary for the following four years. We now have a \$20 annual assessment.

Approximately 10 years ago, the State Bar looked into excess insurance. Only one company made a proposal. That company would only provide excess coverage if NC got all of the other states in the Southeast to join in a regional coverage plan. Each state in the region would have paid the same premium and would have had to adopt payment policies and procedures imposed by the company. The premium was still higher than what we anticipated that we would pay without being in the regional plan. Needless to say, we didn't ask the other states in the region to join us in this effort.

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

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Tuesday, May 25, 2004 12:22 PM
To: Holtaway, John
Subject: Re: list serve request-bonding/excess insurance coverage

Marty: New York has not aggressively pursued insurance coverage. When it was considered several years ago, I believe we were discouraged by the cost and by the concern over an insurer interfering with Trustees' discretion in considering the merits of claims. I am interested in hearing any current news on the subject.

Tim O'Sullivan
NY FUnd

--- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Tuesday, May 25, 2004 1:40 PM
To: Holtaway, John
Subject: Re: list serve request-bonding/excess insurance coverage

Many inquiries over the years...Making clear that Fund Trustees must decide who and what gets paid ends most of them...Those who have gone further to seriously study data ended up asking us how the NJ Fund provides that much protection for \$50 per lawyer, per year.
Ken

--- Original Message -----

Some thoughts: A committee of the Rhode Island Bar explored this issue a few years ago as part of a comprehensive evaluation of loss prevention and found that bonding was not a feasible option for a variety of reasons. Cost, availability of a market to issue coverage, issues of limits, and indemnity of the bonding company as a condition. Should bonding have been mandatory with an indemnity by the covered attorneys, consider the ability of a newly admitted lawyer to have a meaningful net worth to issue such an indemnity! The New Hampshire legislature has from time to time considered such a requirement with resistance from the Bar. The ultimate result was a Supreme Court mandated fund.

Based on my exposure to the bonding issue, it is my opinion that it is an illusory notion which when fully vetted is not a viable alternative to a soundly funded bar/court regulated plan supported by assessments to the bar members. John Bomster

CAPS AND PER ATTORNEY LIMITS

The Wisconsin Lawyers' Fund for Client Protection Committee will be reviewing our current minimum sufficiency level as set by our highest court (\$250,000) and, at the same time, look at increasing our maximum per claim amount (\$75,000). Wisconsin does not have a per attorney maximum and has no plans to initiate it.

I have reviewed the 1999-2001 Survey of Lawyers' Funds for CP for maximum payout levels, but would like to know if the sufficiency levels or per claim maximums have changed since 2001 for any of the funds. I am also wondering if any jurisdictions with per attorney limits have eliminated that component of their programs.

Thanks much everyone.

Kris Wenzel
Administrator
WLFPC
kwenzel@wisbar.org
800-444-9404, ext. 6185

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

The State Bar of Arizona Client Protection Fund Board of Trustees recently approved increasing the current caps of \$100,000 per lawyer/\$50,000 per claim to \$125,000 and \$75,000, respectively. The proposal will be presented to the State Bar Board of Governors, and hopefully the increases will be effective as of January 1, 2005. The Trustees will track how this affects the Fund's assets and may keep the new limits the same, or increase them to \$150,000/\$100,000. The current caps have been in place for many years. Due to increase in the annual assessments, the Fund now has more money and will be able to pay more claims.

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

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]

Sent: Thursday, June 17, 2004 2:41 PM
To: JHoltaway@staff.abanet.org
Subject: Re: Listserve request

Kris: Michigan has increased the reimbursement "caps" to \$50,000 per claim, \$100,000 per respondent, to be prorated among claimants if that amount is insufficient. Good luck.

-----Original Message-----
From: Christopher Blanchard
[mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Thursday, June 17, 2004 2:30 PM
To: Holtaway, John
Subject: RE: Listserve request

Our fund in CT has a policy of paying claims up to \$375,000- however, it is not a hard cap, and our committee retains discretion to award a higher amount in appropriate circumstances.

-----Original Message-----
From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]
Sent: Thursday, June 17, 2004 2:26 PM
To: 'kwenzel@wisbar.org'; 'Holtaway, John'
Subject: RE: Listserve request

Kris: Minnesota currently has a \$150,000 per claim limit, with no aggregate limit per attorney (we have never had one). Although we have no official minimum or maximum fund balance, the Supreme Court has established parameters of \$1.5-million and \$2.5-million; if the fund balance is anticipated to exceed or dip below those amounts, we are required to report to the Court.

-----Original Message-----
Ohio increased the per claim maximum to \$75,000 (from \$50,000). The increase became effective in August, 2003. Ohio does not have a per attorney maximum.

Ohio's fund was established by Court Rule, therefore the increase occurred by an amendment of the rule.

Let me know if you need any additional information.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

-----Original Message-----
From: Donahue, Eileen [mailto:edonahue@iadc.org]
Sent: Thursday, June 17, 2004 3:26 PM
To: Holtaway, John
Subject: RE: Listserve request

Kris; The Illinois fund increased its per-claim cap to \$25,000 and its per-lawyer cap to \$250,000 in April 2003.

Eileen Donahue

-----Original Message-----
From: Carol Green [mailto:green@kscourts.org]
Sent: Thursday, June 17, 2004 3:14 PM
To: JHoltaway@staff.abanet.org
Subject: Re: Listserve request

In Kansas, the cap per claimant is \$75,000 and per lawyer is \$250,000 by Supreme Court Rule, effective December 2, 2002.

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Thursday, June 17, 2004 3:39 PM
To: Holtaway, John
Subject: Re: Listserve request

Pennsylvania has had no changes to these areas since 2001. Our Fund has never had a per attorney cap and we do not anticipate initiating one. Our maximum award was increased to \$75,000 from \$50,000 in 2000.

Kathryn J. Peifer, Esquire
Executive Director
Pennsylvania Lawyers Fund for Client Security
4909 Louise Drive, Suite 101
Mechanicsburg, PA 17055
717-691-7503; 800-962-4618
kpeifer@palawfund.com

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

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]
Sent: Friday, June 18, 2004 8:36 AM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: Listserve request

the maryland fund has never had a per lawyer cap. and the per claim cap is 10% of our fund balance at the end of the fiscal year. this year that means \$400,000. in the past, our fund has paid 100% of every single claim except for one in 38 years. i think that says a lot. anyway yea us. all of us for doing what we should be doing and fighting for the people that need fighting for. janet moss - administrator

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Friday, June 18, 2004 11:11 AM
To: Holtaway, John
Subject: Re: Listserve request

Kris,

The NJ Fund just applied to the Supreme Court for approval of an amendment to its regulations that would double the per claimant maximum to \$500,000 for claims arising after 1/1/04 and the aggregate maximum to \$2 million for claims against any one lawyer.

A few thoughts:

1. Congratulations on not having an aggregate or per attorney limit. They should not be favored.
2. Beware "sufficiency levels", if I understand the term. Whatever amount is settled upon as "sufficient" for a Fund's reserve probably isn't. A Fund that stops collecting an assessment or makes no attempt at subrogation receipts when its reserve hits a certain level is tempting fate to prove it wrong. This is especially so if the figure involved is what a compulsive gambler might go through on a slow weekend (as opposed to multi millions of dollars, or where a Fund is approaching self-endowment).
3. Put differently, as long as a Fund has payment limitations preventing it from making victims whole, true sufficiency has not been reached. Artificial restraints on wherewithal are inconsistent with the Fund's purpose and mission.

Good luck; I hope you go for it. It's great to hear of progress.

Ken Bossong

Kenneth.Bossong@judiciary.state.nj.us

COMMISSIONERS' FEES

In Massachusetts Commissioners are sometimes appointed by the Supreme Judicial Court to act as receivers for client files, clients, trust accounts etc. of a lawyer who has died, been suspended, or been disbarred. Occasionally, Commissioners, after reviewing bank records and client ledgers, are not able to identify the client or owner of the funds that are in the former lawyer's trust account. A proposal is being made that these funds be turned over to the Clients' Security Board regardless of whether there are claims pending brought by clients of the former lawyer. In the past the Board accepted these funds ONLY after it has received claims from clients of the former lawyer and AFTER the claims have been paid. At that point, the Board has standing to receive funds under its right of subrogation. Have any of you had experience in this situation? If so, have you accepted funds WITHOUT have claims pending against the former lawyer? Only after having paid claims? Have you required that the funds be turned over to the Fund only upon order of a court? Where do these funds go if not to the Fund? The state? If you have had experience in this area, I would greatly appreciate learning in as much details as possible about your experience.

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

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

Karen:

In Michigan, we had one case where the lawyer was deceased. There was money in the IOLTA account and an exhaustive review of the records could not determine who the money belonged to. No clients came forward claiming money was owed to them.

The Attorney Grievance Commission handled the receivership action and petitioned the court that the funds be paid to the Client Protection Fund. There were no CPF claims pending against the lawyer. The Court signed the order, the CPF received the money, no clients have come forward, no claims have been filed and we have all lived happily ever after!

Let me know if you want more details. Good luck.

Victoria V. Kremski
Deputy Regulation Counsel
State Bar of Michigan

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

From: Kris Wenzel [mailto:kwenzel@wisbar.org]

Sent: Thursday, August 19, 2004 3:46 PM

To: Holtaway, John

Subject: RE: Commissioners' fees

Karen,

Wisconsin has received such funds when it has approved and paid claims against the attorney, and it generally has involved an attorney who died and there were unidentifiable dollars left in the trust account.
Kris Wenzel

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]

Sent: Thursday, August 19, 2004 4:03 PM

To: Holtaway, John

Subject: Re: Commissioners' fees

Karen,

If there is no indication of dishonest conduct or potential for Fund claims, the NJ Fund has nothing to do with it. Here is NJ Supreme Court Rule 1:21-6(j):

(j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners. When, for a period in excess of 2 years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of 1 year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Hope it helps.

Ken

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

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

Sent: Thursday, August 19, 2004 4:43 PM

To: Holtaway, John

Subject: Re: Commissioners' fees

hey karen, how are you....just thought i would update you on what the maryland fund does. any money left in escrow accounts that is unaccountable or the persons can not be located, that money comes to us for safekeeping. it is put into our general fund, but is accountable and if any of these people come back to claim this money we give it back to them. we have never used it towards paying off claims. but i don't think we have ever had that situation. anyway hope this helps.....janet moss

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

Hello all: New York State has two court rules on the point, both enacted in 1994. One deals with the problem of gaining access to a sole practitioner's trust account when the lawyer dies and is the sole signatory on the checking account. The rule permits a Justice of the Supreme Court (NY's equivalent of a Superior Court), to disburse the proceeds to persons entitled thereto, or be deposited with the Client Protection Fund for safekeeping. The second court rule permits a lawyer or law firm to petition the Supreme Court to deposit with the Client Protection Fund for safekeeping (and disbursement) moneys belonging to clients who cannot be identified or located. The rules were incorporated in NY's banking and record keeping rule (DR 9-102 [f] and [g]). These rules solved many practical problems for NY lawyers and law firms, and law clients. I am sure that Tim O'Sullivan will be glad to elaborate, and share the NY fund's more current experience in administering the rules. I understand that more than a \$1 million in missing client funds have been deposited with the fund and, absent the court rule, would have probably escheated to the state of NY as "abandoned property." Regards. Fred Miller

CLOSED FILE RULES/RECORDS RETENTION

How long do Funds keep files containing claim applications and other documents filed by claimants that were relied upon by the trustees in making their decisions? Does any fund have a File Retention policy?

For those jurisdictions that hold hearings on claims, do you tape record the hearing and if so, are the tapes retained?

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

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

The Arizona Client Protection Fund never destroys claim files. Disciplined lawyers who are reinstated to the Bar are first required to pay restitution to the Fund for any claims that it paid against the lawyer. We keep claim files so that in case a lawyer is reinstated, we can prove that a copy of the claim was sent to the lawyer, that the claim was paid, and that the claimants signed over their subrogation rights to the Fund once they were paid. It may be many years after a lawyer is disciplined that he/she seeks reinstatement, so we keep the files available indefinitely. Additionally, the Board of Trustees meets three to four times a year and the minutes taken at these meetings are also retained.

At the request of a Trustee, or at the written request of either the claimant or the lawyer, the Trustees may afford both the claimant and the lawyer an opportunity to be heard by the Trustees. The hearings are informal and not tape recorded. Minutes are taken, as in the regular meetings of the Trustees.

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

The Clients' Security Fund of Ohio has never destroyed any files, but under CSF Board Rule 16, "all records pertaining to claims filed with the Fund shall be maintained at the office of the Fund Administrator for a minimum of five (5) years following the disposition of the claim. Thereafter, the records may be destroyed provided the Fund maintains a permanent record showing the name of the claimant, the name of the respondent attorney and the disposition of the claim." The permanent record is the Claim Determination Entry. All the fiscal records are to be maintained for 10 years and then can be destroyed.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

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

Neither Rhode Island nor New Hampshire have a file retention policy.

As to hearings: While neither jurisdiction has a "rule", the Rhode Island Fund has, from time to time, taped hearings. To date, that has not been the case with New Hampshire.

Regards: John Bomster - member of the NH and RI funds

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

In Hawaii, so far we have kept all claims - we do not have a file retention policy.

Yes, we do tape record our hearing, but we do not retain the tapes.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii

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

From: Reid F. Trautz [mailto:RFTrautz@dcbar.org]
Sent: Tuesday, September 30, 2003 8:58 AM
To: JHoltaway@staff.abanet.org
Cc: lindo@mobar.org

Subject: Closed Files Rule

John:

Your inquiry on the Client Protection Fund listserve on behalf of Linda Oligshlaeger was forwarded to me by our CSF director. The DC Bar does allow the destruction of a file without client notice, but only for non-valuable property and only after attempting to find the client. See Legal Ethics Opinion 283, available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions.cfm Most lawyers are just hanging on the the files and trying to ignore them

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

From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Wednesday, October 08, 2003 4:23 PM
To: Holtaway, John
Subject: Re: Client Protection Files

Karen,

I've never thrown a claim file out, though some have been lost in floods and other mishaps at off-site storage. Most other files and materials are destroyed after 7 years. We do tape record our hearings, but they are not done by a certified court reporter. So, they are not official records from which a transcript would be prepared. They are for our internal use; once the Trustees approve the Minutes, the corresponding tapes are destroyed. (Actually, they are erased and reused.)

Ken Bossong (NJ)

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

From: MCummings@lsbc.org [mailto:MCummings@lsbc.org]
Sent: Wednesday, October 08, 2003 5:41 PM
To: JHoltaway@staff.abanet.org
Subject: RE: Client Protection Files

In British Columbia we keep claim files for 30 years where the claim is denied, and 70 years where the claim is paid. Most hearings are on paper, but if an oral hearing is held, then a court reporter is present, the hearing is transcribed and kept with the file.

Mary Ann Cummings
Manager, SCF and Custodianship Dept.
LSBC

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

From: Robin Lawnichak [mailto:RLAWNICHAK@mail.michbar.org]
Sent: Thursday, October 09, 2003 8:18 AM
To: JHoltaway@staff.abanet.org
Subject: Re: Client Protection Files

Michigan keeps all files permanently, however, The non payment files are retained in hardcopy format for at least one full year after closure, then the file is gleaned and imaged.

The gifted files are retained in hardcopy format until subrogation is pursued and payment collected in full or the respondent passes away and the estate closed. Once subrogation is pursued and payment received or the respondent has passed away, then the entire content of the file is imaged.

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

From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Thursday, October 09, 2003 9:00 AM
To: Holtaway, John
Subject: Re: FW: Client Protection Files

Robin,
What technology do you use for gleaning and imaging?
Ken Bossong

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

From: Robin Lawnichak [mailto:RLAWNICHAK@mail.michbar.org]
Sent: Thursday, October 09, 2003 9:56 AM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: FW: Client Protection Files

Gleaning of the non-payment files is done by hand by Client Protection Fund personnel (temps are not used). When we send a file to be imaged there is also some prep work involved such as small pieces of paper (such as stickie notes) being taped to an 8 ½ by 11 piece of paper. This type of work can be done either in house or the imaging company may supply this service for a price. The prep work facilitate the imaging company being able to use automatic feeders for processing versus manual feeders which are more costly due to the increased time and labor.

The imaging is done off site by a local imaging company. The files are stored in a PDF (Portable Document Format) format and saved on a CD for delivery to the State Bar. The imaging company's standard storage format is a Tiff Group 4, but you may have to purchase a specific package to view the images if you don't already have a software package that handles tiffs. (We use acrobat reader to view the files.) The only data extracted by the imaging company is the computer file name. We developed a file naming conventions and folder hierarchy depending on the file type (payment vs nonpayment).

The imaging company quality checks 100% of the images. Once the CD is delivered to the Bar we do a random audit of the files.

Things to look for during the audit besides the return of all files (hardcopy and image wise) are: the correct file label, half scanned pages, pages that are too dark or too light, pages that are askew, etc.) We load the images on to our lan for easy access and store the CD's for disaster recovery capabilities.

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Thursday, October 09, 2003 10:39 AM
To: Holtaway, John
Subject: RE: Client Protection Files

The California fund keeps all files. Almost all of the decisions are made on the papers submitted. However, in the rare case where an oral hearing is granted to a party, the hearing is recorded and the tape/disk is retained in the original file along with the transcript if it is prepared upon direction of the Commission.

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

From: NYLAWFUND [mailto:mjk@nylawfund.org]
Sent: Tuesday, October 14, 2003 7:28 AM
To: Holtaway, John
Subject: Re: Client Protection Files

Karen,

In New York, we have retained all claim files received/considered since 1982. Closed files are regularly culled, catalogued and shipped to a secure storage facility offsite.

Since 2000, we also create a digital duplicate of each closed file with the intent of eventually eliminating paper storage. All claims filed since 2000 have been scanned using our digital photocopier which is able to export an image file that can be converted to an Adobe .pdf file. The resulting file is named for the claimant

and claim number and then stored in a computer directory file for the year, month, and day the claim was filed. This permits us to search for the duplicate file by name, date or claim number.

On a regular basis, these directories are burned onto CD-ROMs. Presently, the sum of all claim files processed since January 2000 occupies about 4 CD ROMS. The added beauty of this process is that these files are printable and we are able to certify that the printed pages are true copies of the originals.

Michael J. Knight
Deputy Counsel
NYS Lawyers' Fund
1-800-442-3863
mjk@nylawfund.org

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

From: Carla Freudenburg [mailto:CFreudenburg@dcbarr.org]
Sent: Tuesday, October 14, 2003 1:41 PM
To: Holtaway, John
Subject: RE: Client Protection Files

Karen,

The D.C. Fund does not have a written file retention policy, however, it keeps all files permanently. There is no provision in the Fund's Rules of procedure to tape record a claim hearing.

Carla Freudenburg

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

The WSBA record retention policy includes the following:
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

DEMENTIA vs. MALPRACTICE CLAIMS

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

From: Trish Heim [mailto:heimt@kscourts.org]
Sent: Monday, March 22, 2004 10:56 AM
To: JHoltaway@staff.abanet.org
Subject: Dementia vs. malpractice

Our Commission has received a claim where an attorney took a retainer for legal services but was unable to provide competent legal services due to dementia/early Alzheimer's. The claim was denied because the Commission found it to be malpractice. We are beginning to receive more claims against this same attorney for the same reason.

Has any jurisdiction received a claim like this one, considered it dishonest conduct, and paid the claim? Or otherwise exercised discretion to pay such a claim?

Thank you.
Trish Heim

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

From: Bill.Thomas@judiciary.state.nj.us
[mailto:Bill.Thomas@judiciary.state.nj.us]
Sent: Tuesday, March 23, 2004 9:47 AM
To: Holtaway, John
Subject: Re: FW: Dementia vs. malpractice

Dear John and Trish:

In New Jersey, we have not considered precisely that claim, but we have considered claims where the attorney died suddenly and unexpectedly after receiving the retainer and before any services were performed. Although there is a reluctance to brand such an attorney "dishonest" the trustees have determined that an attorney who receives a retainer accepts that money in trust to be used only as it is earned by the attorney. If the attorney is unable or unwilling to perform the services, then the attorney is obligated to return the retainer and the failure to do so is dishonest.

I would imagine that in most situations where an attorney develops a mental disability after accepting the retainer, the client receives a refund and no claim is ever filed. Perhaps it would help here if the client first filed a fee arbitration.

