

# THE NCPO *e*-FORUM

## A COLLECTION OF INTERNET TOPICS

2005

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](mailto:webmaster@ncpo.org).



**Applications for Reimbursement** ..... [3](#)

**Assessment on Inactive Attorneys** ..... [4](#)

**Benchmarks**..... [8](#)

**Bankruptcy a Stay to Fund Proceedings?**..... [9](#)

**Compelling Assistance**..... [15](#)

**Conversions v. Failure to Provide “Useful Services”**..... [18](#)

**Partner or Associate As Ineligible Claimant** ..... [21](#)

**OPEN RECORDS** ..... [23](#)

**Restitution Prior to Readmission**..... [26](#)

**Obtaining Restitution**..... [32](#)

**Payouts v. Unreimbursed Losses** ..... [38](#)

**Order in which Claims are Presented** ..... [41](#)

**Diminished Capacity (Age)**..... [46](#)

**Payments to Third Parties**..... [50](#)

**Is Your Fund Audited?**..... [53](#)

**Private Counsel To Assist Fund?**..... [58](#)

**Pro Hac Vice**..... [62](#)

**Sanction For Failure to Pay Assessment**..... [63](#)

**Day Trading Lawyers** ..... [68](#)

**Meaning of “Arose Out Of”?**..... [69](#)

## Applications for Reimbursement

Dear colleagues: it is time for me to review/revise our Fund's application for reimbursement. Rather than reinvent the wheel (which would probably be square) I wonder if you might share your application forms with me. Electronic docs or links to websites would be great. Thanks in advance.

Sylvia E. Stevens  
Oregon State Bar

---

California CSF Application Form:

[http://calbar.ca.gov/calbar/pdfs/CSF/CSF\\_Application.pdf](http://calbar.ca.gov/calbar/pdfs/CSF/CSF_Application.pdf)

Matt Zawol, CA

---

Sylvia,

Ohio's Application for Reimbursement can be found at [www.sconet.state.oh.us/client\\_security/](http://www.sconet.state.oh.us/client_security/).

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio

---

The New Hampshire Form, together with the Court Rule and approved regulations can be found at [nhbar.org](http://nhbar.org). We started from scratch a few years back after surveying, and borrowing, from other jurisdictions. The Rhode Island form is likewise found on the Rhode Island Bar web site [rib.com](http://rib.com), but has not been substantially reviews over the years except for an enhanced subrogation clause. John Bomster

---

Sylvia, the Oklahoma form is at [okbar.org](http://okbar.org). Click on Ethics & Prof. then on General Counsel.

Daniel Sprouse, Chair  
Oklahoma Client Security Fund Committee.

## 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

---

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.

---

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

---

Not in Colorado.  
John S. Gleason

---

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.

---

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  
Connecticut Client Security Fund Committee

---

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

---

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.

---

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.

---

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

---

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.

---

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.

---

From: Kris Wenzel [mailto:kwenzel@wisbar.org]  
Sent: Tuesday, January 18, 2005 10:07 AM  
To: Holtaway, John  
Subject: RE: Assessment on Inactive Attorneys

Wisconsin does not receive payment into the fund by inactive members. All others, however, do pay the full mandatory assessment for that fiscal year.

Kris Wenzel

---

From: Paul.WieckII@jb.state.ia.us [mailto:Paul.WieckII@jb.state.ia.us]  
Sent: Monday, January 10, 2005 8:51 AM  
To: Holtaway, John  
Subject: Re: FW: Assessment on Inactive Attorneys

Not in Iowa.

Paul H. Wieck II, Executive Director / Assistant Court Administrator  
Iowa Supreme Court Commissions

---

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]  
Sent: Friday, January 07, 2005 4:35 PM  
To: Holtaway, John  
Subject: Re: FW: Assessment on Inactive Attorneys

nothing charged in maryland at all. they just fill out a form and have it notarized and sent back to us. they can stay on inactive status forever for no charge.

---

From: mtartag@flabar.org [mailto:mtartag@flabar.org]  
Sent: Monday, January 10, 2005 9:04 AM  
To: Holtaway, John  
Subject: Re: FW: Assessment on Inactive Attorneys

Yes in Florida. CSF fee is same for active and inactive ( currently \$20 a year).

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Tuesday, January 11, 2005 1:43 PM  
To: Holtaway, John  
Subject: Re: FW: Assessment on Inactive Attorneys

[Regardless of activity, NJ exempts lawyers in their 1st or 50th or more years of admission. There are lesser payments for those in their 2<sup>nd</sup>, 3rd and 4th years. The following explains activity-based exemptions.] Other than for full-time active duty in the military, NJ has only one, narrowly-defined, exemption from payment of the annual assessment: "retired completely from the practice of law". As defined, the exemption reaches only those not using their legal expertise at all, anywhere in the world. Other than that, there is no "inactive" status, and there are no reduced payments.

This is quite deliberate. The thinking is that when lawyers steal, it besmirches us all; and when the Fund pays, it benefits us all. So, virtually all should pay. For 2005, the full amount (for lawyers in their 5th through 49th years) will be \$182: \$50 to the Fund; \$6 to LAP; and \$126 to Ethics. The Fund conducts the annual assessment under R. 1:28-2.

Ken Bossong

---

## Benchmarks

We are in the process of "benchmarking" here. I am looking for fund timelines for processing claims from beginning to end. Do any of you have established goals for that? Thanks for any information you can provide.

Sylvia E. Stevens  
Senior Asst. General Counsel  
Oregon State Bar

---

Hi Sylvia -

We don't have any timelines provided under statute or policy, but our average time for processing a claim from start to payment is 5-6 months. Given the uniqueness and complexity of many claims, it would be difficult to establish such time limits.

I'd appreciate hearing about any such limits your jurisdiction chooses to set.

Regards,  
Victoria Rees, LSUC

---

## Bankruptcy a Stay to Fund Proceedings?

Has your jurisdiction ever had an attorney claim that the filing of a Chap. 7 or a Chap. 13 bankruptcy petition prohibits the Fund from investigating, adjudicating and/or paying awards to claimants during the duration of the bankruptcy proceedings? If so, please provide information as to the respective arguments and outcome and, if there are any judicial opinions issued by your state's courts or the bankruptcy court regarding this matter.

In PA, we have a subrogated claim after the payment of an award. Additionally, in PA we have a court rule that requires an attorney to repay the Fund, together with 10% interest, should the attorney desire to seek reinstatement.

If anyone has any experience in dealing with this type of issue, I would appreciate hearing from you. If you have not had any experience, but have an opinion, I would also be interest in hearing from you.

Thanks.

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

---

From: Tim O'Sullivan [mailto:tos@nylawfund.org]  
Sent: Tuesday, February 01, 2005 9:45 AM  
To: Holtaway, John  
Subject: Re: Client Protection ListServe - PA BK Question

Kathy:

In New York, only one attorney ever raised the argument that his stay in bankruptcy prevented our Fund from rendering a determination in a claim and paying awards to his clients. We told him to take a hike. We argued that the automatic stay from section 362 of the bankruptcy code applied to proceedings, claims, etc.. against the debtor and that the Fund's proceedings were to reimburse the victim law client so we could to ahead with our claim procedures and payment of awards. The lawyer did not challenge our position and awards were approved.

I believe his bankruptcy case was dismissed so we never got to the issue of the stay applying to our Fund's collection proceedings but I believe the stay would likely apply to a Fund's later restitution efforts against the attorney. I don't want our Fund to delay payment of meritorious claims while some dishonest lawyer goes through lengthy bankruptcy proceedings.

Tim O'S  
NY Fund

---

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]  
Sent: Tuesday, February 01, 2005 11:54 AM  
To: CPR\_LAWYERSFUND@MAIL.ABANET.ORG  
Subject: Re: FW: Client Protection ListServe - PA BK Question

Tim's analysis is the position that Michigan has taken. The decision of whether we pay a claim on a voluntary basis from an independent fund, I think, is solely up to the Fund. It is not an action against the attorney. Now, trying to recoup that payment against the attorney clearly invokes the stay and any attempt to do so would have

to conform with bankruptcy law.

We had one notorious case where the respondent filed Bankruptcy early on in the process. We would have had to file an adversary proceeding and had not yet paid any claims, so we had no subrogation rights at that point in time to pursue. Later, when we paid claims, we knew we had lost our right to pursue collection against the attorney, but went ahead and paid the claims anyway.

Victoria V. Kremiski  
Deputy Regulation Counsel  
State Bar of Michigan

---

Bob Welden <bobw@wsba.org>  
Sent by: Administrators of Lawyers Funds for Client Protection  
<CPR\_LAWYERSFUND@MAIL.ABANET.ORG>  
02/01/2005 03:01 PM

The WSBA has never refused to pay a claim because the lawyer was in bankruptcy. That's a collection issue, and since collection is a pretty "iffy" thing anyway, it ought not control whether or not an eligible claim should be paid.

Bob Welden  
General Counsel  
Washington State Bar Association

---

John, please send this out on Listserv.  
Dan Hendi

Weldon is correct. Get some tea or coffee, read the following, AND TRY NOT FALL ASLEEP!!!

Issue:

Does a Respondent's bankruptcy filing stay the Fund's ability to consider claims by a victim who alleges a loss due to Respondent's dishonest conduct?

Answer:

In New Jersey (and presumably other States), under the NJ Constitution the Supreme Court of NJ is vested with the power to make rules governing the administration of all courts and "shall have jurisdiction over the admission to practice law and the discipline of persons admitted." Article VI, Section II, paragraph 3. This is in essence a police power to govern the practice of law.

Though it has not yet been ruled upon in the context of Client Protection to my knowledge, it would appear that the Sovereign Immunity clause under the 11th Amendment of the US constitution, the Fund's powers to act would be excepted from the Automatic Stay provisions of the Bankruptcy Code Section 362.

In Bankruptcy, under Code section 362 (U.S.C. 11 Section 362 for the diehards), all collections and actions against a debtor are stayed, "except ..." and then the Code Section goes on to list the exceptions to bankruptcy stays. Of particular importance to us is Section 362(b)(4).

Section 362(b)(4) exempts from the bankruptcy stay the "continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power, including the enforcement of a judgment other than a money judgment...." . In language that is clear and unambiguous, therefore, Section 362(b)(4) only limits the government's police and regulatory power to enforce a money judgment outside of the bankruptcy. The government's power to seek entry of a civil penalty judgment for violations of the environmental laws, for example, is not precluded.

In applying pecuniary interest/public policy test to determine whether particular government action falls under police powers exception to automatic stay, court asks whether the governmental proceeding relates principally to the protection of the government's pecuniary interest in debtor's property, rather than to its public policy interest in the general safety and welfare; in the former situation, the action is not exempt from the stay. SEE: In re James R. McAtee v. Florida Bar and Louis Lepp, 162 B.R. 574(1993)

James R. McAtee was a suspended attorney who filed a bankruptcy petition. He then filed for preliminary and injunctive relief against the Florida Bar for which he had petitioned for reinstatement.

The Defendants, as an agency of the supreme court, compromise a governmental unit with the authority to prosecute the debtor for violating the Rules Regulating the Florida Bar. The Court found that Section 362(b)(4) is to be given a narrow construction. Its intent is "to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor.

HOPE THIS HELPS  
Daniel Hendi

---

From: Christopher Blanchard  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Monday, January 31, 2005 3:00 PM  
To: Holtaway, John  
Subject: RE: Client Protection ListServe - PA BK Question

Interestingly enough, CT recently has dealt with that issue. After reviewing the issue with our attorney general's office, we came to the conclusion that the better course for us would be to seek relief from the bankruptcy stay before rendering a decision on the claim. Under our superior court rules, an attorney whose conduct results in the payment of a claim is responsible for restitution to the fund. In addition, we (like most funds) receive an assignment from the claimant of his or her claim against the attorney. Our concern was that a decision by our fund that a claim should be reimbursed had implications for the attorney that could potentially impact the bankruptcy estate- the sense was the better course was to seek relief from the stay, which we obtained.