Bill.Thomas@judiciary.state.nj.us

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

From: Christopher Blanchard [mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Tuesday, March 23, 2004 11:20 AM
To: Holtaway, John
Subject: RE: Dementia vs. malpractice

Trish- In CT, "dishonest conduct" is defined as conduct in the nature of theft, embezzlement or conversion, or a "refusal to refund unearned fees received in advance." I may be wrong, but I'm not sure our committee would find a "refusal to refund unearned fees" in a situation where an untimely death was involved.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

From: Donahue, Eileen [mailto:edonahue@iadc.org]
Sent: Tuesday, March 23, 2004 11:41 AM
To: Holtaway, John
Subject: RE: Dementia vs. malpractice

Illinois has had a few claims involving Alzheimers or mental disability. In one claim the lawyer accepted fees to represent a client in a criminal matter; on the very day he was supposed to (and failed to) appear at the client's preliminary hearing in one county, he was found mentally incompetent in guardianship proceeding in a neighboring county court. We paid on four claims involving that lawyer. And we have paid in similar matters.

In these cases, it is hard to say there was dishonesty, because it is not known when the illness began or what the lawyers mental processes were. Also most funds require that the involved lawyer be disciplined or dead before a claim against him is ripe, and these lawyers are not disciplined or dead; they generally go on some kind of inactive license status. Our Commission has exercised its discretion to pay these claims, however, asking if the conduct, absent the mental problem, was the kind that might have led to discipline and if the loss was the kind we would otherwise reimburse. If so, we pay. So where the client got no service in exchange for the legal fee we would generally pay. It may have helped that we have not had a significant

number of these claims, and therefore they have not had a real impact on the fund financially.

Eileen Donahue

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

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Tuesday, March 23, 2004 12:12 PM
To: Holtaway, John
Subject: Dementia v Malpractice

Trish:

In New York, we have never determined the issue you raise. Our jurisdiction is limited to losses caused by dishonest conduct which is defined as a misappropriation or wilful misapplication. We had one lawyer who claimed that his client's loss was caused by his mental illness, not his dishonest conduct. The claim was resolved without our Board having to squarely resolve the issue. I argued that a venal intent is not required for a finding of a misappropriation or a conversion. The focus should be on the client's loss, not the mental state of the attorney. I would be interested in hearing the result of your situation.

Tim O'Sullivan
NY Lawyers' Fund

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

From: Beverly Lewis-Koch [mailto:blewis.koch@verizon.net]
Sent: Tuesday, March 23, 2004 12:55 PM
To: Holtaway, John
Subject: Re: Dementia vs. malpractice

In the District of Columbia, the trustees would probably consider this malpractice or negligence not dishonest.

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

From: Office of the Disciplinary Counsel [mailto:odc@lava.net]
Sent: Tuesday, March 23, 2004 12:50 PM
To: Holtaway, John
Subject: Re: Dementia vs. malpractice

Our Trustees used failure to return an unearned retainer and granted claim.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection

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

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Tuesday, March 23, 2004 1:11 PM
To: 'Holtaway, John'
Subject: RE: Dementia vs. malpractice

We haven't had the dementia issue, but had two lawyers die suddenly before performing work for which they had been paid in advance. Unfortunately, in both cases, the lawyer had failed to deposit the funds in trust and had dissipated the money so that the estate couldn't pay. The fund reimbursed both clients.

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

From: Kris Wenzel [mailto:kwenzel@wisbar.org]

Sent: Tuesday, March 23, 2004 1:48 PM
To: Holtaway, John
Subject: RE: Dementia vs. malpractice

Wisconsin also hasn't had the dementia issue, but has had lawyers die suddenly - the fund will pay the client when it is evident that the attorney did not deposit the funds into a separate trust account; did not mail subrogated lien payments to creditors; and/or when the estate had no funds to reimburse the clients. I would like to think that Wisconsin's fund would not rule out reimbursement in a dementia matter and would take each case on its merits.

Kris Wenzel
Administrator

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Wednesday, March 24, 2004 2:52 PM
To: Holtaway, John
Subject: Re: FW: Dementia vs. malpractice

Trish,

First, Thanks for raising an important, and obviously stimulating, question. The issue is dishonest conduct, one of the requisite elements of any successful Fund claim. Since even the most craven lawyers seldom announce their dishonest intentions, Fund Trustees are left to infer dishonesty from the circumstances. In states that have the ABA's new Model RPC 1.15 (requiring prepaid fees to be maintained in the trust account until earned), the substantive law and policy are no different, but the inference may be easier to make. The absence of that which was not earned from the trust account is arguably dishonest per se. Otherwise, we are left, as with most difficult claims, with careful consideration of as many facts as we can acquire. What was the lawyer to do? What did the lawyer do? How much was paid and under what circumstances? How much of a pattern is developing in these claims? In your particular case, I wonder not so much about early onset of Alzheimer's, but such sudden onset. Specifically, in a number of separate instances, the lawyer is perfectly competent to discuss a client's matter (thus inspiring some degree of confidence), set a fee, collect a fee, and spend that fee. When it comes time to render services, the lawyer is helpless? Looking at a timeline for the multiple claims might help. Finally, I think that the only thing as important as the facts is the standard to be employed. What is the standard for a finding of dishonest conduct? The most difficult of difficult unearned fee claims are the disability and sudden death claims. Why? Because we feel uncomfortable inferring dishonesty from unfortunate circumstances. The problem is we are looking for the wrong thing, though subtly so. We look for dishonest intent when we should seek to discern dishonest conduct. It's not state of mind that we protect clients from, but behavior.

Note that we don't worry about the lawyer's state of mind in any other type of claim. Who cares what the lawyer is thinking about when forging an indorsement or raiding a trust account? Their victims certainly don't, and neither do those who pay a fee and get nothing in return. Conversely, a lawyer with the most evil of intent who is somehow prevented from stealing gives rise to no claim. Analyzing behavior is enough; assessing moral culpability is for a different forum.

Ken Bossong

Kenneth.Bossong@judiciary.state.nj.us

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

In Washington, we approved applications regarding a lawyer who accepted fees and performed little or no services who was determined to be mentally incapacitated from practicing. He never deposited any of the advance fees into trust, which gave the committee a "hook" to find dishonesty.

Bob Welden

General Counsel
Washington State Bar Association

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

Hello. Great question. In my years at the NY Lawyer's Fund, I was very reluctant indeed to recommend an award of reimbursement to a client whose loss resulted from a lawyer's illness, and not dishonest conduct. Implicit in an award, which is a public record in NY, is dishonest conduct by the respondent lawyer. Fortunately, I found that most clients can accept and appreciate the difference between a lawyer's illness and dishonest conduct. Perhaps that is because most clients respect their lawyers and understand human frailty. In these unfortunate cases, we made a great effort to help the claimants get reimbursed from the lawyer's estate. I hope this is helpful. Regards! Fred Miller

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

The Arizona Client Protection Fund has paid claims against lawyers who are on disability inactive status. Disability inactive status means that the lawyer has substance abuse or mental problems and cannot practice law. However, it must be established that there was dishonest conduct on the part of the lawyer.

Our Fund has paid claims against deceased lawyers. Specifically, we have paid several claims where a client gave money to their lawyer, the lawyer did little or no work and then died, and had no money left in the trust account. We have also paid claims against deceased lawyers because there was dishonest conduct on the part of the lawyer.

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

Trish: Florida will reimburse and appropriate fee claim for a deceased where there is no money from the estate to reimburse and the money was not placed in trust. I think the same result would obtain for the situation you are describing, although I am not on the Florida committee any longer and can not speak for it. It may be a malpractice claim, but I assume there is not insurance. Bill Ricker

Bill Ricker
Akerman Senterfitt

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

Are claims like this resolved differently in states depending upon whether lawyers are required to deposit advance legal fees in their trust accounts? As Bob points out, a deposit requirement provides a "hook" to find dishonest conduct, which is one reason why NCPO recommended that the ABA adopt that policy in Model Rule 1.15. -- Fred Miller

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

In a message dated 3/24/2004 4:09:21 PM Eastern Standard Time,
JHoltaway@staff.abanet.org writes:

... It's not state of mind that we protect clients from, but behavior. Note that we don't worry about the lawyer's state of mind in any other type of claim. Who cares what the lawyer is thinking about when forging an indorsement or raiding a trust account? Their victims certainly don't, and neither do those who pay a fee and get nothing in return. Conversely, a lawyer with the most evil of intent who is somehow prevented from stealing gives rise to no claim. Analyzing behavior is enough; assessing moral culpability is for a different forum.

Ken Bossong

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

I respectfully dissent from Brother Bossong's analysis. If the ethical standard (as in NY) says that a pre-paid legal fee becomes the property of the lawyer when it's paid to her/him, it's sure difficult to say that the lawyer's subsequent death or disability constitutes a theft of the legal fee. I would go the other way if the jurisdiction's ethical standard required that the pre-paid fee be maintained in the lawyer's trust account, to be withdrawn only as earned. Unfortunately, a lawyer's state of mind in investment and unearned fee claims is frequently important. This is a great discussion of an important issue for client protection funds. Let's hear

more!

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

Fred and I agree about many important things, but this (see below) is not going to be one of them.

1. NJ also does not require prepaid fees be maintained in the trust account. It's one thing I think we have wrong. Why did NCPO, led by Fred, successfully urge the ABA to amend RPC 1.15 to so require? Because the idea that a fee paid by a trusting client is property of the lawyer upon receipt is logically and morally bereft.
2. Permitting a standard elsewhere, even in an RPC (or absence of a standard in an RPC) to be outcome - determinative for Fund claims is allowing the tail to wag the dog. The Fund has a job to do - justice in claims presented by real people in actual situations. Funds are unique, and so are their mission and standards.
3. Nobody pays a plumber \$8,000 and hopes he shows up to redo a bathroom. Typically, you pay about 10% to cover some materials, another 40% at about half-way to completion, and the balance upon satisfactory completion. Lawyers are not plumbers (at least, not since Watergate). Clients sometimes pay a full, flat fee in advance because attorney-client is a relationship of special trust. Fund policy should reflect that reality.
4. No matter what your RPC 1.15 (or equivalent) says, your RPC 1.16 says lawyers have an absolute ethical duty to return that which is not earned at the termination of a representation. Who would argue? Failure to return that which is clearly not earned is dishonest conduct. If the claim is arguable, or a close call, that is a non-compensable fee dispute. If it is about a bad result or a poorly handled matter, that is non-compensable malpractice.
5. If lawyers have an absolute duty to return the money unless they ultimately earn it, I would argue that means title to the money does not pass to the lawyer upon payment, even if not required to hold it in trust. Where it resides becomes a question of mechanics. All we're saying by not requiring unearned fees to stay in trust is that not returning them is akin to embezzlement, rather than larceny. Anyone up for a law review article?
6. I've argued that the lawyer's state of mind is virtually irrelevant. It is also unknowable. Anyone's guess as to what lawyers think about while harming clients is as good as mine. But here's mine: most of the time lawyers aren't thinking about clients at all, one way or another. They are thinking about cocaine, a mound of bills, or that unpleasant man threatening to break legs if the bookie isn't paid. To the extent they think of clients at all, most of the time they have every intention of putting back what they "borrow" or earning the fee. I could be wrong. That's the point: such speculation is hopeless, and useless to the Fund's mission. Please understand - Fred has beautifully articulated what is probably the majority position. Emphasizing objective behavior over subjective intent is somehow counter-intuitive, and a bit uncomfortable at times, in these claims. But the second best reason for doing Client Protection Funds (the best being that it's the right thing to do) is to restore the public's confidence in our honorable profession. No matter how well you craft or express your distinctions, reasonable people who have been abandoned in an important matter, with their money gone, and in a worse position than ever, are not going to buy it. Their reality is they may as well have had someone sneak into their house and steal that money. We can do better for them; since we can, we must.

Ken

Kenneth.Bossong@judiciary.state.nj.us

DISCIPLINARY INFORMATION IN PURSUIT OF SUBROGATION

<http://www.courts.state.pa.us/Index/SupCtCmtes/discbd/Indexdiscbd.asp>

The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it amend the Pennsylvania Rules of Disciplinary Enforcement as set forth in Annex A to make clear that the Pennsylvania Lawyers Fund for Client Security may use information obtained during an investigation to pursue subrogated claims. Interested persons are invited to submit written comments regarding the proposed amendment on or before Monday, July 7, 2003, to: Office of the Secretary The Disciplinary Board of the Supreme Court of Pennsylvania First Floor, Two Lemoyne Drive Lemoyne, PA 17043

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

From: Kenneth.Bossong@judiciary.state.nj.us

Sent: Monday, June 16, 2003 11:57 AM

To: Holtaway, John

Subject: Re: Pennsylvania Lawyers' Fund for Client Security

I can't think of a reason why the Fund should not be allowed to use such information. Is no distinction made between those resigning because they just don't want to be PA lawyers anymore, or are facing minor charges, and those resigning because they face charges of disbarment magnitude?

Ken Bossong

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]

Sent: Monday, June 16, 2003 12:59 PM

To: Holtaway, John

Subject: Re: Pennsylvania Lawyers' Fund for Client Security

Ken,

In PA, if an attorney is disbarred on consent, i.e. resigns, the fact that the attorney is disbarred is made public, however the reason for the disbarment is not. There was some concern if an attorney resigns and then the Fund pursues subrogation efforts that an argument could be made that the Fund had violated the confidentiality rules. To my knowledge, that argument has never been made, but someone thought it was important enough to clarify.

Kathryn J. Peifer, Esquire

Executive Director

Pennsylvania Lawyers Fund for Client Security

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]

Sent: Monday, June 16, 2003 2:07 PM

To: 'Holtaway, John'

Subject: RE: Pennsylvania Lawyers' Fund for Client Security

Kathy,

Why on earth are the grounds for disbarment not public??? In Mass. when we exercise our subrogation rights, Mass.Clients' Security Board is substituted for the name of the claimant, but the name of the disbarred lawyer is definitely part of the subrogation case. When we a notice letter to the former lawyer, we write that if an award is made, the CSB intends to make demand on you (former lawyer) and fully exercise our subro rights.

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]

Sent: Monday, June 16, 2003 2:33 PM

To: Holtaway, John

Subject: Re: Pennsylvania Lawyers' Fund for Client Security

Karen,

I am told that the reason the grounds for disbarment are not made public when the attorney is disbarred on consent is to encourage the resignations to avoid a long, expensive prosecution and get the license pulled as quickly as possible. If the grounds for the disbarment are not disclosed, this provides an incentive for many lawyers to resign quickly to avoid the inevitable disbarment hearing and the public disclosure of the grounds for the disbarment.

If the Fund pays out an award(s), the Fund will be named as the party bringing the action against the named attorney. Since the attorney would then be named in the subrogation action, this is where the concern arose regarding our confidentiality rules. It wouldn't take a rocket scientist to figure out that if the Fund was bringing suit against an attorney, that the basis of the civil action was an award that had been made resulting from the conversion of client funds, thereby making public the grounds for disbarment. Again, this has not prevented the Fund from pursuing subrogation actions, but a board member was concerned enough to bring this issue to the attention of the Disciplinary Board and the Supreme Court of Pennsylvania.

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Monday, June 16, 2003 2:53 PM
To: 'Holtaway, John'
Subject: RE: Pennsylvania Lawyers' Fund for Client Security

Yes, I understand the intersection of the subro action and the no-name disbarred lawyer, but does a lawyer who consented to disbarment have to inform his clients that he no longer may practice? If so, what does he/she tell them? The truth?

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Monday, June 16, 2003 3:49 PM
To: Holtaway, John
Subject: Re: Pennsylvania Lawyers' Fund for Client Security

The attorney is required to notify the clients that he/she is no longer licensed to practice, but is not required to advise them why.

----Original Message---

Kathy:

In New York, our Regulations provide that an award of reimbursement and the facts pertaining to the loss are a public record.

Tim O'Sullivan
TOS@nylawfund.org

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Monday, June 16, 2003 3:45 PM
To: Holtaway, John
Subject: RE: Pennsylvania Lawyers' Fund for Client Security

In California, resignations and disbarments are public record; however, the underlying facts are confidential unless at the very least a Notice of Disciplinary Charges was filed in our State Bar Court naming the case. The exception to this confidentiality is only as I wrote before re: Rule 955 where the lawyer must give notice to clients, opposing counsel and the courts. However, if a reporter calls, or a member of the general public, re cases we have paid, unless charges were filed based on the same facts, our confidentiality rules will allow us to only name the lawyer, applicant, amount paid and date paid. Most of our cases come in after the resignation/disbarment on the most egregious offenders.

DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE

On August 6, 2003 the Michigan Supreme Court entered an order requiring lawyers to disclose on their annual registration form whether they maintain professional liability insurance.

The Court's order and a copy of the Michigan registration form are attached.

<<Michigan Disclosure Rule 10-03.doc>>

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

North Carolina also recently adopted a rule requiring lawyers to disclose on their annual registration form whether they have professional liability insurance.

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

The Nebraska rule is effective November 1, 2003 and provides that the information is available to the public.

See Article III, 2(f) .

<<http://court.nol.org/rules/amendments/nsba32.pdf>>

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

FYI, the Standing Committee on Client Protection, the "one lonely ABA committee" referred to, has not given up the battle, but we are considering whether to revise the proposed model rule to require disclosure of malpractice insurance or the lack thereof as a part of the annual licensing or registration of lawyers.

We will keep you advised of the progress of the Committee's work and would appreciate receiving any news from your jurisdiction regarding the disclosure of lack of malpractice insurance.

Bob Welden
General Counsel
Washington State Bar Association

DISCRETION OF TRUSTEES

Our Special Compensation Fund Committee in British Columbia is facing a series of difficult claims on which the Committee may have to exercise its discretion to pay less than the entire amount of the claim. I have found very helpful guidelines for the exercise of discretion in New York's Annual Report and on the Law Society of Upper Canada's website.

Do other jurisdictions have guidelines for the exercise of the trustees discretion and if so, how may we obtain a copy of those guidelines?

Thank you very much.

Mary Ann Cummings
Manager
Special Compensation Fund & Custodianships
Law Society of British Columbia

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Friday, November 21, 2003 9:26 AM
To: Holtaway, John
Subject: Re: Inquiry from Mary Ann Cummings: Compensation Funds/
Exercise of Discretion

I have attached a copy of our Rule 521. Rule 521(d) provides factors that the Board may consider in exercising its discretion.

During my tenure with the PA Fund, we have not had to pay less than the entire amount of the claim, except for claims that exceed our \$75,000 maximum award per claimant. When the Fund was faced with two extraordinary events in 1997, our Board went to the Supreme Court of PA and requested a one time

increase in the annual assessment. The Court approved a one time increase that year from \$45 to \$70. The following year we went back to the \$45 annual assessment. We received a few "grumblings" from the members of the Bar, but the majority of the Bar was supportive.

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

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Friday, November 21, 2003 9:20 AM
To: 'Holtaway, John'
Subject: RE: Inquiry from Mary Ann Cummings: Compensation Funds/
Exercise of Discretion

Mary Ann,

Go to our website: www.state.ma.us/clientssecurityboard and click on rules and read Rule 4:05, section 3 and you will see criteria for paying less than the amount of the total loss. The Board been paying 11% of claims now for about 14 years, but recently held hearings on claims that exceed cumulatively \$7 million. The Board will rely on Section 3 when it pays less than 100%.

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

From: Christopher Blanchard
[mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Friday, November 21, 2003 10:17 AM
To: Holtaway, John
Subject: RE: Inquiry from Mary Ann Cummings: Compensation Funds/
Exercise of Discretion

Mary Ann- in Connecticut, pursuant to Section 2-75(g) of our Superior Court rules, "Based upon the claims approved for reimbursement, the claims being processed and the amounts available in the client security fund, the client security fund committee shall determine in its sole and absolute discretion the amount, the order, and the manner of the payment to be made on the approved claim."

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Friday, November 21, 2003 1:07 PM
To: Holtaway, John
Subject: RE: Inquiry from Mary Ann Cummings: Compensation Funds/Exercise of Discretion

We have language in our rules that allows for reduction in payments etc should the fund face financial difficulty; we have never had to face that issue yet. I am not sure if our language will be helpful to you or not, but I will send it out to you today. Good luck.

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Friday, November 21, 2003 9:41 AM
To: Holtaway, John
Subject: Re: Inquiry from Mary Ann Cummings: Compensation Funds/ Exercise of
Discretion

NJ's Rule 1:28-3(b) provides some guidelines for the exercise of discretion as follows: (b) Consideration of Claims. The trustees in their sole discretion but on the affirmative vote of 4 of them shall determine which

eligible claims merit reimbursement from the Fund and the amount, time, manner, conditions and order of payment of reimbursement. In making such determinations the trustees shall consider, among other appropriate factors, the following:

- (1) The amounts available and likely to become available to the Fund for the payment of claims and the size and number of claims which are likely to be presented;
- (2) The amount of the claimant's loss as compared with the amount of losses sustained by other eligible claimants;
- (3) The degree of hardship suffered by the claimant as a result of the loss;
- (4) The degree of negligence, if any, of the claimant which may have contributed to the loss;
- (5) The potential for recovery from a collateral source.

The one time, years ago, that we were forced to pay less than 100 cents on the dollar, even within our per claimant maximum, we handled it this way: All successful claimants were asked to complete a financial disclosure form - assets and liabilities; income and expenses. The info was used to place each claimant into one of four "hardship categories". The destitute received 100 cents on the dollar; the wealthy, 25; with two categories in between. Anyone unwilling to disclose was presumed wealthy.

Good luck and hope this helps.

Ken Bossong

P.S. Any collateral sources to help ease the pain here?

Kenneth.Bossong@judiciary.state.nj.us

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

From: mtartag@flabar.org [mailto:mtartag@flabar.org]

Sent: Friday, November 21, 2003 1:37 PM

To: Holtaway, John

Subject: Re: FW: Inquiry from Mary Ann Cummings: Compensation Funds/ Exercise of Discretion

Florida's rule. Rules Regulating The Florida Bar Chapter 7

RULE 7-2.3 PAYMENTS

(a) Payment is Discretionary. If, in the judgment of the board or the committee, as the case may be, a reimbursable loss has been sustained by an applicant and the circumstances warrant relief, then, after taking into consideration the resources of the fund and the priority to be assigned to such application, the committee or the board may, in the exercise of their respective discretion, as a matter of grace and not of right, grant monetary relief within the amount of their respective authority as set forth in rule 7-2.2(b).

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

Several years ago, Florida established a procedure where its Fund reimburses the first \$25,000 or each claim when approved. If there are approved individual claims for more than \$25,000, they receive the first \$25,000 and then at the end of the fiscal year if there are funds available to pay more than the \$25,000, the claims are paid pro rata until the funds are exhausted, up to the amount approved for each claim--which maxes out at \$50,000.

Bill Ricker

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

The rule governing the Clients' Security Fund of Ohio sets forth factors which the Board shall consider "in determining the amount, time, manner, conditions, and order of payments of reimbursement:

1. The amounts available and likely to become available to the fund for the payment of claims and the size and number of claims presented.
2. The amount of the claimant's loss as compared with the amount of losses sustained by other eligible claimants.
3. The degree of hardship suffered by the claimant as a result of the loss.

4. The degree of negligence, if any, of the claimant that may have contributed to the loss.
5. Any special or unusual circumstances."

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

EXHAUSTION OF REMEDIES

The Lawyers' Fund committee in Washington is considering whether to amend our rule regarding exhaustion of remedies. I am interested in how other states approach this issue. Does your state have a rule on exhaustion of remedies, and if so, can you please send it to me?

The Washington rule currently reads:

H. Exhaustion of Remedies. The Committee may direct an applicant to seek reimbursement of a loss before making a recommendation to the Trustees on an application. This may include, but is not limited to, the following:

- (1) File a claim with the lawyer's insurance carrier;
- (2) File a claim on a bond, when appropriate;
- (3) File a claim with any and all banks which honored a financial instrument with a forged endorsement;
- (4) Request payment in writing from any lawyer who was a partner of the dishonest lawyer at the time of the dishonest conduct; or any lawyer who was a principal of the professional corporation in which the dishonest lawyer was an employee or member; or against the employer of the dishonest lawyer; or
- (5) Commence appropriate legal action against the lawyer or against any third party or entity who may be liable for the applicant's loss.

The specific issue the committee is struggling with is the requirement set out in parts (4) and (5): should the Fund require applicants to sue "innocent partners" and their insurers before payment is made? If so, should the amount of the loss affect the question of how far the applicant needs to go (i.e., should the same requirement apply to a loss of \$3,000 as for a loss of \$30,000 or \$300,000)? A related issue has to do with part (1) -- does it make any sense to require filing a claim with the lawyer's insurance carrier since malpractice insurance excludes intentional acts like theft.

A related issue is the "statute of limitations" for Fund applications. Should any time limit be tolled while other recovery is sought? If so, should there be a maximum limit in light of the potential for drawn out appeals?

Thanks.

Bob Welden
General Counsel
Washington State Bar Association

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

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Monday, July 12, 2004 11:17 AM
To: Holtaway, John
Subject: RE: exhaustion of remedies

Bob, in Oregon we require exhaustion of remedies but waive it in appropriate circumstances. Claimants are generally required to pursue all the steps in your rule, including having a judgment against the defalcating lawyer. The only exception is for losses of less than \$5,000 if the lawyer has been disciplined in connection with the same conduct.

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Monday, July 12, 2004 12:12 PM
To: Holtaway, John
Subject: Re: exhaustion of remedies

The Pennsylvania Fund is not a fund of last resort. We do not require the claimant to pursue criminal and/or civil actions before obtaining recovery from the Fund. We do, however, require the claimant to file a complaint with the Disciplinary Board and to cooperate with that Board's investigation of the complaint. The Fund does not have to wait for formal discipline in order to pay an award, however.

The Board of our Fund likes to get claims within two years of the claimant discovering the loss, however, they do not strictly adhere to that requirement. Some claimants do not even learn of the Fund's existence until after the expiration of the two years or, do not file a claim with the Fund until after they have pursued an unsuccessful action.

We do not cover a loss that is covered by a bond.

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

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Monday, July 12, 2004 12:36 PM
To: Holtaway, John
Subject: RE: exhaustion of remedies

ditto to Kathy's reply. In California we require the filing of a discipline complaint; while discipline is generally requirement it can be waived.

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Monday, July 12, 2004 12:31 PM
To: Holtaway, John
Subject: RE: exhaustion of remedies

California does not require exhaustion of remedies. The rationale is that the victim has already been harmed and making them go through remedies adds more to the loss. Our experience is that it is even difficult for the bar to get the j against the atty or third parties. We would rather get them reimbursed whole as soon as possible. They subrogate their rights pro tanto to us

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

From: Daniel.Hendi@judiciary.state.nj.us
[mailto:Daniel.Hendi@judiciary.state.nj.us]
Sent: Monday, July 12, 2004 11:48 AM
To: Holtaway, John
Subject: Re: FW: exhaustion of remedies

Bob:

In New Jersey, the Trustees are able to consider the collateral sources available, but there is no set rule per se' that collateral sources must be exhausted before we pay. Of course, where there is a bond in place or clear insurance coverage that only needs to be filed, we do ask that the Claimant place the company on notice right away. The Trustees consider the burden that a client may suffer in pursuing a source. See dicta in *Sears v. Rose*, 134 NJ 326 (1993), and *NJ Lawyers' Fund v. Security Title*, 134 NJ 358 (1993), in which the Court suggested that the Trustees pay-and-chase, rather than make Claimant chase before it

pays. However, in those cases, the practicality of paying off an insurer holding an assigned mortgage that it's own approved attorney failed to pay off, would have wiped out our cause of action.

Careful aspects of the "exhaustion rule" are: a.) the effect of paying off a claim to someone other than the actual claimant; b.) whether the rights of the Fund are prejudiced by a claimant who pursues a collateral source and does a poor job in the process, leaving nothing for the Fund in subrogation work; and, c.) assuming a clear cut case, the burden (financial/ mental) if Claimant is forced to pursue rights directly.
Dan

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

From: Chris Janku [mailto:cjanku@mobar.org]
Sent: Monday, July 12, 2004 2:04 PM
To: Holtaway, John
Subject: RE: exhaustion of remedies

Missouri requires exhaustion of other remedies for claims over \$3,000 but the requirement can be waived by the Committee.

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

From: Bill.Thomas@judiciary.state.nj.us
[mailto:Bill.Thomas@judiciary.state.nj.us]
Sent: Tuesday, July 13, 2004 8:51 AM
To: Holtaway, John
Subject: Re: FW: exhaustion of remedies

Bob:

To echo what my colleague Dan Hendi already stated, New Jersey does not strictly require a claimant to persue a collateral source. The rationale seems based upon two points. First, the claimant's recovery would be smaller (since they would be paying attorney fees out of their recovery) and the recovery would be delayed. Thus, the Fund would not be fulfilling its core purpose. Second, if the claimant failed in this effort to sue the collateral source, the Fund would then be precluded from suing the collateral source after the Fund pays the claim.

In New Jersey, if a claim is filed and a third party collateral source is readily available, such as title insurance or a bond, the Fund will demand that the collateral source resolve the matter first. Usually that is sufficient, but if it fails, the Fund will decide the claim and if an award is granted, the Fund will pursue the collateral source.

I can appreciate that the New Jersey approach might not apply very well in states that do not have the staff resources to pursue subrogation and collection to the degree that New Jersey does.

Bill.Thomas@judiciary.state.nj.us

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

From: Office of Disciplinary Counsel [mailto:odc@lava.net]
Sent: Monday, July 12, 2004 6:12 PM
To: Holtaway, John
Subject: Re: exhaustion of remedies

Hawaii sort of has a rule, but it is designed to be discretionary and not further torment claimants. It's part of RSCH 10.3(a): 10.3. Payment of claims.

(a) Eligible claims. The trustees may consider for payment all claims resulting from the dishonest conduct of a member of the Bar of this State, provided that: (1) Said conduct was engaged in while the attorney was licensed member of the Bar of this State; and (i) the attorney maintains in the State of Hawai'i an office for

the practice of law; and (ii) the claimant engaged the attorney's services in the State of Hawai'i; and (iii) the dishonest conduct occurred in the State of Hawai'i; and (2) The claim arises out of an attorney-client or fiduciary relationship customary to the practice of law such as where an attorney acts as an administrator, executor, trustee of an express trust, guardian or conservator; and (3) The attorney has (one of the following): (i) died; (ii) been adjudicated a bankrupt; (iii) been adjudicated an incompetent; (iv) been disbarred or suspended from the practice of law, or voluntarily resigned from the practice of law; (v) become a judgment debtor of the claimant, which adjudication shall have been based upon dishonest conduct while acting as specified in Rule 10.3(a) (2) and which judgment or judgments remain unsatisfied in whole or in part; (vi) been adjudged guilty of a crime, which adjudication shall have been based upon the dishonest conduct of the attorney; or (vii) left the jurisdiction and cannot be found.

(4) In addition to satisfaction of one of the requirements for eligibility under Rule 10.3(a) (3), the trustees may require that the application demonstrate either: (i) that the alleged defalcating attorney is a judgment debtor of the claimant, the judgment or appeal is final, and the claimant has exhausted all remedies in attempting to collect the judgment; or (ii) that the alleged defalcating attorney is without assets or that under the circumstances it is otherwise impracticable to obtain a judgment against the attorney, and there is no applicable insurance or bond.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Monday, July 12, 2004 3:53 PM
To: Holtaway, John
Subject: Re: FW: exhaustion of remedies

Bob,

As you know, this is one of my favorite issues. Interest in it has generated articles in the Client Protection Webb (e.g. "First or Last Resort: Does It Really Matter?" in Summer 2001 and "Exhaustion" in Fall 1999). A few thoughts: 1. I think you can work with your current rule. In paragraph H, the Committee "may direct" applicants to pursue collateral sources of recovery before considering their claims. It follows that they may also NOT direct them to do so under appropriate circumstances. The word "shall" was available; "may" was used here. So, H (1) through (5) are among potential sources that applicants may or may not be directed to pursue.

2. H (1) is best when combined with H (4) and (5). Malpractice will not cover a thief's deliberate acts. It WILL cover Uniform Partnership Law liability, or negligence, of innocent partners.

3. Malpractice will also cover entities that purport to limit their members' individual vicarious liability, e.g. PAs, PCs, LLPs, and LLCs. In H (4) I believe it is the PC as an entity rather than any given principal in it that is likely to be liable. (Note: any jurisdiction that permits its lawyers to practice in one of these formats should mandate malpractice coverage as a quid pro quo for limitation on vicarious liability.)

4. H (2) makes sense. If an applicable bond (or the equivalent) is sitting there, why not have applicant file a claim?

5. Fund Trustees and Committee members should be very reluctant to require the rest, particularly the expense and effort of litigation suit. Dan Hendi's e-mail is a good summary of the factors to weigh. In addition to "the victim has suffered enough" you want to be very careful about who is litigating cases, like forged indorsement UCC actions, that will affect the Fund. One bad opinion on Articles 3&4 of the UCC, even bad dicta in a good opinion, can cause trouble for years.

6. Please tell me that no Fund would force an applicant to pursue difficult collateral sources before filing a Fund claim, and then turn them down for being out-of-time if they lost. Please.

7. Successful applicants should be required, as a formal condition of their award, to cooperate completely

with the Fund in its pursuit of recovery.
Exactly how to handle this in some likely scenarios would make an excellent Workshop topic.
Ken Bossong

Kenneth.Bossong@judiciary.state.nj.us

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

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Tuesday, July 13, 2004 10:40 AM
To: Holtaway, John
Subject: Re: exhaustion of remedies

Bob:

In New York, we do not really require that a claimant exhaust all remedies. Our relevant regs are as follows: In the exercise of our Trustees' discretion in determining claims, the Trustees shall consider, together with such other factors as they deem appropriate: the existence of other sources to reimburse the claimant's loss.... Our claim form also requires a claimant to specify what steps they have taken to recover their loss from the attorney or other source. In our early years, our Trustees were firmer with requiring the pursuit of recovery from the attorney or collateral sources. Our Board is now much more flexible and willing to reimburse an eligible loss and have our Fund pursue recovery. The circumstances of each claim are considered. Under some circumstances, especially if large losses are involved, we may be more demanding and require the pursuit of recovery. Generally, we do not feel that claimants should throw good money after bad and expend additional legal fees or other costs when they have been victimized already. A big factor is our ability now to pursue restitution due to our arrangement with our State Attorney General for representation of the FUnd in restitution efforts.

I hope this is helpful.

Tim O'Sullivan

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

From: Carol Green [mailto:green@kscourts.org]
Sent: Sunday, July 18, 2004 10:46 AM
To: Holtaway, John
Subject: Re: FW: exhaustion of remedies

Kansas does not require exhaustion of remedies, only filing of a complaint with the Disciplinary Administrator. We do have a subrogation provision.

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

Ohio's fund is not a fund of last resort. The rationale is identical to that offered by Martha from California.

Janet Green Marbley
Ohio

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

The DC Fund is one of last resort. However, we have paid claims when pursuing court action would be futile. Our fund is one of last resort, but if we feel that exhausting remedies would be futile, the trustees have the discretion to approve case.

Beverly Lewis-Koch

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

In NC, the definition of "reimbursable losses" includes three "tests", including "the applicant has exhausted all viable means to collect applicant's losses..." In applying the rule, the Board has never required an applicant to sue the lawyer before the Board would consider the application. However, we quite frequently

require applicants to pursue claims with third parties such as title insurance companies or banks.

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

Both Rhode Island and New Hampshire are "Funds of Last Resort" and require a demonstration of exhaustion of remedies prior to accessing the fund.

John Bomster - Member - NH and RI Funds

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

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

Sent: Tuesday, April 20, 2004 1:48 PM

To: JHoltaway@staff.abanet.org

Subject: Re: Exhaustion of remedies

Michigan has Rule 11 (J) which reads as follows:

The Committee may require the claimant to seek reimbursement from any other source that may be legally responsible for the loss.

This rule has been used in connection with several claims where forged checks had been cashed by a bank and the dollar amount was considered significant enough to warrant hiring an attorney. Before requiring the Claimant to investigate pursuing the bank, the Committee does check to see if the Statute of Limitations may have expired.

The Committee has denied a claim where a request to pursue has been made and the Claimant takes no action.

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

Michigan has struggled with this issue as well. We have found that there are not often real alternative remedies for the victims. Insurance won't cover many of the claims, liability of banks for forged endorsements is governed by statute and is difficult to successfully pursue, and, the dollar amounts involved are often small enough that it is unlikely that any attorney would take the matter on a contingent fee basis. Do we really want to burden the victim by making them pay more money and expend more energy to pursue the attorney that stole their money?

Our Committee pretty much views these on a case by case basis, weighing all the factors, including the statute of limitations, requiring exhaustion of remedies in those instances where it appears viable and fair to do so.

Victoria V. Kremski
Deputy Regulation Counsel
State Bar of Michigan

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

The Arizona Client Protection Fund is a fund of last resort. Rule 13.C.1. of the Amended Declaration of Trust states as follows:

If the aggregate of all claims pertaining to a lawyer which are filed prior to the expiration of the six-month period and approved for payment by the Trustees is less than the \$100,000 limitation, not exceeding \$50,000 to any one claimant, then all such approved claims may be paid in full; provided, however, if any approved claimant has not completed exhaustion of their remedies against any insurance policy, bond, or any other reasonable source of recovery, payment to such claimant shall be withheld until they have realized final recovery thereon.

The obligations of the claimant are the same when the aggregate of all claims exceeds the \$100,000 limit.

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

FYI while we're on the topic. Little known secret as it pertains to collateral sources.

Did you know that many (if not most) Homeowners Insurance policies have a standard clause to cover up to "X-Amount" on an instrument (such as a check) that was forged or misappropriated? Check the fine print...

While New Jersey ordinarily does not ask a Claimant to pursue banks as a collateral source, here is an easy collateral source that could best be pursued (with minimal burden) by the victim if he/she has a homeowner's policy.

DANIEL R. HENDI, SENIOR COUNSEL
New Jersey Lawyers' Fund For Client Protection

FUND FILING TAX RETURNS

From: Ann Hetzler [mailto:Ann.Hetzler@staff.azbar.org]
Sent: Thursday, March 25, 2004 4:51 PM
To: jholtaway@staff.abanet.org
Cc: Robert VanWyck; John G. Balentine; Sturr, Geoff
Subject: Client Protection Funds and Tax Returns

I would like to know if there are any funds that file tax returns, and whether or not the assessments, interest, and restitution received by the funds are considered income.

I would also like to know if there are any funds that are treated as components of their state bars, i.e., are the assessments, interest, and restitution received by the funds addressed in the state bars' tax returns? Any other information regarding this topic would also be appreciated.

As always, thank you for your help.

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

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]
Sent: Monday, March 29, 2004 10:02 AM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: Client Protection Funds and Tax Returns

Maryland does not file tax returns

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

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]
Sent: Monday, March 29, 2004 10:17 AM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: Client Protection Funds and Tax Returns

We checked this out last year with our Finance administrator, who believes that the CPF does not have to file a tax return. If I recall correctly, it is because client protection funds are more in the nature of "restitution." Thanks.

Victoria Kremski
Michigan Client Protection Fund

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

From: mtartag@flabar.org [mailto:mtartag@flabar.org]
Sent: Monday, March 29, 2004 11:51 AM
To: Holtaway, John

Subject: Re: FW: Client Protection Funds and Tax Returns

Our CSF is also a component of the state bar.

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Monday, March 29, 2004 12:18 PM
To: Holtaway, John
Subject: RE: Client Protection Funds and Tax Returns

Hi Ann, the California fund is part of an integrated bar association.

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Monday, March 29, 2004 12:54 PM
To: Holtaway, John
Subject: RE: Client Protection Fund structure

In California, the State Bar provides counsel and staff to assist the Commission. We currently have a 9 full-time staff members consisting of the Directing Attorney (myself), two senior attorneys, one legal secretary, a records coordinator, two administrative assistants, a paralegal and one Sr. Adm. Assistant who assists the director in all matters including the financial reporting and accountability, budgets, etc.

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

From: Christopher Blanchard [mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Monday, March 29, 2004 3:30 PM
To: Holtaway, John
Subject: RE: Client Protection Funds and Tax Returns

Connecticut's fund is operated under the supervision of the State of Connecticut Judicial Branch, and the judges of the Superior Court. We do not file returns.

Christopher G. Blanchard
Assistant Bar Counsel

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

From: Curt Harada [mailto:charada@hei.com]
Sent: Tuesday, March 30, 2004 5:53 PM
To: Holtaway, John
Cc: Carole Richelieu
Subject: Re: Client Protection Funds and Tax Returns

John.

Hawaii's fund is not subject to income taxes nor does it have a non-profit filing requirement. It has been considered a part of the state judiciary, and therefore part of the state government. It was not separately incorporated on its formation.

Curt Harada

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

Same with the Washington Fund, which is part of our integrated bar.

Bob Welden
General Counsel

Washington State Bar Association

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

Ann: The New York Fund does not file tax returns. We are considered a quasi judicial state agency.
Tim O'Sullivan

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

Dear Ann:

This is a really difficult questions to answer, because it may well depend on the nature of the fund's relationship with the organized bar, the lawyer licensing agency (State agency or Supreme Court). The answer to this question about how any of us treat tax filing would be really misleading unless the reader is in identical shoes.

Generally though; those that considered part of a state agency or the Supreme Court will likely not have to file. For those that are affiliated with Bar Associations the answer will likely depend on the tax status of the affiliated association.