---

From: Kathy Peifer [mailto:kpeifer@palawfund.com]  
Sent: Monday, January 31, 2005 3:29 PM  
To: Holtaway, John  
Subject: Re: Client Protection ListServe - PA BK Question

Christopher,

When you said the attorney is responsible for restitution, are you able to automatically file a judgment against the attorney or is the attorney required to make restitution as a condition of reinstatement or is there some other mechanism for enforcement of the restitution?

Also, would you please provide me with the case number so that I could pull the docket/documents from PACER.

Thanks.

---

From: Carl Mendenhall [mailto:cmendenhall@wthlaw.net]  
Sent: Monday, January 31, 2005 3:33 PM  
To: Holtaway, John  
Subject: RE: Client Protection ListServe - PA BK Question

In Montana, we recently had an attorney file a bankruptcy petition while matters were pending before our Fund. Our Fund retained bankruptcy counsel who was able to obtain a stipulated relief from the stay so we could proceed to hear the pending claims involving the attorney. We also encouraged the applicants to file proofs of claim to preserve their rights (and our potential subrogation rights) in the bankruptcy process.

After payment of the claims, our Fund's bankruptcy counsel notified the bankruptcy court of the change and of our partial interest in the claims previously filed by the applicants.

Our Fund had also paid a claim before the attorney filed for bankruptcy protection, so we filed our own proof of claim on that matter.

We considered the possibility of objecting to discharge, but based on advice of our counsel determined it wasn't worth the additional cost given the lack of potential recovery even if we prevailed which was questionable because of the "super discharge" in Chapter 13 cases.

Carl Mendenhall  
Chair, Montana Lawyers' Fund for Client Protection Board

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]  
Sent: Monday, January 31, 2005 3:42 PM  
To: Holtaway, John  
Subject: RE: Client Protection ListServe - PA BK Question

In re Weintraub, 283 B.R. 743 and 284 B.R. 680 (8th Cir. 2002) are two decisions arising out of the Bankruptcy Court for the District of Nebraska, and involving the Iowa client protection fund. These cases support the position taken by your respondent attorney. Our AG too has advised us that these cases are good law, at least here in Eighth Circuit territory. We too were advised that we would have to seek permission of the Bankruptcy Court to handle the matter against the respondent who advised us of these decisions. We have not yet done so in the one claim that would be affected; nor have we required any response from the attorney as yet.

That should be In re Wintroub...my bad

---

From: Christopher Blanchard  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Tuesday, February 01, 2005 7:47 AM  
To: Holtaway, John  
Subject: RE: Client Protection ListServe - PA BK Question

Kathy- section 2-80 of our superior court rules provides, "An attorney whose dishonest conduct has resulted in reimbursement to a claimant shall make restitution to the fund including interest and the expense incurred by the fund in processing the claim. An attorney's failure to make satisfactory arrangements for restitution shall be cause for suspension, disbarment, or denial of an application for reinstatement." Section 2-81(a) of the superior court rules provides, "An attorney whose dishonest conduct results in reimbursement to a claimant shall be liable to the fund for restitution; and the client security fund committee may bring such action as it deems advisable to enforce such obligation." Our office has an arrangement with the state's delinquent accounts unit to pursue restitution.

The case is In Re Heidi J. Tuttle, case no. 04-20518 in the bankruptcy court for the District of Connecticut- the adversary proceeding number is 04-02041.

Hope this helps.

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

---

I am a bankruptcy attorney on the Clients' Security Board in Massachusetts. I am not aware of any such claim having been made and don't see how it could be made, save only the situation where an injunction is affirmatively sought by the trustee or chapter 11 debtor (similar to what might be tried in a situation where a party was suing officers, directors, guarantors, etc. and the facts warranted a temporary stay because of the impact on the estate). Bear in mind that the Code and Rules contemplate creditors being able to pursue non-debtor third parties as well to sell their claims. Whether or not restitution can be sought as part of the reinstatement process during or following a bky (and grant of discharge) is of course another question\

Guy B. Moss

---

From: Administrators of Lawyers Funds for Client Protection  
[mailto:CPR\_LAWYERSFUND@MAIL.ABANET.ORG]On Behalf Of Fred Miller  
Sent: Tuesday, February 01, 2005 3:46 PM  
To: CPR\_LAWYERSFUND@MAIL.ABANET.ORG  
Subject: Re: Client Protection ListServe - PA BK Question

Has anyone researched the issue of whether a client protection fund, as an agency or instrumentality of a state government, is subject to the jurisdiction of the US Bankruptcy Court under the 11th Amendment to the US Constitution?

---

Fred: Just ran across a case that may shed some light on the issue (I am sure there are other cases but I found this one quickly.) "A discharge in bankruptcy does not discharge a debtor from any debt to the extent that the

debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit..." Case talks about a state's interest in rehabilitation--restitution, etc. Farmer's Exchange v. Mills, 290 B.R. 822 (Bkrptcy.D.Colo 2003); 11 USC 523(a)(7). The case cites other cases that argue that if the restitution is for a "governmental unit" vs a specific person that it is not dischargeable. We also have a state supreme court case that holds a disbarment-suspension order that provides for restitution is not dischargeable in bankruptcy. The feds have not challenged the holding.

John Gleason

---

## Compelling Assistance

From: Administrators of Lawyers Funds for Client Protection  
[mailto:CPR\_LAWYERSFUND@MAIL.ABANET.ORG] On Behalf Of Dan Abrahams  
Sent: Tuesday, February 15, 2005 1:40 PM  
To: CPR\_LAWYERSFUND@MAIL.ABANET.ORG  
Subject: Compelling Assistance

I have a request for information that goes a bit outside the ordinary scope of client protection, although of course there is often some nexus between discipline investigation and the assessment of compensation claims. We in Ontario currently have no power to compel cooperation in our investigations from people who are not licensed to practise law and, therefore, not under the jurisdiction of our Law Society. The only exception to this would be if we bring an application to our Superior Court. Even then, our authority over what we call "third parties" is questionable.

Our Law Society derives authority from legislation enacted by the government of Ontario. We are thinking of a request to the provincial government to amend the legislation in order to give us authority to require non-lawyers, who have evidence that is relevant to our investigations, to cooperate with our investigators. We also want to be able to require cooperation without a judicial application, because such applications require time, resources and the satisfaction of certain evidentiary thresholds.

Please note that we are not thinking exclusively of unauthorized practice, although that is one aspect of our investigative mandate.

Does anyone have any relevant authority or experience that might help us justify a change in our legislation?

Dan Abrahams, Barrister and Solicitor  
Professional Regulation Counsel  
The Law Society of Upper Canada

---

I'd frame the issue as one of client/public protection, enabling the law society to better protect the public and redress client grievances -- a subpoena power, with provisions for the subpoenaed person to make application to the courts to quash should calm any concerns about law society prosecutors running amuck -- fred

G. Fred Ours

---

With nonlawyers we only have the subpoena power. Don't know how you could compel cooperation short of a subpoena in the US. Our northern neighbors have always been more creative. I will watch with interest.

John S. Gleason

---

Sections 69 and 70 of the Legal Profession Act in Alberta discuss the participation of witnesses, etc. in disciplinary hearings, however we do not have any specifics in the Act regarding cooperation by non-members during an investigational stage of a claim for compensation from the Assurance Fund. Section 70(1) specifically notes that refusal to participate by a witness who has been served with a notice to attend or notice for production

of records, who refuses to cooperate, may be subject to an order from the Court of Queen's Bench requiring them to comply. In my recent memory I cannot recall any discipline matter where we have had to utilize this.

69 and 70 may give you a workable foundation if you are interested in viewing it, should you consider pursuing this - thus far, cooperation by non-members involved in the Assurance Fund process in Alberta has been pretty uniform, with little or no refusal to participate in the investigational stages when asked to do so. Most people just really want their money back, and are willing to provide whatever assistance we might need to have that happen sooner rather than later.

Follow the link below to the LPA at the Law Society's website (scroll to Page 27 of 52):

<http://www.lawsocietyalberta.com/files/lpa.pdf>

I hope this helps.

Jennifer Rothery  
Hearing Coordinator  
Administrator - Custodianships  
The Law Society of Alberta

---

Same in Washington.

Bob Welden  
General Counsel  
Washington State Bar Association

---

Dear Colleagues:

In reading through the question and some of the responses, I believe that the general rule is that absent voluntary cooperation, Court-Ordered discovery is appropriate and perhaps the only way to compel discovery from a nonparty. Court-ordered includes subpoena.

The inquirer is concerned about jurisdiction by the Law Society over non-lawyers/"third parties", but if the Law Society obtains a right to subrogation and has claims assigned onto it after payment, then I believe that the jurisdiction question may not be a problem at all if a similar court rule exists in Ontario as it does in New Jersey regarding pretrial discovery. In New Jersey the Fund itself has subpoena power, but there is also a mechanism by way of Court Rule 4:11-1, cited below, that would allow us to obtain discovery from nonparty even if the Fund subpoena power did not exist. That is, if discovery were sought in contemplation of future litigation and to preserve evidence for future trial.

But before you look at the Rule below and determine whether Ontario has a similar rule or statute, if you want to get voluntary cooperation, you want to determine why nonparty do not want to cooperate with you in the first place. In my experience, there are generally two reasons: apathy and/or fear (fear of bodily harm, economic repercussions, being labeled a snitch, and even fear of speaking to the "government" - since in the public's eye we are all "one"). Apathy and fear can both work in your favor if the lead counsel or the investigator can assess the witnesses'

motivation on a personal level and address it. Generally, a letter won't do it - but a direct telephone call or visit may. Once you connect, you may be able to go the non-court route. Persistence is the key here to break down the barrier.

#### NJ Court Rule 4:11-1. Before Action

(a) Petition. A person who desires to perpetuate his or her own testimony or that of another person or preserve any evidence or to inspect documents or property or copy documents ... may file a verified petition, seeking an appropriate order, entitled in the petitioner's name, showing: (1) that the petitioner expects to be a party to an action cognizable in a court of this State but is presently unable to bring it or cause it to be brought; (2) the subject matter of such action and the petitioner's interest therein; (3) the facts which the petitioner desires to establish by the proposed testimony or evidence and the reasons for desiring to perpetuate or inspect it; (4) the names or a description of the persons the petitioner expects will be opposing parties and their addresses so far as known; (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each; and (6) the names and addresses of the persons having control or custody of the documents or property to be inspected and a description thereof. ...

(c) Order and Examination. If the court finds that the perpetuation of the testimony or evidence or the inspection may prevent a failure or delay of justice, it shall make an order designating or describing the evidence to be preserved, or the documents or property to be inspected or the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. ...

(d) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or of the state in which it is taken, it may, in accordance with the provisions of R. 4:16-1 and R. 4:16-2, be used in any action between the same parties or their privies involving the same subject matter, which is subsequently brought in any court of this State having cognizance thereof.

Hope this helps.

Dan Hendi

---

## **Conversions v. Failure to Provide "Useful Services"**

The Florida Client Security Fund (FLCSF) currently distinguishes between claims of defalcations by lawyers and claims based upon the failure of a lawyer to provide "useful services". In the latter case, a client may recover up to \$2,500.00 of the fee paid (if the lawyer is no longer in good standing with the Bar).

At my urging, the FLCSF is taking up a proposed amendment of that rule. One possibility is to simply raise the cap from \$2,500.00 to a higher number. Do you have statistics on what other CSF's around the country allow for such claims?

Another possibility is to construct a rule that permits recovery of the full fee paid (limited only by our \$50,000.00 overall cap) when there is evidence that the lawyer is systematically defrauding clients by taking fees without the intent to perform any work. Can you relay how other CSF's deal with the issue of reimbursing clients who paid fees to lawyers who performed no work?

Thanks for your help.

Irwin Gilbert

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]  
Sent: Thursday, June 30, 2005 10:04 AM  
To: Holtaway, John  
Subject: RE: Florida Inquiry - Conversion versus failure to provide services

In Minnesota, Rule 3.02(i)(1) defines dishonest conduct to include "refusal or failure to refund an advance fee when the lawyer performed no work whatever, of an insignificant portion of the services that he or she agreed to perform." There is no separate maximum payment for unearned retainer claims - Minnesota's cap is \$150,000 per claim.