Good Luck

Bob --

INSURANCE COVERAGE FOR CSF

From: mtartag@flabar.org [mailto:mtartag@flabar.org]
Sent: Friday, April 23, 2004 10:11 AM
To: JHoltaway@staff.abanet.org
Subject: Insurance coverage for CSF

Does any Bar use insurance to cover CSF claims or excess coverage for losses exceeding fund balance. Is it available?

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

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Friday, April 23, 2004 11:54 AM
To: Holtaway, John
Subject: Re: LFCP Inquiry: Insurance coverage for CSF

New York does not . Tim O'Sullivan

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

Wisconsin does not

Kris Wenzel

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

From: Victoria Rees [mailto:VREES@nsbs.org]
Sent: Friday, April 23, 2004 12:36 PM
To: 'Holtaway, John'
Subject: RE: LFCP Inquiry: Insurance coverage for CSF

Six provinces in Canada have excess insurance coverage for their compensation funds. These include BC -

\$15 million coverage with a \$2.5 million deductible;

Manitoba - \$10 million coverage; Chambre des Notaires (Quebec) - co-insurance for amounts paid by the fund exceeding \$1.5 million per year;

Ontario - re-insurance for total annual claims in excess of \$6 million up to \$20 million; and

Saskatchewan - \$4 million coverage.

The BC Fund will, as of next week, be replacing their Client Protection Fund with a form of an insurance fund. For more info., contact Susan Forbes, Director of Insurance in BC, a sforbes@lsbc.org.

This is a very hot topic in Canada, and presently being addressed by a National Compensation Fund Task Force, of which I am a member.

Victoria Rees
Nova Scotia Barristers' Society

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

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Friday, April 23, 2004 12:42 PM
To: Holtaway, John
Subject: RE: LFCP Inquiry: Insurance coverage for CSF

California does not. I have a vague memory that many, many years ago insurance coverage was considered here but the cost was exorbitant.

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

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]
Sent: Friday, April 23, 2004 1:14 PM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: LFCP Inquiry: Insurance coverage for CSF

i know it is available because maryland has gotten quotes in the past, but the cost was prohibitive in relation to the claims along with the insurer demanded a say in repayment of the claims. my trustees nixed the idea after that.....

LOSS PREVENTION METHODS

Michigan is exploring the feasibility of implementing various loss prevention measures. Do the states that have record keeping requirements and/or certification of compliance with the record keeping requirements find them to be effective in loss prevention?

We may have limited "political capital" so if you think other loss prevention measures are more effective, that insight would be helpful as well. Thanks so much.

Victoria V. Kremski

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Monday, April 05, 2004 4:38 PM
To: Holtaway, John
Subject: Re: FW: Loss Prevention Measure

Victoria,

I look upon the record keeping/trust accounting rule as: 1) prudent for having a place in the rules lawyers can go to see in black-and-white what to do in these areas; and 2) the building block for other loss prevention mechanisms, particularly random audit (which might be viewed as the enforcement mechanism for the financial record keeping rule). What would the argument be against having a rule setting forth the minimum standards for trust accounting and record keeping? Is what is expected of practicing lawyers to be Bar Counsel's secret? I hope little "political capital" would be needed here. We don't have certification of compliance in NJ. I'd be a bit surprised if those who do consider it especially effective. If you're looking for the most effective loss-prevention mechanism at the least amount of cost, controversy and intrusiveness, I recommend the bounced check rule. If a lawyer is bouncing trust account checks, something is seriously wrong. The payee and the bank "upstream" are going to be notified anyway; why not Bar Counsel? I am also a big fan of random audit, which provides terrific one-on-one training, while catching a bad lawyer every now and then. But I understand why it's more controversial.

Although it is always impossible to prove precisely what has been prevented, I have no doubt that overdraft notification and random audits have each saved the NJ Fund millions over the years.

Ken

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

From: Office of the Disciplinary Counsel [mailto:odc@lava.net]
Sent: Monday, April 05, 2004 7:57 PM
To: Holtaway, John
Subject: Re: Loss Prevention Measure

We have both measures. We would like to think it works - really keeps attorneys accountable, and may head some problems off.

Carole R. Richelieu
Fund Administrator

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

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Tuesday, April 06, 2004 9:36 AM
To: Holtaway, John
Subject: Re: Loss Prevention Measure

Dear Victoria:

NY has recordkeeping requirements and certification of compliance with the requirements. We feel they are both effective. Has proven helpful to be able to give lawyers clear direction regarding their responsibilities for safeguarding client funds. Also sensitizes lawyers to their fiduciary obligations for client funds. As Ken stated, the recordkeeping requirements are a building block for other measures down the road. For example, our bounced check rule depends upon there being uniform accounts for client funds designated a specific title which is required by the recordkeeping requirements. Has proven extremely effective in loss detection and prevention.

Tim O'Sullivan

MALPRACTICE NOT RECOVERABLE

"Holtaway, John" <JHoltaway@staff.abanet.org>
Sent by: Administrators of Lawyers Funds for Client Protection
<CPR_LAWYERSFUND@MAIL.ABANET.ORG>

Please respond to "Holtaway, John"
Subject: Malpractice Not Recoverable-Idaho

There is an April 2003 Idaho Supreme Court opinion that basically affirms that malpractice is not a basis for recovery from a Fund. "McFarland's acts of misconduct were false statements about the status of O'Meyer's case, misrepresentations as to what was being done, and failure to diligently prosecute the claim. By failing to act as a reasonable attorney he deprived O'Meyer of the value, if any, of the claim, but he did not misappropriate client funds entrusted to him. The Court has stated that attorney negligence is not itself sufficient to recover under the Security Fund." The cite is O'Meyer v. Idaho State Bar, 138 ID 603, 67 P.3d 82. It's at <http://www2.state.id.us/judicial/scagency.htm>.

Bob Welden
General Counsel
Washington State Bar Association

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Tuesday, September 09, 2003 11:57 AM
To: Holtaway, John
Subject: Re: Malpractice Not Recoverable-Idaho

If a retainer was paid on this kind of claim, a Fund might be able to at least pay that. If contingency fee, out of luck.

Ken Bossong

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

Ken:

Why would a fund want to pay any of it? The fact that a retainer is paid and the lawyer does incompetent work still should not trigger the unlawful taking threshold for a fund payment. We are opening this door way to wide and cutting the line between E&O and Malfeasance way to thin.

Bob --

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

In California, we look at every angle and try to at least return any advance retainer or advanced costs to the victim. We are always suspicious of an advance retainer fee when there is also a contingent fee arrangement. We often construe the advance as an advance for costs. We look at all the surrounding facts and circumstances of the case. We rarely have one case against one Respondent who legitimately tries to do the work, expends costs, but just blows the case. In other words we rarely get a case based solely based on malpractice.

In our experience, there is usually a pattern involved where the Respondent attorney routinely accepts advance fees or advance retainers and fails to expend any costs and fails to prosecute. Malpractice is just a result of the pattern. Many of our cases involve Respondents who take advance retainers on a contingent fee case but fail to do the work which results in malpractice. We cannot pay for the horrific consequential damages that victims are faced with; but we really try to at least reimburse victims for any money paid to the attorney. Most of our cases deal with repeaters who end up resigning with charges pending or are disbarred. Even in cases where the attorney is suspended and is on probation, we are bound by our highest court to take an independent look at the fund claim.

Fee cases are by far the most difficult to resolve. We often look to the fee agreement which is often unfair to the client or not in compliance with the Rules of Professional Conduct or existing law on certain kinds of matters such as medical malpractice. The most common argument by Respondents is that if "true retainer" is written in the fee agreement no reimbursement can be made. That argument does not fly very well with our rules. A real "true retainer" is very rare; just using the term "true retainer" does not let the pattern Respondent attorneys off the hook who are scamming clients.

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

From: Beverly Lewis-Koch [mailto:blewis.koch@verizon.net]

Sent: Wednesday, September 10, 2003 2:25 PM

To: CPR_LAWYERSFUND@MAIL.ABANET.ORG

Subject: Re: Malpractice Not Recoverable-Idaho

In the District, the Fund will pay if the attorney takes the client's money, does no work and refuses to refund the retainer.

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

The Arizona Client Protection Fund does not pay claims based upon negligence, incompetence, malpractice, or fee disputes. Following are some statistics regarding the percentages of claims denied because they were based upon malpractice or fee disputes from 1999 through 2002:

1999-24% malpractice - 17% fee disputes

2000-24% malpractice - 53% fee disputes

2001-9% malpractice - 29% fee disputes

2002-12% malpractice - 34% fee disputes

The Trustees' goal is to pay as many claims as possible. If a client has paid a lawyer and the lawyer did no work, or such an insignificant amount of work, and refused to return the money to the client, the Trustees will view this as dishonest conduct and pay the claim.

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

Neither the New Hampshire Fund/Rules nor the Rhode Island Fund/Rules provide for payment of malpractice claims.

John Bomster

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

Neither does D.C.

Brian Wolfman

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

The New York Fund also does not have the authority to compensate for malpractice or neglect or to settle and reimburse fee disputes. We agree with Ken. If in the example Bob mentions the client had paid a legal fee, we would reimburse the fee. False statements and misrepresentations by the lawyer constitute dishonest conduct. We would try to rely upon these dishonest acts as a basis for an award.

Tim O'Sullivan

MRPC 5.7

My question is whether Model RPC 5.7 has any potential to increase fund exposure for eligible claims. The rule provides that when lawyers perform "law-related services," such as financial planning, tax preparation, or a host of other services (see comment 9 for a list contemplated by this rule) a lawyer has an obligation to "take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist." This came up at our Board of Governors meeting this week. My initial reaction was that this doesn't change the issues as they have ever arisen in the "dual-profession" context, that the issue remains whether there is a lawyer-client relationship. But as I reread the rule, I wonder what happens if a finding is entered that the lawyer did not "take reasonable measures" as required by the rule. Would this bring a claim within Model Rule for Client Protection 10(a) or comparable state rules?

Does the language of MRPC 5.7(A)(2) result in a conclusion that because the client reasonably thought the lawyer's law-related services were within the client-lawyer relationship, a claim would be eligible even though

had proper disclosure been made, it would not? Or does this merely restate an existing "difficult claim:" situation? Thanks.

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

From: Sylvia Stevens [mailto:ssstevens@osbar.org]
Sent: Monday, April 05, 2004 12:34 PM
To: 'Holtaway, John'
Subject: RE: MRPC 5.7

Bob, I don't think that 5.7 is going to make the situation any more difficult than it already is when lawyers give investment advice and such and the client claim to have believed the lawyer was protecting the client's legal interests?

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Monday, April 05, 2004 12:55 PM
To: Holtaway, John
Subject: Re: MRPC 5.7

I believe PA would still ask the same questions:

Was there a prior attorney/client relationship that led to the lawyer providing the investment advice and receiving the client's funds to invest? If so and the attorney did not "take reasonable measures" to make clear the separation of the provision of legal services and the investment services, I believe for my board it would be a question of the prior existing attorney/client relationship that the lawyer may have taken advantage of to obtain the funds in question.

If there was no prior attorney/client relationship and the client's first relationship with the lawyer was to seek investment advice or some other service not typically associated with the practice of law, then I believe my board would likely deny the claim and it would not matter whether the lawyer took the reasonable measures to make clear that the services were not law related.

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

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

louisiana did not adopt rpc 5.7. -- so we don't have that problem -- fred

NO APPEAL RULE

Greetings from Massachusetts:

The Clients' Security Board is in the process of drafting a rule for our court stating that the Board's decisions are final and are not appealable/reviewable by any court. I have looked at your website for a copy of NY's rule allowing judicial review, but I can't find the rule! Is it 7200.15(e)?? If not, can you give me the cite? I specifically am interested in the standard for review i.e. what is the scope. I will also look at NY cases that were appeals of NY trustees' decisions.

Thanks for your help.

Karen O'Toole

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

From: "Karen O'Toole" <k.otoole@massbbo.org>
To: <CPR_LAWYERSFUND@MAIL.ABANET.ORG>
Sent: Monday, July 28, 2003 1:42 PM

Subject: No Appeal Rule

Dear All,

If you recently received an e-mail from me on this topic, or responded to my inquiry in June on this topic, please disregard this e-mail. Before Mass. is sued again by a disgruntled claimant, we are hoping to have a "no appeal" rule in place.

According to the ABA Survey (1999 - 2001) only 5 jurisdictions permit appeals from the final decision of a Fund. The Mass. Supreme Judicial Court would like to review "no appeal" rules from other states. If your state has a SEPARATE and SPECIFIC rule that says (similar to the ABA Model Rule), "There shall be no appeal from a decision of the Board" would you please e-mail a copy of the no appeal rule? If your state does not have a separate no appeal rule (like Mass.) would you please let me know that.

For example, in Mass, the rule states that all decisions of the Board are final, but there is no separate rule that says there shall be no appeal. Thank you very much for your time and effort. It is greatly appreciated.

Karen O'Toole

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

From: "Christopher Blanchard" <Christopher.Blanchard@jud.state.ct.us>

To: "NCPO" <ncpo@mybizz.net>

Sent: Tuesday, July 29, 2003 11:11 AM

Subject: RE: No Appeal Rule

Karen- In CT, Practice Book Section 2-75(f) provides, in pertinent part, "The client security fund committee shall, on the basis of the record, make its determination in its sole and absolute discretion as to the validity of claims...". Practice Book Section 2-75(i) provides, "The client security fund committee shall notify the claimant and the subject attorney of its determination, which shall be final and not be subject to review by any court."

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

From: "Gonzales, Martha" <Martha.Gonzales@calbar.ca.gov>

Dear Karen--sorry it took me so long to respond. Our judicial review started with an Applicant who disagreed with the amount awarded by the State Bar Court Review Department and sued the Bar. His name was Saleeby. Judicial review is costly in many ways, especially in staff resources.

The California fund was created by Bar-sponsored legislation in 1972. From 1972-1986 the administration of the program and the decision-making was handled by the disciplinary arm of the State Bar--we are an integrated mandatory bar. In 1985 the Supreme Court of California (our highest court) issued an opinion in *Saleeby v. State Bar* (1985) 39 C3d 547. One of the main rulings in *Saleeby* was to grant Applicants the right to review rejections of claims or dispute the amount of the claim in the superior courts of our state through administrative mandamus under 1094.5 of the Cal.Code of Civil Procedure. The opinion was silent on Respondents rights.

The *Saleeby* decision had a significant impact on the fund in terms of the rulings in *Saleeby* which required adoption of a well-defined set of rules, as well as procedures and other requirements to satisfy the court. Thus, in response to *Saleeby*, the Board of Governors took review out of the hands of the disciplinary function of the Bar and adopted new Rules of Procedures, Client Security Fund Matters (patterned after the ABA rules) and created a seven-member Client Security Fund Commission consisting of public and attorney members. The Board delegated administration of the fund and determinations on claims to the Commission. The Board of Governors also created a 9-member professional staff operating as an independent unit within

the bar to assist the volunteer Commission in carrying out its duties.

At this time, Rule 17, based solely on Saleeby, only provided judicial review to an Applicant. However, in the 1991 case, Johnson v. State Bar (L.A. Co. Super.Ct. No. BS 002283) the Respondent Johnson, who had resigned with charges pending, filed a writ challenging a \$200 pay against him. The Bar appealed but the court concluded that a Respondent attorney had a sufficient beneficial interest to challenge the Commission's decision to pay an award in an administrative mandamus proceeding because of significant "financial" and "reputational interests."

I do not believe the Johnson case is published, I will be happy to send you a copy. After the Johnson case, Rule 17 was amended to include Respondents. Our rules have always stated that the Commission's decision constitutes the final action of the State Bar. However, our Office of General Counsel which is within the State Bar, handles all litigation; thus, it is time consuming and expensive and impacts our fund both financially as well as risking bad law. My experience has been that the superior courts "tend" to bend over backwards to assist the petitioner (either an Applicant or a Respondent attorney) and sometimes flip flop the arguments depending on who is before them. The standard of review in the superior court is "substantial evidence." In my personal opinion, even though the court may end up ruling in our favor, the court tends to criticize our rules making the review more like a trial de novo.

Both the Saleeby and Johnson cases were a huge impact on the fund's work. All of the tentative and final decisions have to be written so as to provide findings of fact and conclusions of law to provide an adequate record for superior court review. After Johnson, attorneys were even more likely to file writs due to a 1988 statute requiring Respondents who were suspended, resigned and disbarred to pay the fund back plus interest and costs as a condition of reinstatement; this requirement has caused numerous implementation problems.

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

From: NYLAWFUND [mailto:mjk@nylawfund.org]

Sent: Thursday, July 31, 2003 11:21 AM

To: Karen O'Toole

Subject: Judicial Review/Appeal

Karen - Sorry for the delay.

In New York, our enabling statute, NY JUD LAW §468-b, is silent on a claimant's right to seek judicial review of final adverse determinations of the Trustees. By virtue of our standing as a Special Revenue Fund under §97-t of the NY State Finance Law, we are considered an agency of the State of New York. As a consequence, final determinations of our Trustees are "quasi-judicial" in nature and subject to appellate review under Article 78 of the New York Code, Rules and Regulations. (See, Schettino v. Alter, et al., 140 A.D.2d 600 (N.Y. App. Div. 1988). New York lawyers' fund for client protection performs quasi-judicial functions.)

Appellate review of the Board's determinations is not directly dealt with under our Regulations, but is referred to in Sections 7200.15(e):

Trustees' Regulations

(22 NYCRR 7200, et seq.)

7200.11 Reconsideration of claims. A claimant who is denied reimbursement in whole or in part may request that the trustees reconsider the claim by filing an application with the fund no later than 30 days following receipt of the trustees' determination. If a claimant fails to request reconsideration, or the original determination of the trustees is confirmed, the trustees' determination shall be final.

7200.15 Confidentiality. (a) Except as otherwise provided, all claims and proceedings and the records relating thereto shall be sealed and confidential.

(e) This section shall not be construed to deny access to information by the Court of Appeals, and Appellate Division of the Supreme Court, or to any court of competent jurisdiction in a judicial review proceeding.

Some case law on review of Fund determinations:

Beeson v. Idaho State Bar, 910 P.2d 159 (Idaho 1995). Idaho Supreme Court affirms denial of reimbursement by client protection fund for claim based upon lawyer's negligence, not theft of funds in the practice of law. (See also, *Court Denies Clients' Security Fund Payment*, 7 Prof. Law. 16 (1996). Review of the judicial decision in *Beeson v. Idaho State Bar* which affirmed the fund's denial of claim which was based upon a lawyer's negligence, not the theft of funds in the practice of law.).

Folly Farms I, Inc. v. Trustees of the Clients' Security Trust Fund, 387 A.2d 248 (Md. 1978). In reviewing the denial of an award from the Maryland clients' security trust fund, which involved a theft by a corporate officer who was also a lawyer, the Court of Appeals articulates a "but-for" standard for evaluating losses in transactions with lawyers.

G.E. Capital Mtg. Svcs., Inc. v. N.J. Title Insurance Co., 754 A.2d 558, 333 N.J. Super. 1 (2000). Mortgagee bank filed reimbursement claim to recover realty proceeds misappropriated by sellers' attorney. The mortgagee was not a law client and was told it may not be eligible to seek reimbursement. It brought an action against the Fund demanding to be recognized as a proper claimant and to compel the Fund to make reimbursement. The lower court dismissed the action and the appellate court affirmed holding that the Fund's rules did not provide for a judicial-appeals process and that the Supreme Court had no subject matter jurisdiction over claims made to the New Jersey Fund which is vested solely with the Fund's Board of Trustees.

In Re Gertzman, 446 S.E.2d 130, recons. den., 449 S.E.2d 571 (N.C. 1994). Court affirmed that appellants were not entitled to reimbursement from client protection fund for funds given to attorney for investment. The investment transaction created only a debtor-creditor relationship, not an attorney-client relationship.

Matter of Client Security Fund Claim of Patterson v. Idaho State Bar, 881 P.2d 1284, 126 Idaho 266 (1994). Idaho Client Security Fund properly denied claim where claimants' loss was based on attorney's negligence, not dishonest conduct, even where attorney lied to claimants to conceal his neglect.

Saleeby v. State Bar of California, 702 P.2d. 525 (Cal. 1985). California Supreme Court holds that a claimant who is denied an award from the client security fund may seek judicial review by mandamus. The fund must provide claimants with an opportunity to be heard with respect to determinations, and must make sufficient findings to afford judicial review. State bar cannot prohibit lawyers from charging legal fees to claimants.