Usually, such claims are "all or nothing." The board does not determine how much the lawyer earned for work actually performed, and thus whether some portion of an advance fee should be refunded. Such claims are referred to fee arbitration, which unfortunately is not mandatory in Minnesota. One exception to the "all or nothing" approach is when the claimant can establish that a particular payment was for specific future services never performed, even though the attorney had earned previous payments.

The board is quite generous in defining what an "insignificant portion" of the work is, depending on the amount of the advance fee - it doesn't take much work to make a fee dispute, as opposed to dishonest conduct, out of a \$500-1000 advance fee, for example. Usually, the board has looked more at the amount of proven work actually done, as opposed to the value the client received from that work, which is more of a malpractice issue.

Attorneys against whom unearned retainer claims are paid are always disbarred or suspended, and the timing of when the lawyer accepted the payment is often a factor - i.e., should the lawyer have known she was about to be suspended such that we can infer that she could not have intended to complete the work? Also, as you suggest, a claim that may be somewhat lacking in proof may be considered if it fits a pattern by the particular lawyer of taking fees and not performing any services.

Marty Cole

---

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]  
Sent: Thursday, June 30, 2005 10:44 AM  
To: Holtaway, John  
Subject: RE: Florida Inquiry - Conversion versus failure to provide services

In California a client may recover the full fee paid up to our \$50,000 cap if the attorney performed no work whatever or only an insignificant portion of the work such that the attorney may be regarded as having lacked the intention of performing the work when payment was received. Most often the evidence supporting these cases involves attorneys with a pattern of taking fees and performing little or no work or as you have stated attorneys who are systematically defrauding clients by taking fees and failing to perform. For the most part, the attorneys involved have resigned with charges pending or are disbarred.

---

From: Karen O'Toole [mailto:k.otoole@massbbo.org]  
Sent: Thursday, June 30, 2005 10:50 AM  
To: Holtaway, John  
Subject: RE: Florida Inquiry - Conversion versus failure to provide services

In Massachusetts, the Board must have evidence presented by claimant that lawyer engaged in dishonest conduct. It is the failure to return an unearned fee that is deemed to be dishonest conduct. Where there is evidence that the lawyer performed no work or minimal work, the Board usually makes an award in the full amount of the fee paid after examining the usual criteria - an attorney-client relationship, contract for LEGAL services, and payment of money by the client to the lawyer.

Where there is evidence of some work performed, the Board will apply a quantum meruit analysis and make an award of the portion of the fee that was not earned. The Board looks hard at the value of the services, i.e. were the services rendered necessary? Did they advance the client's case? Was lawyer churning the case? Was the lawyer facing disciplinary charges and was suspension or disbarment imminent?

Where the usefulness of the services is only questionable (as opposed to clearly poor quality), the claim may be more of a fee disputes and the Board usually does not exercise jurisdiction over fee disputes.

Karen O'Toole

---

In Ohio, the acceptance and retention of a fee and subsequent failure to provide the legal services requested is considered dishonest conduct, and assuming the other eligibility criteria are met, the client is eligible for reimbursement of the fee up to our maximum award amount of \$75,000. In claims where the attorney has provided a portion of the services requested, we apply a significant/insignificant analysis in determining whether the claim is eligible.

Unearned fee claims constitute the largest category of claims received and reimbursed in Ohio.

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio  
Ohio Judicial Center

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Thursday, June 30, 2005 6:25 PM  
To: Holtaway, John  
Subject: Re: Florida Inquiry - Conversion versus failure to provide services

Irwin,

These are among the most difficult claims to decide. I attach a copy of a piece written for the Webb a couple of years ago on this topic. We've had "hot shot" lawyers go bad who took \$40,000 retainers to open a file. Most are relatively small, however. Dishonesty is dishonesty, and losses from this kind of abuse of trust are no more palatable to victims than any other, in my experience.

Ken Bossong

---

From: Office of Disciplinary Counsel [mailto:odc@lava.net]  
Sent: Wednesday, July 13, 2005 4:05 PM  
To: Holtaway, John  
Subject: Re: Florida Inquiry - Conversion versus failure to provide services

Our cap per claimant is \$50,000, no matter the type of claim. If no work was performed, the entire fee is awarded (within the cap).

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

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Friday, July 01, 2005 9:21 AM  
To: Holtaway, John  
Subject: Re: FW: Florida Inquiry - Conversion versus failure to provide services

Re: It is the failure to return an unearned fee that is deemed to be dishonest conduct.

Agree completely, Karen. RPC 1.16 (d).  
Ken

## **Partner or Associate As Ineligible Claimant**

Under the D.C. Fund Rules of Procedure, a "partner, associate or employee of the lawyer causing the loss" is ineligible to apply to the Fund for reimbursement. For other Funds that have a similar rule, have you interpreted "partner, associate or employee of the lawyer," to mean within a law firm only, or within any business relationship?

Unlike the ABA Model Rules, the D.C. Fund does not have an extreme hardship exception to its classes of ineligible applicants.

C. Freudenburg  
Director, Attorney/Client Relations Program District of Columbia Bar

---

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]  
Sent: Friday, April 08, 2005 11:37 AM  
To: Holtaway, John  
Subject: RE: Inquiry from the District of Columbia-Help Needed

In Calif the rule is interpreted as within any business relationship

---

Same in Washington.

Except I should add that our Lawyers' Fund for Client Protection Committee members have discretion to approve or deny any application for good cause.

Bob Welden  
General Counsel  
Washington State Bar Association

---

From: Robin Lawnichak [mailto:RLAWNICHAK@mail.michbar.org]  
Sent: Friday, April 08, 2005 3:21 PM  
To: Holtaway, John  
Subject: Re: FW: Inquiry from the District of Columbia-Help Needed

In Michigan the rule is interpreted as within any business relationship; however, Michigan does have an extreme hardship or unusual circumstances rule.

---

From: Kathy Peifer [mailto:kpeifer@palawfund.com]  
Sent: Friday, April 08, 2005 12:58 PM  
To: Holtaway, John  
Subject: Re: Inquiry from the District of Columbia-Help Needed

I believe the Board of the PA Fund would apply the rule to any business relationship. They would likely look at the business relationship of an associate and/or employee of the non-legal business and ask where was the

attorney/client relationship??

Having said that, each claim would be adjudicated on its own merits and if the attorney was acting as the attorney for the non-lawyer business and the claimant was an "inactive" business associate/partner, etc., the Board might consider that type of claim.

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

---

We deleted the rule prohibiting payments to family, partners, etc. some years ago and decided to address each claim on its merits without artificial barriers. That said, we have never paid a family member or business associate. I would argue for a narrow reading since "partners" and "associates" have a distinct connotation in law and "employee" in that context has to mean someone who works in the lawyer's office. Just my 2 cents.

Correction: I didn't say that last part right. I meant read it broadly. No one in business with a defalcating lawyer should be allowed to recover unless they are actually innocent and not legally responsible for the lawyer's misconduct (as a partner might be). We have had two cases in recent years where a lawyer in a firm stole from a client. We have declined to pay until the client pursues the law firm which, in each case, paid up.

Sylvia E. Stevens  
Senior Asst. General Counsel  
Oregon State Bar

---

Ohio would not limit its language to law firms only, but would probably include other business relationships. Our rule, however, gives a great deal of discretion to the Board in determining which claims merit reimbursement from the Fund.

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio  
Ohio Judicial Center

---

## OPEN RECORDS

From: Kris Wenzel [mailto:kwenzel@wisbar.org]  
Sent: Wednesday, October 26, 2005 2:22 PM  
To: Holtaway, John  
Subject: Listserve Query

The Wisconsin Fund has been presented with an open records request from a daily newspaper pursuant to Ch. 19 of the Wisconsin Open Records law and the Fund's confidentiality rule. The reporter is requesting copies of all settled claims paid out of the Wisconsin Lawyers' Fund for Client Protection dating back to Jan. 1, 2003. This request includes but is not limited to copies of the original claims, the amounts approved for payment and the identities of the attorneys against whom the claims were filed. The reporter is also pushing for the names of the clients, which we won't do. We have also denied his request for copies of the claims because of the nature of information provided in the form. Unfortunately, our confidentiality rule is very vague. Our petition to adopt the ABA Model Rule on confidentiality won't be heard until spring 2006.

While the committee recognizes that our fund's confidentiality rule does not compel us to release information, we are currently seeking an opinion from the Director of State Courts as to whether or not the Fund, as an arm of the Wisconsin Supreme Court, is subject to the Open Records Law. That request has now been referred to our state attorney general's office for opinion. No one will say yes or no.

The committee is also more than willing to provide information to the paper - but the reporter is also on a fishing trip and doesn't know what he is looking for until he finds it.....there goes that control issue....

The fund does not believe we are subject to the law but do not want to be challenged in a court - we are also asking if the Supreme Court will provide legal counsel should we be challenged. We have provided information on attorneys we have paid against, dollars paid and numbers of claims, but at this point that is all.

My question - has any other fund found itself to be challenged on its jurisdiction's open records law? If yes, how did you handle it?

Thanks,  
Kris Wenzel  
WLFCP Administrator

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Wednesday, October 26, 2005 3:43 PM  
To: Holtaway, John  
Subject: Re: FW: Listserve Query

Kris,  
NJ's OPRA specifically excludes the Judiciary; no one seriously questions that the Fund is an entity of the Supreme Court. That has ended the discussion, so far. Following Court rule, we would be pretty confident of

prevailing in litigation. We provide the same info you do, and nothing on claims that are pending or rejected. We do also provide a generic description of the kind of claim paid. The furthest I've gone on a couple of occasions is to ask a few claimants if they'd be willing to talk to a reporter.  
Ken

---

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]  
Sent: Wednesday, October 26, 2005 3:06 PM  
To: Holtaway, John  
Subject: Re: FW: Listserve Query

kris, the maryland fund is there right now. we have a request for our records including my pay, diversity policies within the office, money paid to rent space for meetings, money paid as expenses to fund the fund, etc. the person asking is a disbarred and disgruntled attorney who is also on a fishing expedition. at the present time what we have discovered is that our trustees feel that we do come under the freedom of information act and must supply this man with most of what he has requested. we will be charging him reasonable fees for my time to gather the information (less 2 hours free time) along with copying charges, etc. he must pay most of this up front. the ag's office in maryland also feels that we fall under the freedom of information act. we are also in the process of writing a policy as to charges for this, etc. anything further let me know.

janet moss  
administrator

---

From: Ann Hetzler [mailto:Ann.Hetzler@staff.azbar.org]  
Sent: Thursday, October 27, 2005 4:30 PM  
To: Holtaway, John  
Cc: John Furlong; jbalentine@vanosteen.com; gmtsturr@omlaw.com; lsuciu@lwsllaw.net; mark.rubin@azbar.org; mariahoffman@lmsn.com  
Subject: RE: Listserve Query

Pursuant to Rule 16 of the State Bar of Arizona Client Protection Fund Declaration of Trust regarding Confidentiality, the rule states:

A. Claims, proceedings, deliberations, and reports involving claims for reimbursement are confidential, except as provided below. After payment of the reimbursement, the Trustees may publicize the nature of the claim, the amount of reimbursement, and the name of the lawyer. The name and the address of the claimant shall not be publicized by the Trustees unless specific permission has been granted by the claimant.

B. This Rule shall not be construed to deny access to relevant information by professional discipline agencies or other law enforcement authorities as the Trustees may authorize, or the release of statistical information that does not disclose the identity of the claimants.

Please note that this language is very similar to the ABA Model Rule on Confidentiality as it relates to Client Proteciton Funds.

---

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

Sent: Wednesday, October 26, 2005 3:02 PM

To: Holtaway, John

Subject: RE: Listserve Query

In Massachusetts, there has not been a serious challenge. Occasionally someone contacts and asks about obtaining copies of claims. I explain the following: The Clients Security Board is not a public agency and is therefore not subject to a Freedom of Information Act request. Public records are those received by officers and employees of the executive branch of govt. or by an authority established by the Legislature. The Supreme Judicial Court established the Board and appoints its members. In addition, the rules of the Board specifically state that all applications are confidential.

Hope this helps a bit. Good luck.