Wasman v. Goshgarian, 537 So.2d 1026 (Fla. Dist. Ct. App. 1988), reh'g denied 548 So.2d 664 (Fla. Dist. Ct. App. 1989). Florida Supreme Court rejects investor's claim for an award from clients' security fund. Evidence of an attorney-client relationship is inadequate.

Williams v. Idaho State Bar, 848 P.2d 425 (Idaho 1993). The Idaho Supreme Court upholds award determinations made by the clients' security fund. The court adopts a preponderance of evidence standard of judicial review for clients' security fund determinations.

NY Article 78 Proceedings

Matter of Tabak v. Lawyers' Fund, 166 Misc. 2d 502 (Sup. Ct., Albany Co. 1995). Challenged the Trustees' determination that the alleged loss involved a default on a personal loan with the claimant's attorney, not dishonest conduct constituting a theft of law client money in the practice of law. In sustaining the Trustees' determination, the Court reviewed the Trustees' broad grant of discretion from the Legislature, their procedural regulations and their determination that the claimant had not provided satisfactory evidence of a reimbursable loss. The court held that the Fund's procedures provided adequate due process, that the Trustees' determination was supported by the record, and that it was neither arbitrary

nor capricious.

Matter of Bluth v. Lawyers' Fund, No. 044062/97 (Sup. Ct., Kings Co. 1998), aff'd 259 A.D. 2d 543 (2d Dep't 1999). Held that the "The Lawyers' Fund . . . properly exercised its discretion in this proceeding." wherein the Trustees determined the claimant did not provide satisfactory evidence of an eligible loss in a real estate transaction with a lawyer who was disbarred for unrelated professional misconduct.

Matter of Haskins v Lawyers' Fund, No. 25544/1999 (Sup. Ct., Suffolk Co. 1999), rev'd , 286 A.D. 2d 440 (2d Dep't 2000). Reimbursement was denied when the Board determined that the claimant did not provide satisfactory evidence establishing that his loss resulted from a theft of escrow money, as opposed to the repayment of a loan to his attorney. The lower court annulled the determination of the Board. The Appellate Division, Second Department, reversed the Supreme Court on August 20, 2001 holding that "the determination by the board of trustees was not arbitrary or capricious."

Matter of Beutz v. Lawyers' Fund, 187 Misc 2d 359 (Sup. Ct. Albany Co. 2000). Affirmed determination of Trustees which denied reimbursement to a claimant who delivered monies to his lawyer in order to bribe public officials. The Court reviewed the Fund's thorough investigation of the claim and the ample opportunities provided to the claimant to establish eligibility of his loss. The Court determined that there was a rational basis for the Trustees concluding that the claimant's own criminal conduct substantially contributed to his loss.

Matter of Plater v. Lawyers' Fund, No. 7340-00 (Sup. Ct., Albany Co. 2000), aff'd 294 A.D.2d 719 (3d Dep't 2002), leave to appeal denied, ___N.Y.2d ___ (November 2002). The Fund administratively dismissed as an ineligible fee dispute the claim seeking reimbursement of legal fees paid for criminal defense. The Court dismissed the Article 78 petition and held that the Fund's determination "had a rational basis, and was not arbitrary, capricious or made in violation of lawful procedure."

Matter of Saferstein, No. 933/01 (Sup. Ct., Albany Co., 2001), aff'd 298 A.D.2d 726 (3d Dep't 2002), leave to appeal denied, ____N.Y. 2d __ (January 2003). The Trustees determined that the claimant's loss did not qualify for reimbursement since it appeared to result from a failed business loan, not dishonest conduct constituting a misappropriation of law client funds. The Article 78 Petition was dismissed as untimely. The Appellate Division, Third Department, affirmed holding that the judicial challenge was time barred, and that the Fund's determination was final and the statutory period for an Article 78 began to run on the date that the claimant signed for and received the Fund's letter stating that the denial of the claim was final.

I hope this is helpful! - Please call or e-mail with any questions!

Mike Knight
NY Lawyers' Fund
1-800-442-3863

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

Mike,

Many thanks for your response. This clarifies things alot. I got the cases, but still was a little confused. Can either claimant or respondent seek an appeal?? Can any one else - a creditor etc ??

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

From: "Lony-Ann Spelman" <l.spelman@massbbo.org>

August 11, 2003

Good morning,

I hope that this Monday morning is treating everyone well! I'm sure that some of you may be getting tired of my e-mails and questions, but the Clients' Security Board of Massachusetts is seriously considering some important rule changes, and as such, we are trying to arm ourselves with as much information as possible. That being said, if you could all take some time to answer the following four questions, your answers and insight would be extremely helpful to us as we prepare to approach our Supreme Judicial Court with a

proposed "no appeal" rule. Please be as specific as possible in your answers.

- 1.) From what source does your Fund obtain its funding? I.e., is it all through lawyer assessment, or is there some tax payer money involved?
- 2.) Does your Fund put a limit on the award amount per claimant? Per claim? Per attorney? If so, what is the limit(s)?
- 3.) Does your Fund hold hearings before making or denying an award? If so, how often are hearings held/what is the frequency of hearings? If hearings are only held "sometimes," what criteria is used to determine when the Fund will hold a hearing? Is that criteria set forth in the Fund's rules? Who is invited to attend hearings? Claimant, respondent, or both? Please include in your answer any information regarding hearings held by your Fund that you think is important or would be helpful!
- 4.) Finally, does your Fund have an established procedure for review of a claim determination by a body within the state bar/disciplinary agency itself ("intra-review")? For example, in Illinois, the Commissioners of the Client Protection Program established a "Review Panel." The Panel is made up of two lawyers and one non-lawyer, appointed by the Commission. When the Commission makes a decision on a claim, both claimant and respondent have 21 days to request reconsideration. If there is a request for reconsideration, that request goes to the Review Panel, which may conduct additional investigation and then writes a report and recommendation for the Commission. This type "intra-appeal" is separate from the question of whether your fund allows appeals to a court or to another outside source.

Again, I want to stress that the information that you provide is extremely helpful to the Clients' Security Board of Massachusetts, and we really do appreciate your help. If anyone has any questions, I can be reached at this e-mail address, or at phone number (617) 728-8730. Thank you all in advance for your help!
Sincerely,

Lony-Ann Spelman
Law Clerk, Clients' Security Board of Massachusetts

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

From: "Cole, Marty" <Marty.Cole@courts.state.mn.us>
To: "'NCPO'" <ncpo@mybizz.net>
Sent: Monday, August 11, 2003 10:51 AM
Subject: RE: Appeal Rule - request for information

In Minnesota:

- 1.) All funding through assessment, as part of annual attorney registration fees. Currently \$12/atty/yr. Rule 2.02(c), Minnesota Rules of the Client Security Board (MRCSB).
- 2.) Maximum award is \$150,000 per claim; there is no aggregate cap. Rule 3.14(c), MRCSB.
- 3.) Rules allow for hearings, but are discretionary. Board has never authorized a formal hearing. Full board has met with claimants or respondents as part of investigation or as part of reconsideration process; used infrequently. Rule 3.12 and 3.13, MRCSB. If a hearing is ordered, the claimant and respondent and their counsel may appear.
- 4.) Reconsideration by the board is authorized. Rule 3.16, MRCSB. No other judicial or intra-agency review is authorized. Supreme Court retains inherent power to review CSB decisions, but has never granted such review.
Marty Cole

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

From: "John S. Gleason" <john.gleason@arc.state.co.us>
To: "Lony-Ann Spelman" <l.spelman@massbbo.org; <martha.gonzales@calsb.org; <rbravenec@texasbar.com; <info@nylawfund.org; <tbartlett@flabar.org;

<edonahue@iardc.org; <kpeifer@palawfund.com;
<MarbleyJ@sconet.state.oh.us; <kreigler@mail.michbar.org;
<Kenneth.Bossong@judiciary.state.nj.us; <robertmc@gabar.org;
<redmonson@ncbar.com; <busch@vsb.org; <CFreudenburg@dcbar.org
Sent: Monday, August 11, 2003 12:33 PM
Subject: Re: Appeal Rule - request for information

Ms. Spelman: Following answer is for the Colorado Attorney's Fund for Client Protection.

1. All of Colorado's funding is from attorney registration fees. Annually every Colorado attorney on active status pays \$18.15 to the Fund. On every pro hac vice application \$10 goes to the Fund. No tax dollars anywhere...
2. Yes, Our new caps are \$100,000 per attorney and \$50,000 per claim.
3. No "hearings" although if they wanted to the Trustees could take sworn testimony. Generally, the Trustees meet 3 or 4 times a year (as claims warrant) and at each meeting the Trustees evaluate written claims and reports of investigation from the attorney assigned the claim. The Sup. Ct. Office of Attorney Regulation provides all of the support to the Fund.

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

From: "Root Edmonson" <REdmonson@NCBAR.com
Sent: Monday, August 11, 2003 2:03 PM
Subject: RE: Appeal Rule - request for information

1. All of the Fund's funds come from an annual assessment set by the NC Supreme Court. Currently, the assessment is \$20.00 until further order of the Court.
2. Our cap is \$100,000.00 per claim. We have no per lawyer cap.
3. The Fund meets quarterly. No formal "hearings" are held. Both the claimant and the lawyer are invited to attend the Board's meeting to present their case. Applicants are reminded that the Board members have read the written information that the applicant sent as well as the staff's investigation report. The Board members may ask questions of the applicant (or the lawyer.) They appear before the Board separately. The Board has subpoena power, but I don't ever remember it being used.
4. No procedure provides for a review of a decision of the Board. Our Board has reconsidered claims when new evidence is presented, but I don't recall that ever resulted in a claim being paid that was previously denied.

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

1. The State Bar of Arizona Client Protection Fund is funded solely through lawyer assessments. Each lawyer pays \$25 per year into the Fund.
2. The Arizona Fund can pay no more than \$100,000 in claims against one lawyer, and no more than \$50,000 to any one claimant. If the amounts approved for payment by the Board of Trustees exceeds \$100,000, the approved claims that are filed within the six-month period from the date of the lawyer's disbarment, suspension, transfer to disability inactive status, or death, are pro-rated.
3. At the request of a Trustee, or at the written request of either the claimant or the lawyer, the Trustees may afford both the claimant and the lawyer an opportunity to be heard by the Trustees. The request for a hearing shall be filed with the State Bar within thirty days after the lawyer receives notice of the claim. Any such proceeding shall be informal and all relevant testimony and evidence may be received. Absent such a request, a claim shall be processed on the basis of the information obtained in the application for reimbursement, any information obtained by staff, and any written response from the lawyer. We have had maybe three hearings in the last three years; it is not a routine occurrence. This issue is dealt with in Rule 12.D. of the Declaration of Trust.

4. The Trustees shall determine, in their sole discretion, whether a claim merits reimbursement from the Fund. If a claim is denied, the claimant has thirty days to request reconsideration. If the claimant fails to make a request or the request is denied, the decision of the Trustees shall be final. There is no entity that reviews the Board of Trustees' decisions on claims. Additionally, there is no appeals process to a court or to another outside source.

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

From: <Tonimoss@aol.com>

To: <ncpo@mybizz.net>

Sent: Tuesday, August 12, 2003 6:23 AM

Subject: Re: Fw: Appeal Rule - request for information

As to the Client Protection Fund of the Bar of Maryland

- 1) All funding is from an annual assessment of \$20 per attorney
- 2) Only limit we have is 10% of the total amount in the fund at the end of the prior fiscal year.
- 3) Our trustees meet approximately four times per year. We decide at the meeting when the next one will be. Our trustees have a "hearing" on every claim, but the claimant is not present and they base their decision solely on the report presented to them in writing by the administrator. If the claimant is not happy with the decision the trustees make then they can request a rehearing at which time they can elect to be present, with or without an attorney and present whatever evidence they feel can persuade the trustees to change their mind.
- 4) All reviews are initially held by the trustees themselves. If the claimant is still not satisfied after a rehearing then they can file an appeal with the Circuit Court of the State of Maryland. There is no other intra appeal within the state of MD.

Any questions, feel free to call me or email me....janet moss,
administrator

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

From: "Lony-Ann Spelman" <l.spelman@massbbo.org>

To: <martha.gonzales@calsb.org>; <dminnich@isb.state.id.us>;

<tonimoss@aol.com>; <tmanter@nhbar.org>; <info@nylawfund.org>

Sent: Tuesday, August 12, 2003 3:18 PM

Subject: appeal

Good afternoon,

I know that most, if not all, of you have already provided either myself or Karen O'Toole with information about the appeals process that is embedded in the procedure of your respective client security funds. That being said, the Chairman of our Clients' Security Board is requesting more information...do any of you "appeal states" charge money to file an appeal? A quick answer would be much appreciated!

Thank you again,

Lony Spelman

Law Clerk, Clients' Security Board of Massachusetts

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

Good Morning Lony:

In New York,

1. Our principal source of revenue is an attorney registration fee. NY lawyers pay a \$300 biennial registration fee. Our Fund receives by statute a \$60 share of each fee. Additional money from the registration fee is supplied to us by legislative appropriation.

2. We have a \$300,000 maximum limit per loss. There is no per lawyer cap.

3 As to hearings, our Regulations state: "The Trustees may request that testimony be presented to complete the record. Upon request, the claimant and the attorney, or their respective representatives, shall be given an opportunity to be heard."

Our regs also provide that our Trustees have the power to "hold such hearings as the trustees deem appropriate" We rarely hold hearings. It is discretionary with our Trustees. If they are held, they are very informal. Only one lawyer has ever had a hearing before our Board. We may have one hearing every year or two. Claimants that have appeared for hearings have attended with their attorney.

4. There is no review process except that our Trustees can reconsider a claim. After reconsideration, a claimant can pursue a judicial challenge in our Supreme Courts by way of an Article 78 proceeding. The standard of review is whether our Trustees' decision was arbitrary and capricious or whether it had a rational basis. We have had 6 Article 78's in 20 years. We have not lost one.

Please let me know if you need any other info.

Tim O'Sullivan

NY Fund

1-800-442-3863

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

From: "William Ricker" <WRicker@Akerman.com

To: <ncpo@mybizz.net

Sent: Monday, August 18, 2003 10:50 AM

Subject: Re: Fw: Appeal Rule - request for information

Sorry for the delay. I have been on vacation. For Florida this answers are:

1. Lawyers assessment; is part of Bar budget and annual dues.
2. \$50,000 per claimant; no limit per lawyer.
3. No hearings. Committee meets three times a year, considers the investigator's recommendation and makes a recommendation on payment to the Florida Bar Board of Governors, which makes the ultimate decision.
4. No review procedure. If a claimant asks for reconsideration of a decision or if the Board asks for reconsideration of a recommendation, the Committee will take a second look.

Bill Ricker

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

From: "Bob Welden" <bobw@wsba.org

To: ""NCPO"" <ncpo@mybizz.net

Sent: Monday, August 18, 2003 12:01 PM

Subject: RE: Appeal Rule - request for information

Hi Lony-Ann:

1. The Washington fund is funded solely by a Supreme Court-ordered annual assessment on all active lawyers (\$13).
2. There is a per claim limit of \$50,000. There is no aggregate lawyer limit.
3. Our rules allow the fund to hold hearings, but in the 15+ years I have been administering it, there has only been 1, at the request of the applicants. The lawyer was invited but did not appear.

4. The fund is managed by a committee who have authority to make gifts up to \$10,000. Anything larger must be approved by the WSBA Board of Governors who are the fund trustees. A decision by either body is final and not subject to review.

Bob Welden
General Counsel
Washington State Bar Association

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

From: "Gonzales, Martha" <Martha.Gonzales@calbar.ca.gov>
To: "NCPO" <ncpo@mybizz.net>
Sent: Thursday, August 21, 2003 2:10 PM
Subject: RE: appeal

The California fund issues a tentative decision and gives both parties the opportunity to object and have the matter reviewed again--no charge internally for this second review. Our Commission's final decision is considered the final action by the State Bar. However, both applicants and Respondent attorneys have the right to file a writ of mandamus with the superior courts of the state to challenge the final decision. I am pretty sure the superior court charges a fee to file the writ. The fee may differ depending on the location of the court. I will try to find out what the average is.

OVERDRAFT NOTIFICATION

Client Protection Colleagues:

The Commissioners of the Illinois fund are considering an overdraft notification rule, but they are concerned about banks' reactions to such a rule. The ABA Model Rules for Overdraft Notification state that lawyers' trust accounts must be held only "approved" banks, that is banks willing to cooperate with the notification program. Our Commission would like to know if such a rule will result in many banks declining to handle lawyers' trust accounts. If so, that might create a problem, especially for lawyers in small towns. If your state has an overdraft notification rule, can you tell me if there was much negative reaction from banks, specifically did many banks decline to become "approved" to handle lawyers' trust accounts? What, if any, impact did that have, and how has it panned out? Thanks for any help you can give us. Eileen Donahue

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

From: "William Ricker" <WRicker@Akerman.com>
To: <ncpo@mybizz.net>
Sent: Tuesday, July 08, 2003 3:08 PM
Subject: Re: Overdraft Notification and "Approved Banks" Inquiry

Eileen: my recollection is that Florida had not problem. If banks want our money, and they do, they will abide by the rules. I think this is particularly true in this day of statewide and country wide banking.

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

From: Bob Welden

Eileen - In Washington we have had no shortage of banks willing to comply with the overdraft notification rule. I attach a link to the list of approved banks, and there must be over 100.
<http://www.wsba.org/info/operations/finance/iolta.htm>

When we were considering the rule, we contacted the state bankers association to work with them on it. We wanted to minimize their burdens (and also avoid some of the ill-feeling that the initial IOLTA rule caused, which did not include input from the bankers). They were very helpful, and basically what we did was arranged that when they mailed an overdraft notice to an account holder, they send a copy to the Office of Disciplinary Counsel. Works smoothly with a minimum of fuss for all involved - except the misappropriating lawyers, of course.

Bob Welden
General Counsel

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

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Tuesday, July 08, 2003 2:08 PM
To: 'Holtaway, John'
Subject: RE: Overdraft Notification and "Approved Banks" Inquiry

Eileen, your guess is right on. When the Oregon State Bar began discussing overdraft notification, the banking industry was very hostile. However, we worked with them and were able to come to terms. Most everyone fell in line when it became apparent that the cooperative (larger) banks would suck up all the business if the others didn't also become approved institutions. Some of the difficulty went away when banks figured out that the notification process wasn't going to be too hard.

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

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]
Sent: Tuesday, July 08, 2003 2:21 PM
To: CPR_LAWYERSFUND@MAIL.ABANET.ORG; JHoltaway@staff.abanet.org
Subject: Re: FW: Overdraft Notification and "Approved Banks" Inquiry

Michigan is also interested in your responses to this question. We are researching an overdraft notification rule as well.

Thanks!

Victoria Kremski

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

From: "William Ricker" <WRicker@Akerman.com>
To: <ncpo@mybizz.net>
Sent: Tuesday, July 08, 2003 3:45 PM
Subject: Re: Fw: Overdraft Notification and "Approved Banks" Inquiry

I misspoke about Florida. We have a quasi-overdraft notification rule. Rule 5-1.2(c)(4) requires lawyers to authorize and request their bank to notify the Bar of an overdraft. The lawyer has an affirmative obligation, but there is no penalty on the bank for failing to notify the Bar.

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

From: Kenneth.Bossong@judiciary.state.nj.us
<mailto:Kenneth.Bossong@judiciary.state.nj.us>
To: NCPO <mailto:ncpo@mybizz.net>
Sent: Tuesday, July 08, 2003 3:26 PM
Subject: Re: Overdraft Notification and "Approved Banks" Inquiry

Eileen,

I get a chuckle out of your question, because NJ's banks, who can be a contentious lot, fell all over themselves to express willingness to comply. Attorney trust accounts are lucrative; I have never heard of a bank getting out of the business because of this rule. It is my sense that banks are quite efficient in getting out notices of dishonor; this just adds one, central location to send another copy. It's a single stamp! Good luck with this. No jurisdiction has ever regretted getting this rule.

Ken

Kenneth.Bossong@judiciary.state.nj.us

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Tuesday, July 08, 2003 3:18 PM
To: Holtaway, John
Subject: Re: Overdraft Notification and "Approved Banks" Inquiry

To my knowledge, when the mandatory overdraft rule was adopted in PA, the vast majority, if not all, of the banks that were in existence at that time (1995) executed the agreements. During my tenure with the Fund (1997) new banks have eagerly signed the agreement. To the best of my knowledge, none of the attorneys in the smaller, rural PA towns have a problem finding an approved financial institution.

If you would like to view a list of the approved financial institutions in PA, you may go to www.paiolta.org and click on approved banks. I believe there are 200+ on the list.