Karen O'Toole

---

## Restitution Prior to Readmission

From: Jackie Rogers [mailto:JRogers@mebaroverseers.org]  
Sent: Friday, September 02, 2005 7:43 PM  
To: Holtaway, John  
Subject: Reinstated/Readmitted

Hi John,

Would you by chance have a sense of how many states have rules similar to the one adopted by the Louisiana Supreme Court last March which require lawyers to reimburse monies paid by the LFCP funds as a result of their misuse of money prior to readmission? I will be discussing this with the Board of Overseers at their next meeting on September 14th.

Jackie Rogers  
Maine Board of Overseers of the Bar

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Wednesday, September 07, 2005 9:17 AM  
To: Holtaway, John  
Subject: Re: FW: Reinstated/Readmitted

There are two points in NJ:

(1) Re: what must be in the petition seeking reinstatement -

1:20-21. Reinstatement After Final Discipline

(f) Contents of Petition. The petitioner shall provide a certified petition for reinstatement setting forth all material facts on which the petitioner relies to establish fitness to resume the practice of law. The petition shall in the discretion of the Board considering the nature of the disciplinary offense contain, in correlatively numbered paragraphs, the following information:

...

(11) a statement of restitution made for any and all obligations to all former clients and the Lawyers' Fund for Client Protection and the source and amount of funds used for this purpose;

and

(2) Re: consideration of the petition -

(i) Consideration of Petition for Reinstatement. No petition for reinstatement shall be considered by the Board unless:

...

(C) all orders for restitution have been paid;

(D) the respondent has reimbursed or has reached agreement in writing with the Lawyers' Fund for Client Protection to reimburse it in full for all sums paid or authorized to be paid as a result of the respondent's conduct;

Note that the final discipline referred to here is most likely to be a term of suspension. Disbarment is regarded as

permanent. Also, the Fund is not going to "agree in writing" to anything other than immediate, full payment in all but the most unusual circumstances. No lawyer should be practicing, owing the Fund for claims paid. Hope this helps, Jackie. You should consider turning the results of your poll into a brief article for the Client Protection Webb, NCPO's newsletter.

Ken Bossong

---

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

Sent: Tuesday, September 06, 2005 12:18 PM

To: Holtaway, John

Subject: Re: FW: Reinstated/Readmitted

Maryland has a regulation i.9 which states that any lawyer who seeks reinstatement to good standing after suspension, disbarment or decertification shall pay to the fund as a precondition to reinstatement to good standing all sums paid out by the fund as a result of such lawyer's defalcation and all sums due the fund for its current fiscal year and in addition such amount as the trustees by resolution fix from time to time as the estimated cost to the fund of handling processing and recording the requested reinstatement.....

---

PA has a similar rule, however, the former attorney must repay the Fund all amounts paid by the Fund to the former clients, together with 10% interest per annum before the former attorney is permitted to petition for reinstatement. (Pa.R.D.E. 531).

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

---

NC requires that a suspended or a disbarred lawyer reimburse the CSF for any claims paid against the lawyer before being eligible for reinstatement. See 27 NCAC 1B, Sec. .0125.

Root Edmonson

---

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

Sent: Tuesday, September 06, 2005 9:31 AM

To: Holtaway, John

Subject: Re: Reinstated/Readmitted

Pennsylvania has a rule requiring restitution, plus interest at the rate of 10% per annum, before a petition for reinstatement may be filed. The rule reads as follows:

Pa.R.D.E. 531 Restitution a condition for reinstatement.

The Board shall file with the Supreme Court a list containing the names of all formerly admitted attorneys with respect to the dishonest conduct of which the Board has made unrecovered disbursements from the fund. No person will be reinstated by the Supreme Court under Rule 218 (relating to reinstatement), Rule 219(h) (relating to periodic assessment of attorneys; voluntary inactive status), Rule 301(h)(relating to proceedings where an attorney is declared to be incompetent or is alleged to be incapacitated) or Pennsylvania Rules of Continuing Legal

Education, Rule 111(b) (relating to noncompliance with continuing legal education rules) until the fund has been repaid in full, plus 10% per annum interest, for all disbursements made from the fund with respect to the dishonest conduct of such person.

Please let me know if you have any questions.

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

---

From: Donahue, Eileen [mailto:edonahue@iardc.org]  
Sent: Tuesday, September 06, 2005 9:35 AM  
To: Holtaway, John  
Subject: RE: Reinstated/Readmitted

In Illinois, Supreme Court Rule 780(e) requires repayment of Client Protection claims before the end of a period of suspension or probation or before filing a petition for reinstatement (in cases of disbarment or suspension until further order). Here's the text of the rule:

(e) A lawyer whose dishonest conduct results in reimbursement to a claimant shall be liable to the Fund for restitution. Disciplinary orders imposing suspension or probation shall include a provision requiring the disciplined attorney to reimburse the Disciplinary Fund for any Client Protection payments arising from his or her conduct prior to the termination of the period of suspension or probation. Prior to filing a petition for reinstatement, a petitioner shall reimburse the Disciplinary Fund for all Client Protection payments arising from petitioner's conduct. The Petition must be accompanied by a statement from the Administrator indicating that all such payments have been made.

---

From: Kris Wenzel [mailto:kwenzel@wisbar.org]  
Sent: Tuesday, September 06, 2005 9:38 AM  
To: Holtaway, John  
Subject: RE: Reinstated/Readmitted

The Wisconsin Supreme Court (our highest court) approved the Fund's petition to "formally" state the requirement that the attorney pay back the Fund. The new language to our SCR 22.29 (which became effective January 1 of this year)states:

SCR 22.29        Petition for reinstatement.

(4) The petition for reinstatement shall show all of the following: (4m) The petitioner has made restitution to or settled all claims of persons injured or harmed by petitioner's misconduct, including reimbursement to the Wisconsin lawyers' fund for client protection for all payments made from that fund, or, if not, the petitioner's explanation of the failure or inability to do so.

#### COMMENT

An attorney seeking reinstatement of a suspended or revoked license is required to reimburse the Fund for any payments made to injured clients as a result of the attorney's conduct, or to explain why this is not possible. Fund payment to a client signifies that the lawyer's dishonest conduct caused a loss that was restored through an assessment against all members of the bar. The attorney responsible should be required to reimburse the Fund

before resuming practice. In cases where the attorney demonstrates that he or she cannot make full restitution to injured clients and to the Fund, the Fund will defer its right to reimbursement until the clients have been made whole.

Kris Wenzel  
Administrator  
Wisconsin Lawyers' Fund for Client Protection

---

From: Bob Welden [mailto:bobw@wsba.org]  
Sent: Tuesday, September 06, 2005 10:56 AM  
To: Holtaway, John  
Subject: RE: Reinstated/Readmitted

Washington does:

Admission to Practice Rule 21.1:

(c) Payment of Obligations. No disbarred lawyer may file a petition for reinstatement until costs and expenses assessed pursuant to these rules, and restitution ordered as provided herein, have been paid and until amounts paid out of any program maintained by the Bar Association to indemnify clients against losses caused by the conduct of the petitioner have been repaid to the Bar Association, or until periodic payment plans for costs and expenses, restitution and repayment to the indemnity program have been entered into by agreement between the respondent lawyer and disciplinary counsel. A respondent lawyer may seek review by the Chair of the Disciplinary Board of an adverse determination by disciplinary counsel regarding the reasonableness of any such proposed periodic payment plan.

Such review will proceed as directed by the Chair of the Disciplinary Board and the decision of the Chair of the Disciplinary Board is final unless the Chair of the Disciplinary Board determines that the matter should be reviewed by the Disciplinary Board, in which case the Disciplinary Board review will proceed as directed by the Chair and the decision of the Board will be final.

Bob Welden  
General Counsel  
Washington State Bar Association

---

From: Ann Hetzler [mailto:Ann.Hetzler@staff.azbar.org]  
Sent: Tuesday, September 06, 2005 11:12 AM  
To: Holtaway, John  
Subject: RE: Reinstated/Readmitted

Arizona requires that disciplined lawyers reimburse the Client Protection Fund prior to reinstatement. However, in one instance many years ago, the Supreme Court allowed a lawyer to be reinstated and to make scheduled payments to the Fund. The lawyer owed the Fund \$50,000, and because the Court allowed the lawyer to be reinstated without having fully reimbursed the Fund, it required him to purchase a \$50,000 life insurance policy with the Client Protection Fund listed as the beneficiary. This was an unusual occurrence.

---

Ohio's rules require restitution to the CSF of all amounts reimbursed as a result of the petitioner's misconduct.

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio

---

From: Sylvia Stevens [mailto:ssstevens@osbar.org]  
Sent: Tuesday, September 06, 2005 12:24 PM  
To: Holtaway, John  
Subject: RE: Reinstated/Readmitted

Oregon has that rule. It is part of our Bar Rules of Procedure, not the Fund rules.

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]  
Sent: Tuesday, September 06, 2005 12:51 PM  
To: Holtaway, John; JRogers@mebaroverseers.org  
Subject: RE: Reinstated/Readmitted

Yes...Rule 18(e)(4), Rules on Lawyers Professional Responsibility (RLRP)...

---

From: Office of Disciplinary Counsel [mailto:odc@lava.net]  
Sent: Tuesday, September 06, 2005 5:35 PM  
To: Holtaway, John  
Subject: Re: Reinstated/Readmitted

RSCH 2.17(b) - not eligible for reinstatement except upon showing reimbursed, inter alia, the Fund.

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

---

For NH and RI

The New Hampshire Public Protection Fund Rule 800.01 (the Fund is established pursuant to Supreme Court Rule) provides: "Reimbursement by Accused. If an Accused seeks reinstatement to the New Hampshire Bar, the Accused must reimburse the Fund in full as a condition of reinstatement."

The Rhode Island Client Reimbursement Fund is not established by Court Rule, and does not contain a similar provision. However it is the consistent practice of the Supreme Court Disciplinary Counsel request/require/reimbursement to the Fund as a condition of reinstatement.

John Bomster for the New Hampshire and Rhode Island Funds.

---

While she is out of the office, Karen O'Toole asked me to respond to the inquiry with the following information.

Massachusetts has no explicit statutory mandate that a disciplined lawyer petitioning for reinstatement must

reimburse the Clients' Security Fund for the amounts paid out because of the disciplined lawyer's misconduct. Rather, as a pre-condition to "automatic" reinstatement following a short term suspension (fewer than six months and less than one year), Supreme Judicial Court Rule 4:01, Section 18 (1) (a) and (b) require the petitioner to file an affidavit stating (among other things) that he/she "has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct."

Supreme Judicial Court Rule 4:01, Section 18 (4) (d) requires that all other petitions for reinstatement "shall state the extent to which the petitioner has repaid the Clients' Security Board any funds awarded on account of the petitioner's misconduct. . ."

As part of the reinstatement process, Bar Counsel inquires of the Clients' Security Board about awards made and reimbursement received. The Clients Security Board sends a letter to Bar Counsel stating that the Board has awarded \$X and petitioner has reimbursed \$Z. That letter is fact-based and takes no position, pro or con, on the issue of reinstatement. Bar Counsel then customarily argues against reinstatement if the petitioner has not fully reimbursed the Clients' Security Board. The BBO Hearing Committees ruling on the petitions for reinstatement have not been sympathetic to petitioners who have not made full reimbursement. Similarly, the Supreme Judicial Court has not looked with favor on those who have failed to make full reimbursement.

Finally, Supreme Judicial Court Rule 4:01, Section 24 provides: "The court or the Board [Board of Bar Overseers], in its discretion, may order a respondent-lawyer to make restitution to those persons financially injured by his or her conduct and to reimburse the Clients' Security Fund for any payments made on account of misappropriation."

I'll be happy to provide additional information to anyone needing it.

Adam M. Lutynski  
Assistant Board Counsel  
Clients' Security Board

---

## Obtaining Restitution

From: Chris Janku [mailto:cjanku@mobar.org]  
Sent: Monday, June 27, 2005 11:11 AM  
To: Holtaway, John  
Subject: Restitution

The Missouri Bar Client Security Fund is interested in learning how other funds have successfully obtained restitution from attorneys. Are there provisions in the rules that have been particularly helpful? Have outside counsel or debt collection agencies been employed? If so, what are the terms of the arrangements and what legal theories have been successful. Currently the Missouri Bar Client Security Fund obtains restitution if a lawyer applies for reinstatement after suspension or disbarment.

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Friday, July 01, 2005 10:03 AM  
To: Holtaway, John  
Subject: Re: FW: Restitution

Chris,

Pursuit of restitution is a business decision, and I am reluctant to tell anyone how to spend their money. I will say that going all out to recover for the Fund is a decision the NJ Trustees have never regretted. I should add that with the Wilson Doctrine (automatic, permanent disbarment for stealing), we get virtually no money from lawyers being reinstated.

Here is are some thoughts:

1. Wait until you are finished with all claims against a respondent (unless Statute of Limitations is looming) then get a judgement for all at once.
2. Make sure judgement is docketed effectively. Surprisingly often, property is sold in which a respondent has an interest. Disbarred lawyers inherit, and occasionally win a lottery. Every now and then, they are remorseful and are looking to make it right.
3. Send a demand letter. Remember the story told at the recent Forum by Lisa Watkins of PA where a demand letter delivered to the home of a respondent's former spouse resulted in a large check. You never know. Act interested; respondents might not know how limited your resources are. With some success, they will be less limited.
4. Pick your spots with collateral sources. Banks negotiating checks bearing forged indorsements are liable in conversion under the UCC. If forgery is proven and the check is large enough, it has to be worth pursuing, somehow.
5. Encourage prosecutors to get restitution ordered for all victims in all sentences.

Best of luck,  
Ken

## Subrogation Approaches

From: Holtaway, John [mailto:JHoltaway@staff.abanet.org]  
Sent: Wednesday, April 20, 2005 7:00 AM  
To: CPR\_LAWYERSFUND@MAIL.ABANET.ORG  
Subject: Subrogation Approaches

The Michigan Fund encountered three Respondents in the last 3-4 years whose approved claims exceeded the aggregate maximum payout with many of the claimants receiving less than their total loss as determined by the Fund. (Note: these claims are held for two years prior to a determination being made in an effort to collect all the claims before pro-ration.) Historically, the Michigan Fund has, except in rare instances, required that subrogation be taken at the beginning. In other words, that once the subrogation agreement has been executed that any funds being paid to Claimant by Respondent or any other source connected to Claimant's claim would be directed to the Fund regardless of amount of loss recognized by the Fund. We have encountered some instances where Respondent was ordered to pay criminal restitution and is slowly doing so; however, for those claimants who lost more than the Fund approved, taking subrogation at the beginning takes on the appearance of the Fund competing with the Claimant for the monies. The Michigan Fund would like to know how other Funds are approaching this issue.

When does your Fund take its subrogation rights? Does your subrogation approach differ depending on the source of subrogation, i.e. criminal restitution v. lawsuit proceeds?

---

From: Sylvia Stevens [mailto:sstevens@osbar.org]  
Sent: Wednesday, April 20, 2005 9:56 AM  
To: Holtaway, John  
Subject: RE: Subrogation Approaches

In Oregon, our subrogation rights are co-extensive with the amount we pay and we have first rights to monies recovered by the claimant from any source until we have recovered what we paid (plus interest). We have waived that requirement only once to my knowledge, in a case of severe hardship.

---

From: Kris Wenzel [mailto:kwenzel@wisbar.org]  
Sent: Wednesday, April 20, 2005 10:13 AM  
To: Holtaway, John  
Subject: RE: Subrogation Approaches

Wisconsin is on the front end for subrogation, however, we also did waive our rights in a case of extreme hardship, with the dishonest attorney making payments directly to the client. But, the Wisconsin Supreme Court has directed the fund to do all it can to make certain the client is made whole first. Interestingly, the Supreme Court Rule does not state that. The fund will be presenting a petition to revise the rule this fall to reflect that efforts will be made to determine if the client has been made whole before the fund exercises its subrogation rights.

Kris Wenzel

---

From: Daniel.Hendi@judiciary.state.nj.us  
[mailto:Daniel.Hendi@judiciary.state.nj.us]  
Sent: Wednesday, April 20, 2005 1:21 PM  
To: Holtaway, John  
Subject: Re: FW: Subrogation Approaches

The New Jersey approach, to avoid exactly the issues you raise, is to allow a Claimant to collect first AS TO PRINCIPAL LOSS ONLY. Because consequential losses can "pad" a loss and are sometimes arbitrary (interest, lawyers' fees, additional taxes, opportunity costs, etc.), the cut off is the amount of the actual principal that the Trustees could not reimburse due to caps.

The distinction is clear. If a claimant had a \$100,000 loss and the Fund cap is \$75,000, the Trustees would allow the Claimant to collect the first \$25,000 in subrogation. Thereafter, we collect our principal losses due to all claims we paid out to others. Our Trustees recognize the losses suffered by victims who trusted lawyers and they want to do what they can to help those victims get back on their feet. One of the things they found they can do is to take a back seat to subrogation until the Claimant is made whole as to its principal loss.

Dan Hendi

---

From: Christopher Blanchard  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Wednesday, June 29, 2005 10:16 AM  
To: Holtaway, John  
Subject: RE: Restitution

Chris- Connecticut currently has an arrangement with our Department of Administrative Services to pursue restitution as a delinquent account. They employ a collection agency to pursue restitution, and if the collection agency is unsuccessful, the Attorney General's office may be used to pursue a civil action. Generally speaking, our office has been most successful in receiving restitution when restitution to the victim has been made part of an order in sentencing as part of the criminal proceeding.

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

---

In Arizona, if a disciplined lawyer applies for reinstatement, he/she must compensate the Fund for the total amount that it paid out before becoming reinstated. If disciplined lawyers are reinstated, they do reimburse the Fund. In one instance, the Fund paid out a total of \$50,000 in claims against one lawyer. The lawyer applied for reinstatement. An exception was made in this instance and he was not required to pay back all of the money at one time, but did it in increments. He was also required to take out a \$50,000 life insurance policy with the Fund as the beneficiary in case something happened to him before he repaid the Fund. Fortunately for him, he is ok and has paid back the \$50,000 to the Fund.

The Arizona Fund has consulted with a lawyer regarding collection efforts, but has not taken this sort of action yet. We paid out over \$90,000 on one lawyer over the last couple of years. She stole almost \$400,000 from

former clients and bought things with their money. She has a house in her son's name. It is a dilemma - should the Fund spend money hiring a lawyer to pursue collection efforts, when it might not do any good.

Ann Hetzler

---

The Florida Client Security Fund generally does not file suit against attorneys for restitution.

Recovery is often arranged as either a condition of reinstatement to the Bar or a condition of a criminal sentence.

The rate of recovery is not particularly good. Some lawyers are deceased. Many do not seek reinstatement. Little is done to punish defendants who fail to pay restitution.

Irwin Gilbert

---

From: Bob Welden [mailto:bobw@wsba.org]

Sent: Wednesday, June 29, 2005 5:38 PM

To: Holtaway, John

Subject: RE: Restitution

Chris -- Like others who have responded our main restitution is gained as a consequence of criminal sentencing and disbarred lawyers seeking reinstatement. Historically, we get about 10% of our money back.

We have tried both collection agencies and private lawyers. The success rate was dismal. The collection agency gave up, and one of the lawyers managed to recover \$5,000 from 1 lawyer.

Bob Welden

General Counsel

Washington State Bar Association

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]

Sent: Thursday, June 30, 2005 9:10 AM

To: Holtaway, John

Subject: RE: Restitution

In Minnesota, we are fairly aggressive in pursuing our subrogation rights. We are fortunate to have the services of the Attorney General's office to handle our civil matters. We do not pay any fees for their services, which allows us to take steps that a private collection lawyer would not do, since the return would not be sufficient. We are responsible for costs and expenses only. As a state agency, we are not authorized to hire private counsel.

We are able to file revenue recapture claims with the Department of Revenue, which will direct to us any tax refunds or lottery winnings the attorney may receive (no lottery winners yet). We routinely obtain judgments or take assignments if the claimant already has obtained a judgment - the AG often waits and aggregates several claims into one civil case against the attorney. We enter into payment plans either after judgment or with a confession of judgment that we file only if payments are not made. We have very rarely sued a third-party such

as a lawyer's partners or a bank (we have not had great success in the area of forged endorsements - some states have better case law precedents). Who We follow respondents into bankruptcy to bring adversary proceedings to prevent discharge (straight-forward theft is not the problem, but unearned retainers can be).

A surprising source in recent years has come when we seek to renew judgments after ten years - a couple of respondents we had given up pursuing wanted to settle up.

We too have a requirement of restitution as part of reinstatement, but that usually only generates small amounts (the biggest thieves rarely seek to come back). Criminal restitution orders are also common but quite frankly probation officers are not always interested in pushing their probationers very hard. We've had far more success getting involved in criminal matters before sentencing, when the defendant attorney has far more incentive to be cooperative in an effort to get a more favorable pre-sentence investigation report. We have a good relationship with the local US Attorney's office, who have made use of our investigation and findings (disciplinary and client protection) to prosecute in several matters, and then is willing to push the attorney-defendant to pay us back. We have averaged approx. \$45,000/year in repayments; \$736,000 in sixteen years (14%).

Marty Cole

---

As is probably true in most states, attorneys seeking to return to practice in Ohio are required to reimburse the CSF for any amounts reimbursed to former clients. That accounts for the largest portion of our restitution proceeds received each year. We also have a small measure of success where restitution is required as part of a criminal sanction. Beyond that, the results are varied. The State Attorney General's Office pursues our claims for restitution. They get 9% of any amount recovered. Early on, the fund employed private collection counsel, and the fee was usually around 30-40 %.

On average, we collect between \$30,000 - \$40,000 in restitution each fiscal year.

As a general rule, Ohio favors a policy of full reimbursement to the claimant prior to enforcing the Fund's subrogation rights. We do consider the source of the restitution payment, i.e. where restitution has been ordered in a criminal proceeding we usually make certain that the probation department is aware that funds are also owed to the claimant/victim.

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio  
Ohio Judicial Center

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Thursday, April 21, 2005 4:00 PM  
To: Holtaway, John  
Subject: Re: Subrogation Approaches

Re: taking subrogation at the beginning takes on the appearance of the Fund competing with the Claimant for the monies. It takes on the reality of the Fund competing with the Claimant, the more I think about it. Given that per claimant and aggregate limitations are artificial impediments to the Fund's fulfilling its mission and, at best, necessary evils, the argument for having Claimants recover first is compelling.

This is true even if it's the Fund's own considerable efforts that produce the recovery. It's tempting to want to enhance your subrogation receipts; the suggestion is to keep another statistic, one to be proud of.

Ken Bossong

---

The Rhode Island and New Hampshire Fund rules contain virtually identical provisions and require a subrogation/assignment as a condition precedent to reimbursement. All sums recovered are paid first to the Fund up to the amount of the reimbursement plus the entirety of any expenses and costs, including attorney fees, incurred by the Fund in such action. Qualifying language states that at a minimum, the agreement shall transfer to the kFund, to the extent of the reimbursement, all of the claimant's claims and demands and rights to sue, the all persons and entities who may be liable on account of the dishonest acts, and losses with respect thereto, described in the claim.

No distinction is made between criminal restitution or other sources of recover, though because of the Rule on Exhaustion, any criminal restitution received by the claimant would go to reduce the net recovery/reimbursement.

John Bomster - member RI and NH Funds.

---

## **Payouts v. Unreimbursed Losses**

We at the Illinois Fund are working up information to present to our Court in support of a change in our funding mechanism, specifically we are looking for an annual assessment for the Fund. One key thing our Commission has been looking at is our payout in relation to our unreimbursed losses, and they are interested in how we compare with other states. Can you tell me:

- 1) The percentage of claims your Fund reimbursed in full in each of the last 5 years;
- 2) The dollar amount your Fund paid out in each of those 5 years, and
- 3) The dollar amount of otherwise eligible losses that went unreimbursed due to caps and lack of sufficient funding in each of those 5 years?

I hope I am not asking too much. Anything you can tell me would help.

Thanks so much.