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

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

From: Victoria Rees <mailto:VREES@nsbs.org>
To: 'NCPO' <mailto:ncpo@mybizz.net>
Sent: Tuesday, July 08, 2003 3:39 PM
Subject: RE: Overdraft Notification and "Approved Banks" Inquiry

How timely! I just had a meeting with my Chair and we are putting this item back on our agenda for consideration - I would be VERY interested in your survey results. At this time, only one Province in Canada has such a program, but I plan to make NS #2.

Regards,

Victoria Rees

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

Eileen: As you know Colorado was the last state to have a client protection fund (and therefore the most recent) to implement trust account notification. Initially, the banks reacted with the "sky is falling" approach, but after a couple of meetings with most of the banks (we have about 100 banks/financial institutions in the program) it settled down quickly. I must say that it was virtually painless for everyone. We gave the banks 6 months to prepare their computers, etc. and then implemented the program. We have been up and running for 3+ years now and receive 300+ notifications a year. In my capacity with the supreme court I approve the banks. If we find one that is not complying we put them on notice immediately and so far all have been very cooperative. Every bank signs a written agreement prior to my certifying them as a trust account bank. I am not aware of any bank withdrawing from the trust account business because of the rule. You can view our rule 1.15 at our website: www.coloradosupremecourt.com or call me at your convenience. Most importantly, we have nabbed many thieves by using the program.

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

From: Kenneth.Bossong@judiciary.state.nj.us
<mailto:Kenneth.Bossong@judiciary.state.nj.us>
To: NCPO <mailto:ncpo@mybizz.net>
Sent: Tuesday, July 08, 2003 4:26 PM
Subject: Re: Fw: Overdraft Notification and "Approved Banks" Inquiry

Let's make it unanimous: every jurisdiction in North America! Why not? What's the argument against Overdraft Notification? What more telling red flag can there be than for a lawyer to bounce a trust account check? What Ethics Counsel wouldn't want to know? What bank cannot afford a stamp? (Indeed, why not

send notices electronically?) As Isaac Hecht always said, you can pay and pay these claims, but it is going to be hard to keep up unless we do what we can to prevent them. Similarly, if we prevent all the losses we can, we are in a better position to do justice in the claims we can't prevent. Meanwhile, the banking industry talks, and is not shy about advancing its interests. (Why do you think there's a 3-year Statute of Limitations for forged indorsements in the UCC all of a sudden?) They would have been all over this issue long ago if they had a meritorious argument to make.

Ken

P.S. Anyone looking for help on this, or any other topic, should consider NCPO's Speaker's Bureau.

Kenneth.Bossong@judiciary.state.nj.us

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

From: <Gwen.Hodge@usdoj.gov>

To: <CPR_LAWYERSFUND@MAIL.ABANET.ORG>

Sent: Tuesday, July 08, 2003 4:16 PM

Subject: Re: FW: Overdraft Notification and "Approved Banks" Inquiry

I believe that AR has an overdraft notification rule. I will look into it and provide the language if in fact we do.
Gwen

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

From: Office of Disciplinary <mailto:odc@lava.net> Counsel--Hawaii

To: NCPO <mailto:ncpo@mybizz.net>

Sent: Tuesday, July 08, 2003 5:45 PM

Subject: Re: Overdraft Notification and "Approved Banks" Inquiry

". . .will such a rule result in many banks declining to handle lawyers' trust accounts?" No. In fact, when many banks failed to report overdrafts, the Chief Justice and Chair of the Disciplinary Board wrote a joint letter to the banks to remind them of their duty to report. Compliance was immediate (and voluminous).

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii
1132 Bishop Street, Suite 300
Honolulu, Hawaii 96813
(808) 599-2483

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

From: Ann Hetzler [mailto:Ann.Hetzler@staff.azbar.org]

Sent: Tuesday, July 08, 2003 6:47 PM

To: 'Holtaway, John'

Subject: RE: Overdraft Notification and "Approved Banks" Inquiry

Arizona has had overdraft notification for a few years. The State Bar receives around 100 notifications per year. Most of them concern solo practitioners and not lawyers in larger firms. This is related to accounting procedures and most of the notifications turn out to be minor errors and not theft. The State Bar of Arizona does not do random audits. Most banks do not have a problem with this rule. They cooperate because they want to stay competitive, and if they did not agree and attorneys could not do business at their bank, they would probably lose other business from attorneys as well, like personal accounts. When the overdraft notification rule was first implemented there were 29 participating banks. I don't know how many there are now.

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

From: Gwen.Hodge@usdoj.gov [mailto:Gwen.Hodge@usdoj.gov]

Sent: Tuesday, July 08, 2003 4:14 PM
To: 'Jholtaway@staff.abanet.org'
Subject: FW: Overdraft Notification and "Approved Banks" Inquiry

Attached is the response from the Executive Director of our Office of Professional Conduct.

Gwen

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

From: Stark.Ligon@mail.state.ar.us [mailto:Stark.Ligon@mail.state.ar.us]
Sent: Tuesday, July 08, 2003 4:10 PM
To: Hodge, Gwen
Cc: Stark.Ligon@mail.state.ar.us
Subject: RE: Overdraft Notification and "Approved Banks" Inquiry

Ours is in Model Rule 1.15(d)(1) (Rev. 7-1-02) and Section 28 of the Procedures (added 7-1-02), both available on our website. To my knowledge, only one small rural bank of all the banks in AR declined to sign a contract with our office to follow this new rule on all atty trust accounts (not just IOLTA accounts). I did a lot of work with the AR Bankers Association before the rule was presented to the Court, and would like to think it paid off. Their Executive Director and other leaders talked it up among their members well. The larger, chain banks were all familiar with it from doing it in other states where they operate, so that took care of those like Regions, BA, Arvest, BankCorpSouth, etc. The program has run smoothly for one year now, with probably about 75-95 reports of overdrafts to us, most of which were caused by forgivable human error, usually by the lawyers, occasionally by the bank. Hope this helps, Stark

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Monday, July 21, 2003 12:09 PM
To: 'Holtaway, John'
Subject: RE: Overdraft Notification and "Approved Banks" Inquiry

Eileen,

The banks did not resist at all in becoming approved. They really had no choice because if they wanted to have lawyers' clients funds account on deposit, they had to be approved. The only resistance at the time that the rule was being discussed was that the banks wanted mutual funds that have a check writing component to the account also to be required to send overdraft notices to bar disciplinary people. The funds were not ever really contemplated by the rule, but it is an interesting idea. In Mass. we have had a dishonored check rule for many years. The major 2 problems: 1) not all of the banks fully comply. There can be long stretches of time when the large banks send no notices. This lack of sending notice prompted me last summer to notify all of the banks that were approved on their responsibilities. It was very clear to me that in the years since the rule was first implemented, personnel at the banks had changed - even the banks had changed and many banks had no idea what their responsibilities are. 2) Despite the fact that the rule covers client funds accounts PLUS all other accounts in which client funds are on deposit - i.e. an estate account, a guardian's account for a ward, a trust etc. banks report only on IOLTA accounts.

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

From: "Lynda C. Shely" <lshely@cox.net>
To: <CPR_LAWYERSFUND@MAIL.ABANET.ORG>
Sent: Wednesday, July 09, 2003 1:14 PM
Subject: Re: FW: Overdraft Notification and "Approved Banks" Inquiry

Victoria, I'll echo Ann's response for Arizona; when we implemented the Overdraft Rule in Arizona we made sure to "market" it to financial institutions as something they would want to do both for their own protection (overdrafts actually can get costly for banks) and because they would want to continue to have

the law firm and private accounts business. Every financial institution doing business in Arizona signed on with virtually no hesitation - the only technical glitch was in who was paying for the "extra" copy of the overdraft notice - eventually the one hesitant bank finally realized it wouldn't be a huge postage burden (and for verification purposes we wanted a paper copy of the overdraft notice that they sent to the lawyer - not an email notice). Lynda

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

From: Kenneth.Bossong@judiciary.state.nj.us
<mailto:Kenneth.Bossong@judiciary.state.nj.us>
Sent: Friday, July 25, 2003 10:33 AM
Subject: Overdraft Notification Rule

Dave Johnson's Office of Attorney Ethics runs New Jersey's Overdraft Notification Program. I thought his reply to Janine Abbott's inquiry would be of interest to anyone considering this loss prevention mechanism. That the Fund is healthier for the program's existence is inescapable.

Ken

Kenneth.Bossong@judiciary.state.nj.us
<mailto:Kenneth.Bossong@judiciary.state.nj.us>

Your request to Ken Bossong has been referred to me for reply. Attached is a copy of the Trust Overdraft Notification Agreement signed in New Jersey by financial institutions wishing to be an approved Supreme Court depository for attorney trust funds. Since the program began in 1985, we have averaged 325 overdrafts per year. Since that time, our Supreme Court has disciplined 85 attorneys for financial misconduct that was discovered solely through overdrafts arising out of the Trust Overdraft Program. Fifty of the 85 attorneys have been disbarred, or 59%. The rest were suspended, reprimanded or admonished.

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

Dear Eileen:

In New York, we have a dishonored check notification rule which is not as broad as an overdraft rule. Our rule was implemented in 1993. Since that time, we have never had a bank decline to handle attorney trust accounts because of the burden imposed by the rule. As with the other replies to your inquiry, the New York banks want the business. Our rule has been very effective in detecting misuse of client funds as well as educating the bar on proper trust account procedures. Since 1993, the rule has detected over 90 lawyers who were misusing client funds. In addition, in New York we have pursued litigation against a bank for failure to comply with the rule resulting in the Fund's payout of over \$1 million for client losses. We were successful in obtaining a favorable settlement. New York banks still do not complain about our dishonored check rule.

Good luck in Illinois,

Tim O'Sullivan
NY Fund
1-800-442-3863

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

From: Janine <mailto:janine_abbott@yahoo.ca> Abbott
To: ncpoinfo@nylawfund.org <mailto:ncpoinfo@nylawfund.org>
Sent: Monday, August 18, 2003 12:30 PM
Subject: Overdraft Notification

Hi there, my name is Janine Abbott and I am a law student working for the Nova Scotia Barristers' Society. I am doing research on Overdraft Notification Rules and am wondering if any Canadian provinces have implemented or considered such a rule; and also if the CBA has Model Rules for Overdraft Notification.

Thank you for your assistance.

Sincerely,

Janine Abbott

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

I think it is a little difficult to prove statistically that a payee notification rule reduces claims. I am sure that if you ask the fund administrators in the jurisdictions that have adopted a rule, they will tell you the rule works.

Please let me know if you need anything else.

John A. Holtaway
Client Protection Counsel
ABA Center for Professional Responsibility

PER LAWYER LIMIT

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

From: William Ricker [mailto:WRicker@akerman.com]
Sent: Friday, March 26, 2004 9:53 AM
To: JHoltaway@staff.abanet.org
Subject: per lawyer limits

John would you please post this on the listserv.

This question is directed to funds which have per lawyer aggregate limits. I would like to know what experiences you have had in

1. invoking the limit,
2. using discretion to avoid or override the limit,
3. handling claims submitted after the limit was exhausted,
4. dealing with fund statutes of limitations, i.e. tolling for instance,
5. establishing a lifetime aggregate limit or an incident aggregate limit in the case of a catastrophic loss arising out of one set of circumstances,
6. handling a short fall in the fund resource that where there were not enough resources to fund the aggregate
7. substantiating the claims.

Thanks Bill Ricker

Bill Ricker

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

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]
Sent: Monday, March 29, 2004 10:30 AM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: per lawyer limits

Bill:

Michigan has had 4 or 5 attorneys meet the aggregate limit of \$100,000. Only in one case did we seek permission from the Board of Commissioners to pay in excess of that, and it was a relatively small amount over the aggregate. Any time we think we might have a "heavy hitter" we hold the claims for a period of two years to give the claimants sufficient time to make a claim. Any claims received after the expiration of the two year period would be denied. We've never had a problem substantiating the claims, only the usual questions of whether the conduct was intentional conduct or more in the nature of malpractice, or whether there was an attorney-client relationship.

Hope this helps.

Victoria Kremski
Michigan Client Protection Fund.

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

From: Office of the Disciplinary Counsel [mailto:odc@lava.net]
Sent: Monday, March 29, 2004 2:54 PM
To: Holtaway, John
Subject: Re: per lawyer limits

Answers for Hawaii follows:

1. Only once that I know of; came close two other times.
2. Used discretion to limit amount of awards to limit; have not had to override limit.
3. "sorry, but limit..." letter.
4. Our Statute of limitation is discretionary, and has been overridden.
5. No experience.
6. No experience.
7. Preponderance of the evidence.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii
1132 Bishop Street, Suite 300
Honolulu, Hawaii 96813

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

From: Christopher Blanchard [mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Monday, March 29, 2004 3:27 PM
To: Holtaway, John
Subject: RE: per lawyer limits

Dear Bill- Connecticut does not have a per lawyer aggregate limit. We do have a policy of only paying \$375,000 per individual claim. However, the limit has not yet been reached, and the committee has retained discretion to consider a higher amount. We have a limitations period of four years from the date the loss was discovered or reasonably should have been discovered. However, Connecticut's superior court rules specifically provide that the committee that oversees our fund can, in cases of extreme hardship or special or unusual circumstances, consider a claim eligible that would not otherwise be eligible as a result of the four-year rule.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

From: Donahue, Eileen [mailto:edonahue@iardc.org]
Sent: Wednesday, March 31, 2004 10:15 AM
To: Holtaway, John
Subject: RE: per lawyer limits

In Illinois, we have a \$25,000 per claim and \$250,000 per lawyer limit. We haven't hit the per lawyer cap since we have had these limits, which is just about a year. We previously had a \$10,000 per claim and a \$100,000 per lawyer cap, and we we hit that just twice. In one case it was just a shade over and we paid them all in full. The other case involved \$6 million in claims against one lawyer. We had to hold all the claims for the full three years of the statute to make sure we had everybody and that they were all treated

fairly. The lawyer in that case died, and there was a related probate court case. We got lists of the client/claimants in the probate case and sent them all notice of the 3-years deadline, so we knew we had done all we could to get everybody. Then we paid about 2 cents on the dollar on those claims. It was brutal. Fortunately, there was some money in the probate estate and they got maybe 14 cents on the dollar more from the estate. We did not get any claims after the cap was exhausted.

When it looks like we may hit the per lawyer cap, which has happened several times, we send notice to all the claimants about the cap and let them know that the claims will be held for the 3 years or until we reasonably believe we have all the claims we are likely to get. If a claim still came in after all that time, I doubt we would honor it unless there was a legal disability involved. If there was a good reason for the late claim, and it was meritorious, then we would likely pay the claim at the same proration as the other claims.

We haven't had an issue yet with lack of resources to fund the aggregate claims or the other claims. We usually get some warning from the disciplinary agency in advance when it looks like there may be a big hit on the Fund, and we can make that part of funding projections and budget requests for upcoming years. We are a budget item for the disciplinary agency.

Generally, I would say that substantiating the claims wouldn't be any different for claims hitting the per-lawyer cap, but in the case of our \$6 million man we were not as strict as we might have been otherwise. The case involved fraudulent investments and we were not too strict about the actual lawyer-client relationship. So, for example, if the lawyer had ever been lawyer for anybody in the claimant's family, that was good enough. Our cap was so stingy, we did not then also want to be hyper-technical or exclusionary.

Eileen Donahue

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

I want to thank everyone who is responding to this inquiry. Washington will be considering increasing our caps this year, and this is great information. Thanks.

Bob Welden
General Counsel
Washington State Bar Association

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

1. The Arizona Client Protection Fund cannot pay out more than \$100,000 in claims against one lawyer. To my knowledge, we have paid out the limit against four lawyers.
2. The Trustees consider each claim on its own merits. They do not try to avoid paying the \$100,000 cap. They will approve claims, not taking into consideration the \$100,000 cap, and if the total amounts approved exceed \$100,000, they pro-rate the claims.
3. Claims submitted after the limit has been exhausted are denied.
4. We have a three-year statute of limitations. A claimant must file the claim no more than three years from the time they knew, or should have known, of the dishonest conduct. However, in the past, frequently, people would file a complaint with the State Bar and not be informed about the Client Protection Fund on a timely basis. When they finally were, the three-year statute had lapsed. In these cases, the Trustees would overlook the length of time that it took people to file claims.
5. Our limits are that we pay out no more than \$100,000 total on claims against any one lawyer, and no more than \$50,000 per claim. We have never sought to exceed these limits.
6. Fortunately, we have never had a short fall.
7. We have no problem substantiating claims. Often times we do not have sufficient information from the

claimant to consider a claim, but we always request more information and will not consider a claim until we receive it.

I hope this helps.

PRIVATE PRACTICE FOR FUND ADMINISTRATORS

Do you know if there are any executive directors, administrators, etc. of client protection funds that are licensed members of the bar that do some type of private practice in addition to their positions with the client protection funds?

This is new territory for us as I have only been a member of the PA bar since last Nov. I have been approached to assist some non-profit agencies with representation in administrative hearings re: budget issues, etc. My Board has requested that I check to see if other funds permit their directors to do any type of practice.

The PA fund is not a line item on anyone's budget. We are totally self-funded. We do not receive any tax dollars, the employees are not state employees and do not receive any type of state benefits.

This is not a big issue, but since the inquiry came up, now is as good a time as any to develop a policy. I'm certain that my Board will be guided by whatever is the norm in other states.

If you have any information and/or input, I would appreciate it.

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

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Friday, November 21, 2003 9:12 AM
To: 'Holtaway, John'
Subject: RE: Inquiry from Kathy Peifer

Kathy,

In Mass. no staff lawyer for the Fund also represents any private clients. Since I also work in the disciplinary side, I am prohibited from doing any private practice work. We have not addressed the issue of allowing private practice for Fund counsel who are not also involved in the disciplinary process of lawyers.

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

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]
Sent: Friday, November 21, 2003 9:32 AM
To: 'Holtaway, John'
Subject: RE: Inquiry from Kathy Peifer

In Minnesota, attorneys in the disciplinary and client protection office are employee of the Supreme Court (State of Minnesota); the Court employment plan prohibits court attorneys from any outside practice of law except for immediate family members. Within our office, there exists a pro bono policy, which has never been formally approved by the Court. It is limited as follows:

TYPES OF PRO BONO ACTIVITIES. Attorneys who wish to pursue pro bono activities must obtain prior approval from the Director. Specifically, the following types of pro bono matters and activities may be

approved:

1. Participation in "advice only" clinics sponsored by a recognized attorney volunteer agency;
2. Service as an officer, board member, or committee member in any organization whose purpose is to provide free or low cost legal services to persons of limited means;
3. Providing research assistance or expert advice to providers of legal services to the low-income and disadvantaged;
4. Participating on the board of a legal services organization;
5. Providing training or preparing materials for seminars or other educational activities involving poverty law issues;
6. Participating on bar committees and projects relating to the delivery of legal services and pro bono legal services.

Most of these activities may not in fact be the practice of law. Attorneys in our office do staff a high school advice clinic, however, and meet individually with students to provide legal advice, but no further representation.

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

From: Christopher Blanchard
[mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Friday, November 21, 2003 10:13 AM
To: Holtaway, John
Subject: RE: Inquiry from Kathy Peifer

Kathy- in Connecticut, my position as Staff Attorney for the Client Security Fund Committee is a position with the State of Connecticut Judicial Branch. Therefore, any other legal work that I might wish to perform as an attorney admitted in Connecticut is governed by administrative policies that apply to any other attorney employed by the Judicial Branch. We are not strictly prohibited from practicing law outside of whatever position we may hold in the Judicial Branch. However, any employment must comport with Judicial Branch policy, i.e., no conflicts, must be performed so as not to interfere with our other duties, must take vacation/personal time to attend to matters, etc.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

As administrator of the Washington Lawyers' Fund for Client Protection I am bound by the Washington State Bar Association employment policy which includes, "Lawyers on the staff may not engage in private practice for profit or serve in any judicial or quasi-judicial capacity."

Bob Welden
General Counsel
Washington State Bar Association

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

Ohio's fund does not permit its Administrator to engage in the private practice of law in addition to serving as Administrator. The only exception to that is legal work done for family and/or charitable organizations.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

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

Our rule in California is as follows:

"An Employee may engage in outside employment or pro bono legal assistance so long as prior written notice is given to the State Bar, and the Employee makes a satisfactory showing to his/her supervisor that such employment neither conflicts with the performance of the Employee's duties nor presents an actual or substantial potential conflict of interest for the Employee or the State Bar."

I personally just don't have the time since my job as the Director of the fund is never-ending and I almost live here at my desk. I do a little pro bono, usually family or a really sad case, but it really, really taxes my energy.

An employee

PROHIBITION ON OVERDRAFT PROTECTION FOR ATTORNEY TRUST ACCOUNTS

Hello all.