Eileen Donahue  
Illinois

---

Since the Washington Supreme Court imposed a mandatory assessment for the Fund in 1994, we have been increasingly healthy. Since 1994, we have never had a per lawyer cap, and the per claim cap has been increased from \$30,000 in 1994 to \$50,000 in 2001 to \$75,000 this year.

In that time, we've had 9 approved claims that exceeded the \$30,000 cap, and 3 that exceeded the \$50,000 cap.

Bob Welden  
General Counsel  
Washington State Bar Association

---

Eileen, Oregon's experience is similar to Washington's, although we have had an annual assessment since the beginning. We also maintain a reserve of at least \$500K. Our assessment has been down to \$5 for the past four years because claims were down and the reserve was approaching \$1 million. It is down now because of a spate of larger claims.

In our 30+ years of operation, there was only one (many years ago) where the Fund was unable to pay all claims in full (up to the amount of the cap) and those claims were paid in the following year.

Our payment history for the past five years:

2004 \$55,743  
2003 \$12,673  
2002 \$98,664  
2001 \$53,209  
2000 \$94,068

(We are already over \$200K for 2005 with more coming, but I think this is a bit of an anomaly.)

During each of those years, there were never more than two or three claims that exceeded our \$50K per claim cap. I don't have exact figures handy but I would guess that the unreimbursed losses during the five year period 2000-2004 was less than \$100,000.

Sylvia Stevens  
Oregon State Bar

---

In Massachusetts the data are:

2005: awarded - \$2,212,027.19 Claim amounts: - \$2,210,921.93

Board found during hearing that one claimant's loss was greater than what had been set forth in application hence the difference in the two figures.

2004: awarded - \$2,412,597.49 Claim amounts: - \$2,449,947.49

Board reduced by \$38,000 an award to an institutional claimant whose officers negligently supervised the lawyer who misappropriated the institution's funds.

2003: awarded - \$1,055,477.90 Claim amounts: \$1,147,876.90

Board found that one claimant, who was a lawyer and the estate administrator of a state hospital resident, failed to diligently pursue the interests of the in recovery efforts. On the second claim, the Board found that the claimant was able to recover \$2,400 of her lawyer's \$4,000 defalcation so the Board awarded 100% of claimant's remaining loss.

2002: awarded - \$1,066,379.91 Claim amounts: - \$1,083,745.75

Board found that co-claimants had failed to pursue their former lawyer for recovery of their loss with sufficient diligence. The Board reduced these claimants' award by 33%

2001: awarded - \$1,963,555.27 Claim amounts: - \$1,963,555.27

There were no caps or any other financial factor that prevented the Board from paying 100% during the years when it paid out less than 100%.

The Board has consistently reduced awards to less than 100% reimbursement when a claimant who has had the resources to make reasonable attempts at recovering funds before seeking reimbursement fails to do so. The resources have included such factors as a ready, willing, and able malpractice carrier willing to pay and awaits a final figure of the loss from a claimant, but claimant fails to submit information to the carrier, and where a claimant, who is also a lawyer, fails to file a claim in a solvent probate estate.

Hope this helps. Please do not hesitate to ask any follow up questions.

Karen O'Toole  
Massachusetts

---

Hi Eileen,

Ohio's figures for the last 5 years are:

FY2001: \$1,314,268 awarded to 94 eligible claimants; 41 Claimants received full reimbursement of their loss.

FY2002: \$810,137 awarded to 106 eligible claimants; 102 received full reimbursement of their loss.

FY2003: \$1,006,729 awarded to 104 eligible claimants; 96 received full reimbursement of their loss.

FY2004: \$1,019,555 awarded to 116 eligible claimants; 100 received full reimbursement of their loss.

FY2005: \$1,493,899 awarded to 101 eligible claimants; 86 received full reimbursement of their loss.

Those claimants that did not receive full reimbursement of their loss were reimbursed up to the maximum award amount which is currently \$75,000; prior to 8/03 the per claim max. was \$50,000. Fortunately, lack of sufficient funding has not been an issue.

Ohio's CSF is funded from attorney registration fees, and the Ohio Supreme Court allocates funds from these fees to the CSF on an annual basis. Fortunately, there is no predetermined amount for the CSF; my budget request is based upon what I estimate will be needed to pay awards. The Court is very interested in making sure that Claimants are fully reimbursed, and I provide them with this data from time to time.

It was very helpful in getting them to approve the increase from \$50 to \$75,000 for our max. award amt.

I hope this info. is useful to you. I would be happy to provide any further assistance that you might need.

Janet

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio  
Ohio Judicial Center

---

I'm not currently on the listserve, so I'm unsure whether Eileen Donahue's questions regarding payments and percentages of claims paid out of Lawyers' Funds have been answered yet.

The ABA Survey of Lawyers' Funds for Client Protection (2002-2004) was mailed out on 9/28/05, and I believe the results of this national survey answered each of these questions. The survey compiled excellent information from the responding states and should be helpful for the Illinois Fund.

Marie Connolly  
Program Coordinator  
State Bar of Montana

---

## Order in which Claims are Presented

How does your fund determine the order in which claims are presented to the Board of Trustees/Commissioners for a determination of eligibility (once the investigation is complete, the attorney is disciplined, etc.)

Does your fund have a rule or policy regarding claimant requests to be placed before the Board out of your normal order/cycle? If so, please provide a copy.

Thanks. I hope all is well.

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio  
Ohio Judicial Center

---

From: Karen O'Toole [mailto:k.otoole@massbbo.org]  
Sent: Thursday, June 16, 2005 10:02 AM  
To: Holtaway, John  
Subject: RE: Inquiry: Janet Green Marbley

Janet,

The Massachusetts Clients' Security Board holds hearings on matters in the order in which claims was filed and docketed. There are exceptions resulting in claims being deferred. Mainly, where the former atty. is being criminally prosecuted the Board will usually hold off on hearing a matter as long as the prosecution is in the near future, and where there is a viable exhaustion of remedies action that claimant should pursue, hearings will be deferred. There are also exceptions where there are many pending claims involving the same former lawyer. The Board will hear all of these claims in groups usually over a 1 -3 month period. The Board meets once a month and has had entire meetings devoted to claims involving the same former lawyer. A final exception is where the claimant is suffering extreme hardship as a result of her financial loss. The former lawyer has 20 days within which to file answer to a claim. Upon the expiration of that 20-day period, the Board is able to hear a claim. In these hardship situations, a hearing is held within 2 -3 months of filing a claim.

Let me know if you have any follow-up questions.  
Karen

---

From: Sylvia Stevens [mailto:sstevens@osbar.org]  
Sent: Thursday, June 16, 2005 9:50 AM  
To: Holtaway, John  
Subject: RE: Inquiry: Janet Green Marbley

Janet, we don't have any rules, just a goal of moving them as quickly as possible. We put items on the agenda as they are ready for consideration. Given the pace at which our volunteers work, we have never had a problem with too many claims on one agenda. Our committee meets about 6 times a year. The Board of Governors (which has final approval on all claims) also meets about 6 times a year and we just move things from one agenda to the other as they come up.

---

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

Sent: Thursday, June 16, 2005 10:24 AM  
To: Holtaway, John  
Subject: Re: Inquiry: Janet Green Marbley

Janet,

In PA, we process our claims for review in the order in which they are received. We don't have a rule or policy regarding exceptions, however, we have made exceptions in rare, extreme hardship cases, i.e. a claimant who is in danger of losing a home or needs urgent medical treatment.

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

---

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]  
Sent: Thursday, June 16, 2005 10:16 AM  
To: Holtaway, John  
Subject: RE: Inquiry: Janet Green Marbley

Once investigation is complete and the attorney is disciplined, our goal is to process applications in the order in which they are received in the office. However, we do consider hardship, egregiousness of conduct, and economies of scale in determining the timing of handling cases.

---

From: Kris Wenzel [mailto:kwenzel@wisbar.org]  
Sent: Thursday, June 16, 2005 10:15 AM  
To: Holtaway, John  
Subject: RE: Inquiry: Janet Green Marbley

Janet,

In Wisconsin any claim submitted within 60-days of the scheduled date of the committee meeting is placed on the agenda. They are placed on the agenda in the order received. If the committee finds that dishonest conduct occurred, it does not have to wait for an attorney to be entirely through the discipline process and have his or her license suspended/revoked.

We do not have a rule, or anything in writing, on placing requests before the board out of our regularly scheduled meetings, however, we have done it administratively when there is a "hardship" concern for the client, and it involves an attorney the committee is familiar with based on past claims - but this type of situation does not occur often.

Generally, I discuss the matter with the chair and let him or her make the call on whether or not to call a special meeting.

Kris

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]

Sent: Thursday, June 16, 2005 10:07 AM  
To: Holtaway, John  
Subject: RE: Inquiry: Janet Green Marbley

Minnesota: there is no rule-based order for presentation of claims and there is no aggregate cap per attorney to deal with. Claims are presented as soon as all necessary investigation is completed without regard to the order in which the claim was filed. That routinely includes waiting for the completion of related disciplinary proceedings to be able to rely upon any findings. In some instances of related criminal or civil proceedings, the board also will wait for completion before considering the claim. The board does have a policy that a claim should be presented within 90 days (i.e., at the next board meeting) of the completion of other proceedings, when the board is relying upon findings from that proceeding. We attempt to present multiple claims against one lawyer at the same meeting, but we would not delay the presentation of a valid claim solely for that administrative reason.

---

Washington basically follows the pattern Marty describes. The most serious problem is posed by disciplinary proceedings that become disability proceedings. In the disability mode, a proceeding can leave the underlying disciplinary issues in limbo until the lawyer is deemed not disabled, which can be years. When that happens, the Fund Committee usually will try to resolve the claim without waiting for resolution of the disciplinary charges.

Bob Welden  
General Counsel  
Washington State Bar Association

---

In Arizona, we try to review claims in the order that they are received. Once we have completed the information-gathering process we send a copy of the claim to the lawyer and await his/her response. The claim is also forwarded to the Board of Trustees at this time and put on the agenda for the next meeting.

In an effort to be expedient, if a claim is deemed materially complete, the Trustees will consider the claim even though the lawyer may have not yet been disciplined. If the Trustees vote to pay a claim, we hold it until the lawyer is disciplined. If the Trustees deny the claim, we send out a denial letter right away, so that the claimant does not have to wait forever.

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 within thirty days after the lawyer receives notice of the claim. 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. Hearings are infrequent, maybe one every couple of years.

Ann Hetzler  
Arizona

---

From: Christopher Blanchard  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Thursday, June 16, 2005 12:00 PM  
To: Holtaway, John

Subject: RE: Inquiry: Janet Green Marbley

Janet- CTs policy has been to investigate claims generally in the date order in which they have been filed. Exceptions are made in extreme circumstances, usually at the discretion of the committee.

---

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

Sent: Wednesday, June 22, 2005 3:38 PM

To: Holtaway, John

Subject: Re: Inquiry: Janet Green Marbley

Janet,

Following is Michigan's process information which covers more than your inquiry.

The Michigan Client Protection Fund only has one rule related to the timing of claim review. That would be the rule which requires all claims regarding a single respondent wherein the amount requested for reimbursement exceeds the aggregate maximum of \$200,000, be held for two years in an effort to collect all existing claims.

Claims are first presented to the Standing Committee, which meets 3-4 times a year, as soon as all necessary investigation is completed without regard to the order in which the claim was received. Necessary investigation includes waiting for the completion of disciplinary proceedings (a claimant is required to file a Request for Investigation unless the Respondent is deceased) and the conclusion of any pursuit of viable exhaustion of remedies actions. However, if the disciplinary proceeding concludes with a Consent Order where the attorney's status becomes Voluntary Inactive due to health reasons or the like, then the Committee usually tries to resolve the claim.

Exceptions to this process are claims that clearly fall outside of the scope of the Fund. The Fund Administrator can close these claims. The Claimant has 45 days to file an appeal. If an appeal is filed, the claim is submitted to the Standing Committee. If the Standing Committee denies the claim, the Claimant is notified of the decision and 45 days to file an appeal. However, if the claim was an appeal of an administrative closing, the decision is considered final. If a recommendation of payment is made or an appeal of a denied claim is received then the claim is presented to the Professional Standards Committee at its next regularly scheduled meeting.

The Professional Standards Committee, a sub-committee of the Board of Commissioners holds six meetings a year. The claims recommended for payment and the appeals are reviewed. If the appeal is denied the decision is viewed as final. If the claim is recommended for payment, the claim is presented to the Board of Commissioners at its next regularly scheduled meeting.

The Board of Commissioners, which has final approval on claims, holds six meetings a year where claims are reviewed. Once final approval is acquired subrogation agreements are mailed for signature. Upon receipt of the executed agreement the check is cut. Michigan's average processing time since 1966 is 14 months, including those files which have been held for 2 years.

---

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

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

Sent: Thursday, June 16, 2005 5:15 PM To: Holtaway, John

Subject: NJ Response to Janet's Inquiry

Assuming threshold jurisdiction (respondent is suspended, disbarred, deceased, or convicted) claim goes on the first agenda after: (1) respondent has had 30 days to address the claim; and (2) either the claimant and respondent have provided all available proofs or the Fund has received all available subpoenaed documents, or both. Claimants and respondents are given opportunities to reply to each others' submissions.

Trustees meet every month.

Order of filing original claims is irrelevant; perfecting claims is what matters. They are considered when ready. Now and then, claimant tells a complete, believable, and proven story with the original claim. That can go on next month's agenda. If approved, check can be cut at following month's meeting. It's unusual, but it happens. In cases of extreme hardship, we might not wait the month.

Ken

---

## Diminished Capacity (Age)

Colleagues:

The Michigan CPF is wrestling with its first claim arising from a lawyer that is suffering from diminished capacity because of age. The disciplinary agency brought a proceeding which ultimately concluded with the attorney taking forced inactive status. Our rules state that the Fund covers claims arising from "intentional" conduct. Perhaps I'm being overly analytical, but if someone is suffering from diminished capacity, do they "intend" to take the \$? Have any other claims wrestled with this issue and either paid or not paid claims based on this issue? Any guidance would be most appreciated. Thanks.

Victoria Kremski

---

From: Blanchard, Christopher  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Tuesday, December 13, 2005 9:16 AM  
To: Holtaway, John  
Subject: RE: Michigan inquiry for listserv

Victoria- CT has paid claims where there has been an argument made that the attorney was suffering from a diminished capacity due to mental illness. For our purposes, we consider ourselves a victim's fund, and would probably leave the attorney to make his "diminished capacity" argument in the criminal proceedings, if the claim were otherwise reimbursable.

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

---

Colorado would probably pay under our broad "discretionary" authority established in our Rules. We have had somewhat similar circumstances where practitioners of 40 to 50 years standing with good reputations die and certain retainers could not be accounted for in their estate proceedings.

Chuck Goldberg

Charles Goldberg, Esq.  
Rothgerber Johnson & Lyons LLP

---

Missouri's regulations authorize a claim if the lawyer is "adjudged mentally incapacitated" but the fraudulent or dishonest act must have been of such a nature that, but for the mental incapacity, the lawyer would likely have been disbarred or suspended.

Chris Janku

---

In Arizona, lawyers can be placed on "disability inactive status," which covers a whole realm of issues. If a lawyer is on disability inactive status, this is considered a triggering event and allows our Fund to pay claims.

Lawyers placed on disability inactive status could be suffering from diminished mental capacity, substance abuse, depression, being bipolar, or dealing with other mental issues. This is a good thing, because it allows the Fund to compensate people who have been harmed, and it also allows the lawyer to seek and receive treatment. We have a very good Membership Assistance Program, and I personally know of one lawyer who had severe substance abuse and mental problems and is now working on becoming reinstated.

Ann Hetzler

---

From: Sylvia Stevens [mailto:sstevens@osbar.org]

Sent: Tuesday, December 13, 2005 10:01 AM

To: Holtaway, John

Subject: RE: Michigan inquiry for listserv

Victoria, we haven't dealt with old age, but we recently discussed this issue in connection with a lawyer who was an end-stage alcoholic and also probably suffering some mental impairment. She took money for a case for which the statute of limitations had already run but she never did figure it out...kept telling the clients about what a good claim they had and seemed to believe it herself. The committee struggled with whether she had the requisite bad intent or whether she was just monumentally negligent. Ultimately paid the claim based in part on evidence that she had never clearly explained the fee agreement to the clients. There was also a huge sympathy factor because the clients were poor, uneducated and pathetic (the suit was for the wrongful death of their 15-year old son who fell from a cliff on his motorbike and was allegedly not properly treated by paramedics at the scene). I am not sure that old age/senility necessarily blunts the lawyer's knowledge of what is right and wrong regarding client funds.

---

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

Sent: Tuesday, December 13, 2005 10:10 AM

To: Holtaway, John

Subject: Re: Michigan inquiry for listserv

In PA, our Fund is permitted to act on a claim even if the attorney has been transferred to inactive status due to a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent attorney to defend the disciplinary proceedings.

We have awarded claims involving attorneys who were transferred to inactive status under the rule, however, our rule does not use the word "intentional" in defining dishonest conduct. Our rule defines dishonest conduct as "wrongful acts or omissions committed by a covered attorney in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money, property or other things of value."

Kathryn J. Peifer, Esquire

Executive Director

Pennsylvania Lawyers Fund for Client Security

---

It seems to me that, allowing that the lawyer may be incapacitated, once it is called to the lawyer's attention that he/she has not paid money owing to a client, and the lawyer continues not to do so, that is a dishonest act.

Bob Welden

General Counsel

Washington State Bar Association

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Tuesday, December 13, 2005 5:17 PM  
To: Holtaway, John  
Subject: Re: Michigan inquiry for listserv

Victoria raises a key issue, one that goes to the heart of difficult unearned retainer claims, for example. (That's a subject for a future article in the Webb.) First, I'll bet Victoria's rule uses the word "intentional" to distinguish from conduct that is negligent - and therefore not compensable. Many, perhaps most, rules call for "dishonest" conduct by a lawyer. I am increasingly convinced that what really matters is the lawyer's behavior, rather than a lawyer's intent. The standard for evaluating that behavior should be an objective one: "Under all the circumstances was the lawyer's behavior dishonest when viewed from the perspective of a reasonable client?"

Although it's tempting, the lawyer's subjective intent is not really the issue. First, it is generally unprovable and unknowable. Second, if it were knowable, in most instances, it would probably be something like this: " My intent was to keep my bookie from breaking my legs." - or - "My intent was to return this money after..." Very few of these folks wake up in the morning saying, "Today I steal Client Smith's money."

Third, none of this makes the slightest difference to the purpose and mission of the Fund - or, for that matter, to the honor of the profession. Why inject mens rea into the analysis? If a lawyer takes something from a client without entitlement, and refuses, or even fails, to return it, that's dishonest conduct. I don't care what the lawyer is thinking about or whether the lawyer is thinking at all.

Ken Bossong

---

I do not believe that diminished capacity impacts whether an action is intentional or not. It mitigates the level of criminal responsibility, it does not alter the fact that the act was designed and/or intended.

I extend my wishes for a safe and happy Christmas to all of my friends. Each of you are a hero to me for what you do. I also wish for a healthy and prosperous New Year for all of you.

Regards,

Irwin Gilbert  
Florida

---

From: Peter H Sutton [mailto:PSutton@riemerlaw.com]  
Sent: Wednesday, December 14, 2005 11:25 AM  
To: Irwin Gilbert; CPR\_LAWYERSFUND@MAIL.ABANET.ORG  
Subject: RE: Michigan inquiry for listserv

I think the point that needs stressing is the lawyer's act was a defalcation, ie a breach of trust. No matter the intent of the lawyer, the money should be there and it wasn't. I agree with Ken's analysis, but would go further and add that the purpose of these funds is to compensate the victims, not to figure out the motives or intentions

of the disbarred attorneys. We have to right the wrong. Once we figure out the wrong, then game, set, match.

What I found most frustrating after my 5 years on the Massachusetts Board was the numerous attorneys who were never prosecuted in a criminal court. For whatever reason, they never faced criminal charges. The lawyers who were charged in some cases depended on how much they stole, or how many victims they had. It was also sad to see some of those never charged try to get reinstated by filing bankruptcy and claiming their obligations to repay were "discharged" .

After witnessing first hand the disruption of lives and the harm caused by these "felons", especially against the poor, elderly, or immigrants who "trusted" them in most cases with their life savings, we have to try to show the victims that a rotten apple doesn't spoil the truckload and try to restore their faith in attorneys and in the legal system. If an independent financial money manager steals ones money, the victim has no hope. If a lawyer steals, it's a black mark on the profession, and the profession tries to make restitution to right that wrong. Simple!

Peter Hercules Sutton, Esq  
Riemer&Braunstein, LLP  
Boston, Ma.

---

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]  
Sent: Wednesday, December 14, 2005 11:18 AM  
To: Holtaway, John  
Subject: RE: Michigan inquiry for listserv

Thanks Ken for making it clear. If the client pays money and gets no work or no refund, it is dishonest for the attorney or his family or his estate to keep that money.----

---

From: Tim O'Sullivan [mailto:tos@nylawfund.org]  
Sent: Friday, December 23, 2005 2:32 PM  
To: Holtaway, John  
Subject: Re: Michigan inquiry for listserv

Victoria

I apologize for my delay in replying. We have confronted this intent issue. In NY, we need a finding of dishonest conduct which is defined as a misappropriation or wilful misapplication.

Our Board has accepted our argument that we do not have to show an "intentional" misappropriation - the focus is on the victim who has suffered the loss.

Good luck, Tim O'S

---

## Payments to Third Parties

We have tentatively decided to pay an otherwise eligible claim. The problem is that the money \*(fees) paid to the lawyer came not from the client, but from her sister. The sister is demanding that any reimbursement be paid to her since she was the one who lost money. Our rules require that claims be presented by the client and do not offer any guidance for dealing with a third party.

If anyone else has dealt with this situation, could you tell me how you resolved it? Were there any repercussions?

Sylvia E. Stevens  
Senior Asst. General Counsel  
Oregon State Bar

---

We have the applicant assign her recovery to the 3rd party. We usually do this very informally with a letter from the applicant sufficing. The more money involved, the more formal we would likely be. You just need to be satisfied with the legitimacy of the assignment, however it is done.

Bob Welden  
General Counsel  
Washington State Bar Association

---

In CA, we reimburse the person whose funds were used to pay the attorney unless that person states in writing that we should pay the client.  
Matt Zawol, CA

---

We frequently pay claims or parts of claims to other than the claimant. In circumstances such as yours, our board would find that the client had a valid claim, but reimbursement is being made to the client's sister. In all matters, we attempt to pay the money to whoever would have gotten it if the lawyer hadn't dishonestly taken the money. That may mean that payment is made to a lender so that the client's mortgage is cancelled or to a medical provider who should have been paid from PI settlement proceeds.

Root Edmonson  
North Carolina

---

Maryland Opinion 01-06 (11/22/00) Retainer agreements; Fees; Discharge of lawyer; Escrow accounts; Lawyer-client relationship.

A lawyer whose retainer has been paid by his client's mother may not, when the client and the mother have a falling-out and the mother purports to fire the lawyer, comply with the mother's demand for a refund of the retainer fee. The lawyer having made clear to the mother that the client is the son, who is an adult, rather than the mother, and no representations having been made to the mother that she would retain any control over the case or the money, only the client himself can terminate the lawyer's services. Rule 1.8(f).

John Holtaway  
ABA

---

In Missouri we found that many times family members were helping to pay for the lawyer's fees, particularly in criminal defense cases. We amended our rule to provide "The claims of third parties, such as family members, may be recognized."

Chris Janku

---

The New Jersey policy on this point is that the payments should be made to the third party who does not have an attorney/client relationship with the lawyer, if the Client itself filed the claim and the payment to the third party inures to the benefit of the Client (such as relieving him or her from a debt or judgment). Also, we try to obtain the third party's signature on the Release, Assignment and Subrogation Agreement so the path is clear to pursue subrogation.