We are considering recommending a change to our current trust account and recordkeeping rules to include a prohibition against overdraft protection on attorney trust accounts. New York's Dishonored Check Notice Rule is limited to insufficient funds notices. Overdraft protection on these accounts permits attorneys to circumvent our dishonored check notice rule.

I would like to know if your state carries a prohibition against overdraft protection on attorney trust accounts. If so, what is the language in your rule?

Thank you.

Michael J. Knight
Deputy Counsel
NYS Lawyers' Fund

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

From: Sylvia Stevens
To: 'NYLAWFUND'
Sent: Thursday, August 21, 2003 12:55 PM
Subject: RE: Overdraft Protection on Attorney Trust Accounts

Oregon's trust account overdraft rule requires notification "when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored." That means we get notice even if the bank pays the NSF check as a courtesy or under some agreement for "overdraft protection" with the bank.

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

From: Karen O'Toole
To: 'NYLAWFUND'
Sent: Thursday, August 21, 2003 2:04 PM
Subject: RE: Overdraft Protection on Attorney Trust Accounts

Hi Mike,

In Mass. we do not have a rule prohibiting overdraft protection on trust accounts. Banks have been told why they should not sell this protection to trust account customers, but they still sell it.

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

From: Kenneth.Bossong@judiciary.state.nj.us
To: NYLAWFUND
Sent: Thursday, August 21, 2003 2:32 PM

Subject: Re: Overdraft Protection on Attorney Trust Accounts

Mike,

It might be easier to change your Dishonored Check Notice Rule into an Overdraft Notification Rule. The latter is not only better as a practical matter, but reflects sound policy as well. When lawyers bounce trust account checks, who cares if the bank protects them, or if they make it good? Whose money are they using to cover? Our next claimants', that's whose - except for the easily explained honest mistake.

Ken

Kenneth.Bossong@judiciary.state.nj.us

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

The Washington rule includes the language "if any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored."

Bob Welden

General Counsel

Washington State Bar Association

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

Connecticut's rule (Section 2-28 of the Superior Court rules, referred to collectively as the "Practice Book") does not explicitly prohibit overdraft protection, but requires a bank to report an overdraft "irrespective of whether or not the instrument is dishonored."

Christopher G. Blanchard

Assistant Bar Counsel

Staff Attorney/Client Security Fund

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

Michael,

For Wisconsin, I would suggest you review SCR20:1.15 on our webpage www.wisbar.org under the topical heading of Legal Resources and subheading of Court Rules and you will find our trust account rule SCR20:1.15 there. You will want to look in particular at SCR20:1.15(a) and (j). Although these subsections of our trust account rule do not specifically prohibit overdraft protection sub (a) does generally in the sense that it prohibits deposit of funds belonging to the lawyer or law firm in the trust account (except for those reasonably necessary to cover ordinary service charges) and sub (j) provides - to paraphrase it - that even if the bank honors a check when there are insufficient funds they still must report the overdraft to the disciplinary agency.

Kris Wenzel

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

As you know, NS is just considering its first ONP Rule, so your responses to this survey would be most valuable to us as well.

Thanks.

Victoria Rees

PURSUIT OF SUBROGATION

Sent: Wednesday, May 05, 2004 8:00 AM

To: CPR_LAWYERSFUND@MAIL.ABANET.ORG

Subject: Posting for CPF list serv

The Supreme Court Committee reviewing the operations of the Michigan Client Protection Fund has asked for a report on subrogation programs. It would be most helpful if we could learn the following:

- 1). How many staff members you have devoted to subrogation matters or the percentage of time that they spend on subrogation matters.
- 2). If outside counsel is used to pursue subrogation, are they volunteers, paid hourly or paid on a contingency fee basis?
- 3). What approximate overall percentage of paid claims are recouped through subrogation?
- 4). Any new trends that you are seeing in the subrogation area - is it just Michigan that is seeing an increase in bankruptcy filings by respondents?

Thanks!

Victoria V. Kremski
Deputy Regulation Counsel
State Bar of Michigan

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

1. I devote approx. 10% of my time to administering the Fund. Very little is spent on subrogation matters.
2. We have tried employing outside counsel on a contingent fee basis, with very limited success. We were actively solicited by a collection agency that does lots of lawyer fee collection work, and after 1 year they return all the Fund accounts as uncollectible.
3. Historically, we have recouped approx. 10% of the funds we paid out. Most of that comes through the Fund being included in criminal restitution orders, or by repayment from disbarred lawyers seeking reinstatement.
4. We have seen very few lawyers seek bankruptcy.

Bob Welden
General Counsel
Washington State Bar Association

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

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Wednesday, May 05, 2004 10:38 AM
To: 'Holtaway, John'
Subject: RE: Posting for CPF list serv

- 1) One (me) doing it part time (approximately 20% of my time is devoted to CSF and pursuing collections is a relatively small part of that).
- 2) We used outside counsel in the past on a contingency fee basis, found it not terribly successful. More recently have begun assigning claims to a collection agency with modest success (we pay a 50% contingent fee).
- 3) We collect approximately \$7000-8000 in a typical year, about 5% of paid claims in an average year. We hit the jackpot one year when a defalcating lawyer's mother died and we collected \$25,000 from her estate.
- 4) Our defalcating lawyers rarely file bankruptcy (only 2 in the six years I have been working with the fund);

they just fade away. Only a handful are practicing law; the others work at low paying jobs and can't afford to pay much. Many are deceased. I do have several that make regular (?) monthly payments to satisfy their obligations. It helps that the list of receivable is published annually with my annual report and I get tips from practitioners about what my debtors are up to...

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

From: MillerFG@aol.com [mailto:MillerFG@aol.com]
Sent: Wednesday, May 05, 2004 10:36 AM
To: JHoltaway@staff.abanet.org
Subject: Re: Posting for CPF list serv

With respect to subrogation efforts, don't overlook the feasibility of engaging the services of the Attorney General of Michigan as the fund's enforcement counsel. Tim O'Sullivan can provide you with information about the NY experience. As for enforcement by fund staff, check with Ken Bossong or Dan Hendi in New Jersey.

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

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]
Sent: Wednesday, May 05, 2004 11:00 AM
To: 'Holtaway, John'
Subject: RE: Posting for CPF list serv

In Minnesota: The Attorney General represents the Board in its subrogation/collection/litigation efforts. We are not charged any attorneys fees, just direct costs. We try not to abuse this situation. Once payment plans are agreed upon, we usually process the payments directly through our office, rather than involve the AG further, for example. There is also an agency (Minnesota Collections Enterprise, or MCE) that represents all state agencies in collection matters. The AG refers the less-likely-to-pay respondents over to them. They are authorized to assess attorney fees and costs on top of the debt. In the current fiscal year we have collected \$81,184 (a large percentage from one respondent). Historically we have paid \$4.878-million in claims, and collected \$701,065 in restitution/subrogation payments from all sources, which is 6.95% of the amount paid. We have not seen any particular trend or increase in bankruptcy filings.

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Wednesday, May 05, 2004 10:56 AM
To: Holtaway, John
Subject: Re: Posting for CPF list serv

NJ's subrogation effort is quite vigorous and almost entirely in-house. 1. Staff members: two senior counsel devote about 30-40% of their time to pursuit of collateral sources and respondents; one deputy counsel spends about 85% of her time seeking collection from respondents; three legal secretaries spend corresponding amounts of time on our collection efforts.

As Director, I seldom handle these directly, but spend about 20-25% of my time overseeing these efforts. These estimates are approximate; a hotly contested litigated matter can consume any one of us for days at a time.

2. In-house employees. If a claimant's lawyer has a matter well in hand, sometimes we'll just let the matter conclude that way. We only seek outside help when pursuing respondents who have left NJ.

3. Hard to say. Recently, we have been paying about \$3 million per year in claims and recovering a little over \$500,000 in subrogation receipts. Given the lag time involved in claims, I'm not sure I can say with confidence that we recover one-sixth of what we pay out, but it's a start.

4. We have seen bankruptcies, too. This makes us aggressive in urging prosecutors to prosecute, to include all victims, and to seek full restitution in the sentencing (with or without plea deal). We're also not shy about looking into fraudulent transfers where disbarred lawyer has all the debts and nonbankrupt spouse "owns" all the assets. We have been known to point out to courts that respondents have taken inconsistent positions in, say, criminal and bankruptcy proceedings.

Another trend is that claims seem to be involving larger, more convoluted and stranger transactions. Even as we examine such claims for compensability, we have our eyes wide open for collateral sources.

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

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

From: Christopher Blanchard [mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Wednesday, May 05, 2004 11:14 AM
To: Holtaway, John
Subject: RE: Posting for CPF list serv

Our fund is in the first year of an agreement with the state agency that collects delinquent accounts for the State of Connecticut. We really do not have enough experience with this arrangement yet to provide you with any meaningful statistics. I can tell you that we have had a small amount of restitution paid this year (about \$4,500), two-thirds of which is the result of a criminal restitution order assigned to our fund, and the remainder the result of demand letters sent to 2 attorneys prior to having their accounts forwarded to our state delinquent accounts agency. We have no client security fund staff specifically assigned to pursuing restitution, and I am responsible for the administrative duties regarding restitution, which I would say have taken up about five percent of my time.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

The Florida Bar experience:

- 1). How many staff members you have devoted to subrogation matters or the percentage of time that they spend on subrogation matters. Less than 10% of administrator's time
- 2). If outside counsel is used to pursue subrogation, are they volunteers, paid hourly or paid on a contingency fee basis? Tried both and results were minimal.
- 3). What approximate overall percentage of paid claims are recouped through subrogation? Less than 5%
- 4). Any new trends that you are seeing in the subrogation area - is it just Michigan that is seeing an increase in bankruptcy filings by respondents? No trends noticed.

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Wednesday, May 05, 2004 12:45 PM
To: Holtaway, John
Subject: Re: Posting for CPF list serv

1. I spend very little time on subrogation issues. I would guesstimate about 10%. Our Counsel to the Board is instituting collection policies and procedures, which have not yet been fully implemented. Hopefully by this time next year we will have a feel for how the new "program" will be working. Our Counsel to the Board will be primarily responsible for overseeing these collection efforts.

2. We plan to retain outside counsel if a former attorney fights the collection efforts. We will be filing complaints in-house and then proceeding to obtain default judgments when possible. We also retain outside counsel if there is ongoing litigation that we become involved in due to our subrogation interest. Usually this occurs when the loss is greater than our \$75,000 maximum award and the claimant was already pursuing civil remedies. We typically retain the same attorney. Outside counsel is usually retained on an hourly basis with caps placed on the amount of fees we are willing to incur.

3. The amount recovered varies. For the fiscal year ending 6/30/02, we recovered slightly over 9% of the amount of awards paid during the same fiscal year. For the fiscal year ending 6/30/03, we recovered slightly over 4%. To date, we have recovered 75% of the amounts paid out in awards during the current fiscal year. This is terribly skewed, however, as we recently recovered just shy of \$1 million from a former attorney's bankruptcy that had been ongoing since 1997. For that particular attorney, we had paid out approximately \$2.3 million to his former clients.

Historically, most of our recovery has been accomplished through criminal restitution orders or through our Pa.R.D.E. 531 which requires full restitution to the Fund, plus 10% interest per annum, before a former attorney may even file a Petition for Reinstatement.

4. We are not seeing an increase in bankruptcy filings by former attorneys. The few that have attempted it in the past, we have fought vigorously and have always been successful in having the obligation declared nondischargeable, usually by eventually getting the former attorney to sign a stipulation that the obligation is nondischargeable.

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

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

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]
Sent: Thursday, May 06, 2004 5:16 AM
To: JHoltaway@staff.abanet.org
Subject: Re: Posting for CPF list serv

the maryland fund does not have anyone assigned to handle subrogation. we have retained the services of an attorney who handles our subrogation stuff. they work on a contingency basis. maryland has not noticed an increase in filings for bankruptcy, i believe that it has always been an easy way out for attorneys. we pursue vigorously non-dischargeability of debt in these cases. i believe that we have recouped approximately 5% on an average. not a very good rate, but every bit helps.....hope this info helps.....janet moss

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

From: Tim O'Sullivan [mailto:tos@nylawfund.org]
Sent: Thursday, May 06, 2004 1:24 PM
To: Holtaway, John
Subject: Re: Posting for CPF list serv

Dear Victoria:

Here are New York's answers to your questions re subrogation matters: 1. We have an arrangement with the State Attorney General whereby we finance the cost of one Assistant Attorney General position who is assigned exclusively to our restitution litigation. In addition to the time spent by the Assitant AG, I would estimate that I spend 10% of my time with subrogation matters and working with the Att Gen's office.

2. Once about five years ago we used outside counsel on a contingency fee basis.

3. I can not say with certainty what percentage of our payout each year we recover via subrogation b/c of the time lag involved. Going strictly by our fiscal year numbers for the past three years, our % is as follows:

FY	2002-03	23%
	2001-02	13%

2000-01 13%

We had a particularly good year in 02-03 because we obtained a large recovery in litigation vs a dishonest lawyer's bank.

4. I can't say we have seen any new trends with subrogation - there has been no increase with bankruptcy filings - we do have several dishonest lawyers go into bankruptcy each year and we vigorously contest any discharge and seek restitution.

I hope this is helpful.

Tim O'Sullivan

NY Fund

tos@nylawfund.org

1-800-442-3863

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

Thanks for all the great responses. This information is very helpful. Thanks for taking the time to respond.

Victoria Kremski

State Bar of Michigan

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

From: Beverly Lewis-Koch [mailto:blewis.koch@verizon.net]

Sent: Friday, May 07, 2004 12:01 PM

To: Holtaway, John

Subject: Re: Posting for CPF list serv

The DC fund uses an outside attorney to do subrogation matters. Our staff is not involved.

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

From: Kris Wenzel [mailto:kwenzel@wisbar.org]

Sent: Tuesday, May 11, 2004 8:29 AM

To: Holtaway, John

Subject: RE: Posting for CPF list serv

The Wisconsin fund has recently entered into a contingency fee agreement with a collection firm. The collection firm will receive a percentage of all recovery for claims/cases. We do not have staff to focus solely on subrogation but it became obvious that our Supreme Court wanted us to become proactive in obtaining restitution. The contract was signed only a week or two ago, so we shall see what success, if any, is realized.

Kris Wenzel

RECEIVERS/MISSING CLIENT FUNDS

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

From: Holtaway, John [mailto:JHoltaway@staff.abanet.org]

Sent: Thursday, August 19, 2004 12:41 PM

To: CPR_LAWYERSFUND@MAIL.ABANET.ORG

Subject: Commissioners' fees

In Massachusetts Commissioners are sometimes appointed by the Supreme Judicial Court to act as receivers for client files, clients, trust accounts etc. of a lawyer who has died, been suspended, or been disbarred. Occasionally, Commissioners, after reviewing bank records and client ledgers, are not able to identify the client or owner of the funds that are in the former lawyer's trust account. A proposal is being made that these funds be turned over to the Clients' Security Board regardless of whether there are claims pending brought by clients of the former lawyer. In the past the Board accepted these funds ONLY after it has received claims from clients of the former lawyer and AFTER the claims have been paid. At that point, the Board has standing to receive funds under its right of subrogation. Have any of you had experience in

this situation? If so, have you accepted funds WITHOUT have claims pending against the former lawyer? Only after having paid claims? Have you required that the funds be turned over to the Fund only upon order of a court? Where do these funds go if not to the Fund? The state? If you have had experience in this area, I would greatly appreciate learning in as much details as possible about your experience.

Karen D. O'Toole
Board of Bar Overseers/Clients' Security Board
99 High Street
Boston, MA 02110

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

In Washington, statutorily any unclaimed funds in the possession of a fiduciary escheat to the state general fund.

Bob Welden
General Counsel
Washington State Bar Association

REQUIREMENT OF CRIMINAL OR CIVIL COMPLAINT

I had a question that I wanted to place on the Client Protection list serve, in order to obtain some feedback from other client protection fund administrators. As with most funds, our fund is considered a remedy of last resort. My question is whether other funds will consider payment of claims if a claimant has not either filed a criminal complaint against the responsible attorney (in a situation where the claim alleges a theft or embezzlement of funds) or a civil action against the defalcator. If not, do they notify the claimant and advise him/her that he or she needs to file a criminal complaint and/or pursue a civil action? Please let me know how I can pose this issue on the list serve. Thank you for your assistance.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

From: Carla Freudenburg [mailto:CFreudenburg@dcbar.org]
Sent: Monday, November 03, 2003 9:37 AM
To: Holtaway, John
Subject: RE: Client Protection Fund Question

The D.C. Fund will consider payment of a claim even if a claimant has not filed a criminal or civil complaint against the attorney.

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

From: Kris Wenzel [mailto:kwenzel@wisbar.org]
Sent: Monday, November 03, 2003 9:37 AM
To: Holtaway, John
Subject: RE: Client Protection Fund Question

In Wisconsin, there is no requirement that the claimant file civil or criminal charges. We do require, however, that a complaint be filed with the Office of Lawyer Regulation and claimants are encouraged to contact their circuit courts to get information on filing small claims actions and to contact local authorities. I do stress to the claimants that our fund is a fund of last resort and that they must have made every possible effort to get their money back from the attorney. As administrator, I have also seen claimants struggle with filing small claims actions in states outside of Wisconsin when the attorney has relocated to a different state adding to the hoops claimants sometimes are required to jump through. For some reason, Texas seems to be the location of choice.

Kris Wenzel
Administrator
Wisconsin Clients' Security Fund

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Monday, November 03, 2003 9:33 AM
To: 'Holtaway, John'
Subject: RE: Client Protection Fund Question

Chris, In Mass. our rules are clear that all claimants must exhaust reasonable remedies. We ask all claimants to both file a criminal complaint (where circumstances make this an option) and to file a civil action again where circumstances make this an option. By this I mean, that the loss has to be of an amount large enough for the claimant to be able to reasonably expect to hire a lawyer to bring the civil action. Practically speaking, we find that the criminal route is far more likely to result in restitution to former clients or to the Fund. Claims where claimants' former attorneys are under indictment result in that claim being deferred until the criminal case has been completed. We ask the prosecutor to allow the Fund to be present at sentencing hearing or to accept a memo in which we indicate whether there are claims pending and the total amount of those claims. Where the Fund has paid claims, the Fund is worked into the court's restitution order.

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

From: Victoria Rees [mailto:VREES@nsbs.org]
Sent: Monday, November 03, 2003 10:03 AM
To: 'JHoltaway@staff.abanet.org'
Subject: Client Protection Fund Question

Nova Scotia is a jurisdiction of first resort. We do not require that a claimant file either a discipline complaint, a criminal complaint nor commence civil proceedings. To do so, to me, would be anathemous to the principle of a client protection fund, however I understand that in some jurisdictions, such steps are required in order to bring to bear the full authority of the State Bar.

Victoria Rees
Director of Professional Responsibility
Nova Scotia Barristers' Society

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

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Monday, November 03, 2003 10:32 AM
To: 'Holtaway, John'
Subject: RE: Client Protection Fund Question

In Oregon we often waive the requirement that the claimant have a civil or criminal judgment, especially if the size of the claim or other circumstances indicate it would be a hardship to require the claimant to proceed in that way. On at least two occasions in the last few years, the Fund has joined several assigned claims and pursued the defalcating lawyer directly.

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

From: Ann Hetzler [mailto:Ann.Hetzler@staff.azbar.org]
Sent: Monday, November 03, 2003 10:45 AM
To: 'Holtaway, John'
Subject: RE: Client Protection Fund Question

The Arizona Client Protection Fund is also a fund of last resort. We encourage claimants to exhaust all other remedies, and will hold claims if there are lawsuits or other pending actions. If a claimant is compensated, we will close the file. If a claimant is not compensated, the Trustees will go ahead and

consider the claim. Although this is a fund of last resort, we do not refuse to consider claims if a claimant has not pursued other remedies.

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

From: Bob Welden [mailto:bobw@wsba.org]
Sent: Monday, November 03, 2003 10:55 AM
To: Holtaway, John
Subject: RE: Client Protection Fund Question

Washington does not require that the claimant file a criminal complaint. We do require a disciplinary complaint, except where the lawyer is already disbarred or dead.

Bob Welden
General Counsel
Washington State Bar Association

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

From: MillerFG@aol.com [mailto:MillerFG@aol.com]
Sent: Monday, November 03, 2003 11:26 AM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: Client Protection Fund Question

Let's avoid the misrepresentation that client protection programs are "funds of last resort". Indeed, let's drive a stake in the heart of that monstrous notion, which is nowhere found in the ABA's Model Rules for Lawyers' Funds for Client Protection. I suspect that a fund that truly considers itself to be a "last resort" for victims of lawyer theft really doesn't want to be involved in law client protection, or the enforcement of a fund's subrogation rights. This does not mean, of course, that funds should not require a claimant to report the alleged theft to an appropriate criminal and lawyer discipline agency, and to cooperate with their investigations. That's an extremely helpful policy that every fund should observe in the processing of claims. The typical claimant should be told that, in writing, when the fund acknowledges receipt of the claim. But "fund of last resort" no. Warm regards to all. -- Fred Miller

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Monday, November 03, 2003 12:03 PM
To: Holtaway, John
Subject: Re: Client Protection Fund Question

There was an article on this topic called "Exhaustion" in NCPO's newsletter, the Client Protection Webb (Vol. 2, # 3, Fall 1999), and a follow-up letter to the editor in Vol. 3, #1, Spring 2000. Spring 2000 is the only edition for which I do not have some extra copies. Call me @ (609) 984-7179 for Fall '99 or any of the others. In NJ, claimants must disclose the same facts to the appropriate ethics committee and county prosecutor that they put in their Fund claim, and are expected to cooperate thereafter. Most fulfill the obligation by sending copies of their completed claim form. There is no across-the-board requirement that civil suit be filed. If there is a remedy available for the asking (e.g. a bond) we require claimants to do the asking. Otherwise, we pay, take an assignment, and get busy. Often, we want to control the litigation. (Years ago, a claimant's new lawyer blew a forged indorsement case. We resisted the urge to have claimant go after that lawyer's carrier.)

Ken Bossong

P.S. Quick question for jurisdictions requiring claimants to bring suit against dishonest lawyers: How often does that result in recovery obviating the need for Fund awards?

Kenneth.Bossong@judiciary.state.nj.us

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

From: Bob Welden [mailto:bobw@wsba.org]
Sent: Monday, November 03, 2003 12:27 PM
To: Holtaway, John
Subject: RE: Client Protection Fund Question

Don't forget, the Client Protection Webb newsletters are posted on the NCPO website in the "members only" section: <http://www.ncpo.org/>.

Bob Welden
General Counsel
Washington State Bar Association

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Monday, November 03, 2003 12:32 PM
To: 'Holtaway, John'
Subject: RE: Client Protection Fund Question

In answer to the P.S. question, it depends. Usually we ask that claimants exhaust only when there is a reasonable likelihood of success. For example, in forged/missing endorsement claims, or where the former attorney has a valuable asset that has few attachments, success is almost 100% that Fund does not have to pay. In other cases where the likelihood of success is small, but where claimant has counsel who is willing to obtain a judgment (often a default judgment) and obtain an execution, we ask that that be done. In those cases, the Fund almost always pays the claim and pursues the former lawyer under subrogation rights.

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

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]
Sent: Monday, November 03, 2003 1:32 PM
To: JHoltaway@staff.abanet.org
Subject: Re: Client Protection Fund Question

Maryland is technically a fund of last resort. lately we have swayed slightly from that notion in that we received twenty some claims referencing one attorney and took all of them and just paid them and then went after the attorney ourselves. we will also pay a claim that is less than 2,500 without exhausting all remedies because we feel that it is not in anyones' best interest to get a lawyer and then attempt repayment for this amount of a claim. we always tell the claimant that we are a last resort but do attempt to assist the claimant as to how to go about exhausting remedies.

hope this helps

janet moss

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

From: Office of Disciplinary Counsel--Hawaii [mailto:odc@lava.net]
Sent: Monday, November 03, 2003 3:10 PM
To: Holtaway, John
Subject: Re: Client Protection Fund Question

Our Trustees do not require a civil action. Depending upon the facts, they will require a criminal complaint. If a forgery, they have been requiring that an Affidavit of Forgery be filed with the bank.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii

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

From: Beverly Lewis-Koch [mailto:blewis.koch@verizon.net]

Sent: Tuesday, November 04, 2003 9:35 AM

To: Holtaway, John

Subject: Re: Client Protection Fund Question

D. C. is a fund of last resort. However, if it is clear that exhaustion would be futile the case is considered based on the merits.

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

Both the New Hampshire Fund, which is by Order of the New Hampshire Supreme Court, and the Rhode Island Fund, which is a voluntary fund, each require exhaustion of other remedies but do not specifically mandate a criminal complaint or civil suit. Rather, each has a rule provision requiring exhaustion, and a demonstration of the steps taken - all of which are evaluated in the review of a claim. John Bomstger / member New Hampshire and Rhode Island Funds.

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

The California fund is not a fund of last resort--we do, however, require that the applicant file a corresponding discipline complaint unless the attorney has resigned with charges pending, has been disbarred or is deceased. The reason for this is that the State Bar has difficulty in recovering from Respondents as well as third parties such as banks, etc. The vast majority of the Respondent attorneys we deal with are judgment proof. We try to minimize to the extent possible the harm and hassle dishonest attorneys cause their clients.

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

Ohio's Fund is not a fund of last resort, meaning we do not require that the claimant take any action against the attorney prior to payment by the fund. Our rule requires that the attorney be (1) disbarred; (2) suspended; (3) publicly reprimanded; (4) resigned; (5) convicted; or (6) deceased. The discipline imposed does not have to involve the claimant. In some instances, if a civil action between the claimant and the attorney is pending when the claim is filed, we will hold it until the conclusion of that proceeding. As some have already noted, in many instances the attorney is judgment proof, and to require an attempt to collect by the claimant runs against the whole purpose of client protection funds.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

SPECIAL ASSESSMENT

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

From: "William Ricker" <WRicker@Akerman.com>

To: <mknight@nylawfund.org>

Sent: Wednesday, June 18, 2003 10:25 AM

Subject: Special assessments

Folks: have any of your funds made a special assessment to address one large claim, or one large class of claims? If so, can you give me the details. Thanks. Bill Ricker

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]

Sent: Wednesday, June 18, 2003 9:36 AM

To: 'Holtaway, John'

Subject: RE: Special assessments

We have not Yet done so. We just met with our Court and explained a potential financial disaster. The

feeling that I got from the Court that the entire registration fee (now at \$220) would be raised to pay for the burden on the Fund.

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

From: Kris Wenzel [mailto:kwenzel@wisbar.org]
Sent: Wednesday, June 18, 2003 9:37 AM
To: Holtaway, John
Subject: RE: Special assessments

Bill,

In Wisconsin, we can only set annual assessments, with a maximum assessment level per attorney. However, we can prorate payments out over five years, which then allows us to have several years at the maximum assessment level to try and recoup a balance. Recently, Wisconsin was hit with large dollar claims causing us to put out payments into subsequent fiscal years. We then petitioned the Wisconsin Supreme Court to raise our maximum assessment level from \$15 per attorney to \$25 per attorney. The petition was approved and the new maximum became effective for fiscal year 2003 (July 1, 2002-June 30, 2003).

Kris

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

From: Carla Freudenburg [mailto:CFreudenburg@dcbar.org]
Sent: Wednesday, June 18, 2003 9:34 AM
To: Holtaway, John
Subject: RE: Special assessments

D.C. has never had a special assessment.

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

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Wednesday, June 18, 2003 10:39 AM
To: 'Holtaway, John'
Subject: RE: Special assessments

Bill, Oregon has never had a special assessment, but in the early years of the program the fund was drained by huge claims involving one lawyer. The fund was unable to pay them all in one year so held them over, raised the annual assessment for the next year and brought in enough to cover those claims plus whatever came along in the new year. That experience generated the policy of establishing and "growing" a reserve to prevent such problems in the future. Our rules do allow a "special assessment" if necessary.

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

From: "John S. Gleason"

Not Colorado.

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

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Wednesday, June 18, 2003 10:39 AM
To: 'Holtaway, John'
Subject: RE: Special assessments

Bill, Oregon has never had a special assessment, but in the early years of the program the fund was drained by huge claims involving one lawyer. The fund was unable to pay them all in one year so held them over, raised the annual assessment for the next year and brought in enough to cover those claims plus

whatever came along in the new year. That experience generated the policy of establishing and "growing" a reserve to prevent such problems in the future. Our rules do allow a "special assessment" if necessary.

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

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Wednesday, June 18, 2003 10:17 AM
To: Holtaway, John
Subject: Re: Special assessments

Bill,

In early 1997, PA was facing two situations that had the potential for the Fund to pay out as much as \$3 million to former clients of one attorney and an additional \$1.5 million to former clients of another attorney. These two situations were, obviously, in addition to the "normal" amount of claims expected to be received by the Fund.

Our Board Chair at that time met with the justices of our state Supreme Court and explained the situation. Our Court issued an order amending the rules for a one time increase from \$45 to \$70 for the 1997 - 1998 assessment and rescinding the amendment for the 1998 - 1999 assessment and thereafter.

Please let me know If you would like a copy of the court's order and I will fax it to you.

FYI - we ultimately paid out \$1.78 million and \$1.34 million to the clients of these attorneys.

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

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

From: "William Ricker" <WRicker@Akerman.com>
To: <ncpo@mybizz.net>
Sent: Wednesday, June 18, 2003 4:54 PM
Subject: Re: Fw: Special assessments

Kathy: would you be kind enough to fax me the order. My number is 954-468-2452. We are looking at a 13,000,000 problem.

Bill Ricker

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

Bill:

In New York, we have never had a special assessment to deal with claims. We are financed by a biennial attorney registration fee of which we receive a portion. That revenue, coupled with our other sources of revenue, has been sufficient to deal with disasters.

Tim O'Sullivan
NY Fund
tos@nylawfund.org

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

From: "Root Edmonson" <REdmonson@NCBAR.com>
To: <CPR_LAWYERSFUND@MAIL.ABANET.ORG>
Sent: Wednesday, June 18, 2003 3:47 PM
Subject: Re: Special assessments

Bill, following is a copy of a report I drafted relating to a special assessment for calendar year 1999:

The 1984 order of the Supreme Court which created the Fund contained provisions for an assessment of \$50.00 to provide initial funding for the program. In subsequent years, upon being advised of the financial condition of the Fund, the Court in certain years waived the assessment and in other years set the assessment in varying amounts to provide for the anticipated needs of the Fund. There was no assessment for the year ending December 31, 1998. 1998 was the fourth consecutive year in which no assessment had been ordered.

On September 8, 1995, Hendersonville, NC attorney James H. Toms signed an affidavit admitting embezzling in excess of \$380,000.00 from the Howard Smith Estate and in excess of \$150,000.00 from other estates for which he served either as executor or attorney-in-fact. Under the rules then in existence, claims were capped at \$60,000.00 per claimant and \$100,000.00 per lawyer. The Board published the notice then required for all those who had a loss as a result of Toms' dishonesty to file claims with the Board within one year. The Board received \$747,118.79 in claims within the one year period. Before deciding any of these Toms claims, the Board asked the Supreme Court to amend the rules to eliminate the per lawyer cap and increase the per claim cap to \$100,000.00 so that the Board could more fairly address the pending Toms claims. The Supreme Court amended the rules in 1997. At its first meeting in fiscal year 1998, the Board considered all of the existing Toms claims and paid \$278,034.66 to reimburse the victims of his dishonesty.

Soon, other victims of Toms' dishonesty asked to be able to file claims against Toms. These victims had not filed claims within the previous one year period because they assumed that their share of the \$100,000.00 under the per lawyer cap would be minimal given the amount of the Smith Estate's claim. The Board published another notice for victims who would benefit from the new caps to file claims by the end of July, 1998. As a result of the new notice, the Board received \$863,235.28 in additional Toms claims, including claims by a public administrator appointed for estates opened after the original claim filing deadline. Two of the additional Toms claims were paid in fiscal 1998 totaling \$102,042.45.

After awarding payments at its last meeting in fiscal 1998, the Board had additional claims pending against Toms and also faced substantial claims against a former Charlotte attorney, but had only \$120,035.38 remaining above its required \$1,000,000.00 fund balance with which to address these claims. As a result, the Board recommended petitioning the Supreme Court for an assessment of \$50.00 per lawyer for calendar year 1999. On October 8, 1998, the Supreme Court ordered the assessment.

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

From: MCummings@lsbc.org [mailto:MCummings@lsbc.org]
Sent: Wednesday, June 18, 2003 10:35 PM
To: JHoltaway@staff.abanet.org
Subject: RE: Special assessments

In B.C. we have not yet had a "special assessment", although our annual assessment was raised this year from \$250 to \$600 to deal with a very large set of claims. Even so, this annual assessment will not be sufficient, but we have not yet decided on how best to fund all of the claims.

Mary Ann Cummings
Law Society of British Columbia

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

From: MillerFG@aol.com <mailto:MillerFG@aol.com>
To: ncpo@mybizz.net <mailto:ncpo@mybizz.net>
Sent: Thursday, June 19, 2003 12:31 PM
Subject: Re: Fw: Fw: Special assessments

Hey Bill: Is there supposed to be a \$ sign before your "13,000,000 problem"? Doubtless an ineligible Fee Dispute.

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

From: "William Ricker" <WRicker@Akerman.com>
To: <ncpo@mybizz.net>
Sent: Thursday, June 19, 2003 5:42 PM
Subject: Re: Fw: Fw: Fw: Special assessments

Yes, and I understand it is not a fee dispute.

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

As I am sure Ken Bossong would say (Ken, are you there?), this talk about needing special assessments points out the importance of building a strong fund reserve to anticipate future demands.

Bob Welden
General Counsel
Washington State Bar Association

STRUCTURE OF OTHER FUNDS

From: Ann Hetzler [mailto:Ann.Hetzler@staff.azbar.org]
Sent: Monday, March 15, 2004 2:40 PM
To: jholtaway@staff.abanet.org
Subject: Client Protection Fund structure

Hi John,

I would like some information regarding the structure of other funds. Specifically, I would like to know how many funds have a full-time counsel overseeing the fund, where 100% of his/her time is dedicated to the fund. I would also like to know if there are funds who have more than one counsel, part-time counsel, or someone different overseeing the fund. If the counsel is part-time I would like to know what the counsel's other duties entail.

I would really appreciate it if you could put my questions on the listserv. Thank you very much.

Ann Hetzler
Client Protection Fund Administrator

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

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Monday, March 15, 2004 3:04 PM
To: 'Holtaway, John'
Subject: RE: Client Protection Fund structure

Ann,

In Mass. we have one atty who works 3/4 for the Fund, one attorney who works 1/4 for the Fund and one atty. who works 100% for the Fund. The 3/4 and 1/4 attys are counsel to the Board of Bar Overseers, the entity that hears disciplinary cases. It ends up that the Fund has the equivalent of 2 full time attys. We do not have any paralegals, investigators; however, the Fund administrator performs many paralegal functions. Let me know if I may be able to provide more info.

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

From: Christopher Blanchard [mailto:Christopher.Blanchard@jud.state.ct.us]
Sent: Monday, March 15, 2004 3:07 PM
To: Holtaway, John

Subject: RE: Client Protection Fund structure

The Connecticut Judicial Branch Client Security Fund has one full-time staff attorney (me!). We also have one clerical employee, and an investigator.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

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

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]
Sent: Tuesday, March 16, 2004 4:52 AM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: Client Protection Fund structure

ann, the maryland fund has an administrator, me, who oversees the fund. I am not an attorney. the board that has final say on everything is made up of eight attorneys and one lay person. anything further let me know....janet moss

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

From: Carol Green [mailto:green@kscourts.org]
Sent: Monday, March 15, 2004 3:50 PM
To: JHoltaway@staff.abanet.org
Subject: Re: FW: Client Protection Fund structure

As Clerk of the Kansas Supreme Court, I am an attorney and spend about 20% of my time on the Fund. The rest of my time is devoted to case administration, attorney registration, bar admissions, and judicial ethics. I have one non-attorney clerk who likewise spends about 20% of her time on client protection. I would estimate that the Disciplinary Administrator and his two investigators spend 10-15% of their time on client protection.
Carol

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

From: Mike Knight [mailto:mjk@nylawfund.org]
Sent: Monday, March 15, 2004 4:14 PM
To: Holtaway, John
Subject: Re: Client Protection Fund structure

Dear Ann:

In New York, our Fund has a staff of five full-time people. We have an Executive Director who serves as the Fund's Counsel, a Deputy Counsel, one investigator and two secretarial positions. Our caseload and activities are substantial. Last year we received over 500 filed claims. We approved 165 awards providing \$5.8 million in reimbursement. We also administer our State's Dishonored Check Notice Rule and other programs. If you need any other information please let me know.

Tim O'Sullivan, Executive Director

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

From: Carla Freudenburg [mailto:CFreudenburg@dcbars.org]
Sent: Tuesday, March 16, 2004 7:56 AM
To: Holtaway, John
Subject: RE: Client Protection Fund structure

Ann,

The D.C. Bar has three full-time employees who work for both the Fund and the Attorney/Client Arbitration Board (ACAB) through the Attorney/Client Relations Program. Operations of the Fund and the ACAB are overseen by myself, an attorney. The Programs Coordinator for the Fund and the ACAB is also an attorney, and the Programs Specialist provides administrative and clerical support for both programs.

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

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Monday, March 15, 2004 3:59 PM
To: Holtaway, John
Subject: Re: FW: Client Protection Fund structure

With a reminder that the Fund staff does everything in house in New Jersey, from conducting the annual assessment through claims and a vigorous, successful subrogation and litigation effort: I am Director; there are two Senior Counsel and one Deputy Counsel; and three legal secretaries assist the four of us. In addition, our Fund Accountant and Secretary to the Board of Trustees is also a lawyer. I am pleased to say each is full time, and proud to say they are very good. They are also very busy. For perspective, there are 80,000 lawyers licensed in NJ; about 54,000 pay into the Fund.
Ken Bossong

Kenneth.Bossong@judiciary.state.nj.us

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

From: Office of the Disciplinary Counsel [mailto:odc@lava.net]
Sent: Tuesday, March 16, 2004 5:06 PM
To: Holtaway, John
Subject: Re: Client Protection Fund structure

The Fund contracts with the Disciplinary Board to handle investigations and administration. As Chief Disciplinary Counsel, I also get to be the Fund Administrator. So I'm part-time, a paralegal, and a secretary - but no extra compensation for us.

Carole R. Richelieu

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

From: Kris Wenzel [mailto:kwenzel@wisbar.org]
Sent: Wednesday, March 17, 2004 9:38 AM
To: Holtaway, John
Subject: RE: Client Protection Fund structure

In Wisconsin the Fund administrator is a non-lawyer. The administrator also oversees other programs, such as fee arbitration, lawyer dispute resolution, consumer protection and other assignments. The committee that decides on compensation is made up of five lawyers and two non-lawyers.

Kris

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

I am the General Counsel for the WSBA, and am also Fund administrator. About 10% of my time is spent on the Fund. Washington is an integrated bar, so most of the investigative work is done by the Office of Disciplinary Counsel. By court rule, the ODC and the Fund can disclose otherwise confidential information to each other.

Bob Welden

General Counsel
Washington State Bar Association

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

I am part-time counsel to the NC fund. The fund pays 20% of my salary and benefits. I am also a deputy counsel in the NC State Bar's disciplinary office. I litigate disciplinary cases, reinstatement cases and handle some of the litigation in the courts of the state, including judicial disciplinary cases, contempt proceedings and lawsuits against the State Bar.

Root Edmonson

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

The Clients' Security Fund of Ohio was created by Supreme Court Rule. The Court appoints a full-time Administrator, who is a licensed attorney, to oversee the Fund's operations. The Administrator is a full-time employee of the Supreme Court of Ohio who spends 100% of his/her time overseeing the Clients' Security Fund. Ann, please let me know if you would like any additional information.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

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

Hi: Neither New Hampshire nor Rhode Island have staff counsel. In Rhode Island, Helen McDonald, Executive Director, handles the administration aspect of things including claim intake. However the attorney members of the fund evaluate and decide claims. In New Hampshire, Tom Manter, a Bar Staff member handles claim intake and the administrative aspect of things with the attorney members of the fund evaluating, hearing, and deciding claims. Regards: John Bomster member RI and NH Funds.

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

In La., we do not have any full time employees for the fund. I serve as the staff liaison to our committee/fund. My work with the fund is part-time. My secretary also works with the fund part-time. We have a foundation that has financial oversight for the fund and I serve as the staff liaison for the foundation.

I am responsible for the administration of the 2 diversion programs in La. I also serve as the staff liaison for the following committees: Mentoring, Multijurisdictional Practice, Ethics 2000, Alcohol and Drug Abuse, Committee on Codes of Lawyer and Judicial Conduct and Practice Assistance. The following committees and programs also fall under my dept: CLE, Ethics Advisory Service, Lawyer Advertising Advisory Service, Fee Arbitration Program and the Opinion Service.

I will be happy to answer any questions or provide additional information.

Cheri Cotogno Grodsky
Director of Professional Programs/Practice Assistance Counsel
Louisiana State Bar Association