Example: Upon sale of a business (bulk sales), the seller's lawyer holds funds in escrow necessary to pay as of yet uncalculated sales taxes. The tax is later calculated, and State comes looking for its money but the lawyer absconds. Clearly, the State is a third party. It does not have any attorney/client relationship with the thief, but nonpayment will hurt the client whose obligation stands and the net proceeds from the sale of the business was earmarked to pay his taxes.

We NEVER make a payment to any party (client or third party) whose rights to the escrow deposit is in question. Example: \$10,000 is withheld at a real estate closing in March to ensure that when the swimming pool is opened in May, it has no cracks or that the filtration system is in order (a condition in the original contract). The money is stolen and the pool is opened according to schedule; however, the buyer and seller dispute the damages found relating to the pool. If a claim is filed in this example, the Fund Trustees will not decide the claim. They will force the parties to work it out or dispute it in a Court of Law, and when decided - we will pay the claim. Rationale, we are not a court of law established to settle civil disputes between two parties, either of which are not a suspended or disbarred lawyer and the issues are outside of the Trustees' regulatory jurisdiction.

Dan Hendi  
New Jersey

---

Ohio has dealt with this situation many times, and we have almost always paid the party who actually paid the fee. In some instances the claimant will say that someone other than the client, usually a family member, paid the fee. We will then simply tell the claimant that if the claim is eligible, reimbursement will be paid to that person. We will, of course, verify the payment and contact that person prior to Board review. But if the claim is otherwise eligible, we pay the 3rd party.

We recently had a claim where payment by a third party was disputed by the claimant. We had receipts and cancelled checks indicating payment by a third party, and our investigation found that the former girlfriend of the claimant had actually paid a lawyer to represent the claimant, who was incarcerated. The claimant insisted that he was entitled to reimbursement and not his former girlfriend, but we reimbursed the former girlfriend.

Our rule does not specifically address this issue either, however our Board, in the exercise of its discretion, has determined that it should reimburse the party that suffered the loss rather than deny the claim or unjustly enrich the client.

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio

In Arizona if a mother paid for a lawyer to represent her son and the Trustees approved payment of the claim, we would consider the mother a co-claimant and would make the check payable to the mother. We have, on several occasions, written checks out to the claimant and to medical providers, jointly. In one case, we made a check payable to a claimant and her chiropractor. For some reason, the bank cashed the check either without the chiropractor's signature, or the claimant forged it. I believe that the chiropractor took action against the claimant.

We are having quite a few Bankruptcy Trustees file claims. They feel that they stand in the shoes of the claimant and therefore are entitled to ompensation. Our Trustees have not paid Bankruptcy Trustees. This is becoming more common all the time. Bankruptcy Trustees in Arizona receive commissions, so they are quite aggressive and motivated.

Ann Hetzler  
Arizona

---

Similar circumstances have occurred in Michigan several times over the last three years where the person paying for the services is not the client, such as a criminal appeal where a family member pays for the services and the client is incarcerated. If reimbursement is approved, unless an agreement to the contrary is communicated to the Fund in writing, the reimbursement check is made payable to the remitter of the original funds if those are the funds at issue.

We do ask that both parties submit a notarized questionnaire indicating whether they have received any reimbursement funds from the attorney or other sources before a subrogation agreement is drafted.

Robin Lawnichak  
Michigan

## Is Your Fund Audited?

I would like to know the following from each fund:

1. is your fund audited?
2. if your fund is audited, what entity mandates that it be audited, i.e., the Supreme Court, the Bar, or some other entity?
2. if your fund is audited, how often is it audited?
3. who pays for the audit; i.e., is the auditor paid with client protection fund monies, or does the state bar with whom the fund is associated pay for the audit?

Thank you.

Ann Hetzler  
State Bar of Arizona  
Client Protection Fund Administrator

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]  
Sent: Wednesday, April 27, 2005 8:53 AM  
To: Holtaway, John  
Subject: RE: Query - Lawyers' Funds for Client Protection and Audits

The Minnesota Client Security Fund is not audited. The Client Security Board does not have direct control over the Fund itself, which is maintained as part of the state general treasury and invested according to state guidelines.

---

From: Christopher Blanchard  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Wednesday, April 27, 2005 7:40 AM  
To: Holtaway, John  
Subject: RE: Query - Lawyers' Funds for Client Protection and Audits

Ann- in Connecticut, we do not have any particular superior court rule concerning an audit of our fund. However, we are subject to the same audits of public accounts as other state agencies, so our processes and procedures are usually audited about every three years. There is no charge or cost, as the audits are handled by auditors employed by the state.

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

---

From: Kathy Peifer [mailto:kpeifer@palawfund.com]  
Sent: Wednesday, April 27, 2005 9:24 AM  
To: Holtaway, John

Subject: Re: Query - Lawyers' Funds for Client Protection and Audits

Ann,

1. Yes, the Pennsylvania Lawyers Fund for Client Security is audited.
2. The Supreme Court of Pennsylvania mandates this audit in accordance with Pa.R.D.E. 502(d) which reads: The Board shall annually obtain an independent audit of the fund by a certified public accountant, and shall file a copy of such audit with the Supreme Court.
3. As indicated in the Rule, we have an annual audit
4. The Fund pays for the audit.

Please let me know if you need any additional information.

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

---

From: Kris Wenzel [mailto:kwenzel@wisbar.org]  
Sent: Wednesday, April 27, 2005 7:02 AM  
To: Holtaway, John  
Subject: RE: Query - Lawyers' Funds for Client Protection and Audits

Wisconsin's fund is audited at the conclusion of the fiscal year, (July 1-June 30). The audit is paid for with the client protection funds and we are audited on an annual basis. When the fund was created in 1981 by the Wisconsin Supreme Court (our highest court) the annual audit was put right into the rules that govern the program.

Kris Wenzel

---

The Clients' Security Fund of Ohio is audited bi-annually. The audit is required by the Fund's governing rule, which is Rule VIII of the Supreme Court Rules for the Government of the Bar. The Fund is audited by the State Auditor's office at the same time as the Court.

For the first ten years of the Fund's existence (1985 -1995), the rule required an annual audit by a private auditor. The auditor was paid out of the Fund's administrative budget. There is no cost for the State Auditor's office to perform the audit.

Janet Green Marbley, Administrator  
Clients' Security Fund of Ohio  
Ohio Judicial Center

---

From: k.otoole.concord@comcast.net [mailto:k.otoole.concord@comcast.net]  
Sent: Tuesday, April 26, 2005 7:08 PM

To: Holtaway, John  
Subject: Re: Query - Lawyers' Funds for Client Protection and Audits

Ann,

The Mass. Fund is audited annually as required by the Supreme Judicial Court. This is the highest court in Mass. and it established the Fund. A CPA accounting firm that specializes in small, non-profit agencies does the audit. It is paid by the Board of Bar Overseers, which is the entity that pays all of the expenses and operational costs of the Fund, i.e. salaries, rent, office equipment etc.

Karen

---

NC's answers:

1. Yes
2. NC State Bar
3. Annually
4. The State Bar pays for the audit, but charges each board or agency a pro-rata share. Thus, the CSF pays its fair share of the audit from its funds.

Root Edmonson

---

From: Sylvia Stevens [mailto:sstevens@osbar.org]  
Sent: Tuesday, April 26, 2005 5:28 PM  
To: Holtaway, John  
Subject: RE: Query - Lawyers' Funds for Client Protection and Audits

In Oregon, the fund is audited every two years by a private auditor hired by the bar to conduct the full bar audit that is required by statute. The fund pays a proportional share of the auditor's fee.

---

From: mtartag@flabar.org [mailto:mtartag@flabar.org]  
Sent: Wednesday, April 27, 2005 9:35 AM  
To: Holtaway, John  
Subject: Re: Query - Lawyers' Funds for Client Protection and Audits

1. is your fund audited? Only as part of a annual audit of bar accounts. Bar pays for audit.

Michael A. Tartaglia  
Director-Program's Division  
The Florida Bar

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Tuesday, April 26, 2005 5:18 PM

To: Holtaway, John  
Subject: Re: Query - Lawyers' Funds for Client Protection and Audits

John,  
1. Yes  
2. Rule of the Supreme Court of NJ.  
3. Annually.  
4. The Fund pays.

Ken

---

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]  
Sent: Tuesday, April 26, 2005 4:35 PM  
To: Holtaway, John  
Subject: Re: Query - Lawyers' Funds for Client Protection and Audits

the maryland fund is audited yearly by a private cpa firm. we have also been audited once (in 40 years) by the court of appeals auditors. we did not pay for that audit but do pay for our yearly audit. we are mandated by the court of appeals that they can do an audit, and that we must also do an audit, but it is not specific as to how often.

---

From: Donahue, Eileen [mailto:edonahue@iardc.org]  
Sent: Wednesday, April 27, 2005 10:17 AM  
To: Holtaway, John  
Subject: RE: Query - Lawyers' Funds for Client Protection and Audits

In Illinois, our Fund is part of the disciplinary commission. The commission has an annual audit by a private accounting firm. This annual independent audit is required by IL Supreme Court Rule 751. The Commission pays for the audit. Every two years the State also audits the commission, and the Commission also pays for that audit.

Eileen Donahue

---

The Washington Fund is audited annually as part of the WSBA's audit. It is paid for out of the WSBA General Fund.

Bob Welden

---

From: Paul.WieckII@jb.state.ia.us [mailto:Paul.WieckII@jb.state.ia.us]  
Sent: Wednesday, April 27, 2005 7:41 AM  
To: Holtaway, John  
Subject: Re: Query - Lawyers' Funds for Client Protection and Audits

The Iowa Client Security Trust Fund is audited annually, as directed by rule of the Iowa Supreme Court. The cost of the audit is budgeted as part of annual budget of the Client Security and Attorney Disciplinary Commission, and is paid from the Client Security Trust Fund.

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

---

1. yes
2. Supreme Court RSCH 10.4(a)
3. Annually
4. Client protection fund monies. Fund is separate from bar association.

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

---

The Minnesota Client Security Fund is not audited. The Client Security Board does not have direct control over the Fund itself, which is maintained as part of the state general treasury and invested according to state guidelines

---

From: Jane Schoenike [mailto:JSchoenike@nebar.com]  
Sent: Friday, April 29, 2005 11:58 AM  
To: Holtaway, John  
Subject: RE: Query - Lawyers' Funds for Client Protection and Audits

In Nebraska - 1. yes 2. CAF Rules (bar association), ordered by Sup. CT 3. yearly 4. part of CAF admin budget (part of association)

---

From: David Shearon [mailto:dave.shearon@cletn.com]  
Sent: Wednesday, April 27, 2005 7:04 AM  
To: Holtaway, John  
Subject: RE: Query - Lawyers' Funds for Client Protection and Audits

Until the Attorney General determined we were a "state agency" with all that entails, we had our own CPA and got our own audit which we paid for. This was required in the Supreme Court Rule that created us. Now, I assume that we will be audited by state auditors and likely charged for that, though it may just get rolled into charges assessed against the Administrative Office of the Courts since our budget is now attached to theirs.

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

---

## Private Counsel To Assist Fund?

From: Tonimoss@aol.com [mailto:Tonimoss@aol.com]  
Sent: Monday, August 29, 2005 7:18 AM  
To: Holtaway, John  
Subject: help

i need to know if any other client protection fund has private counsel that assists with their fund. (advising, going to court on their behalf, etc) i would also like to know if any funds have particular attorney generals that are assigned to assist their funds, that also advise the funds, etc). as usual, thanks for all of your help.  
janet moss, administrator, client protection fund of the bar of maryland

---

From: Daniel.Hendi@judiciary.state.nj.us  
[mailto:Daniel.Hendi@judiciary.state.nj.us]  
Sent: Monday, August 29, 2005 9:04 AM  
To: Holtaway, John  
Subject: Re: Query from Maryland

I happen to know that the NY Fund has an Attorney General counsel assigned to it for collection cases. Speak to Tim O'Sullivan.  
Dan

---

NC only has me. Our Board did consider retaining a private lawyer to search for assets in one subrogation claim in which I had already obtained a judgment, but chose not to.

Root Edmonson  
North Carolina

---

From: Blanchard, Christopher  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Monday, August 29, 2005 9:11 AM  
To: Holtaway, John  
Subject: RE: Query from Maryland

Janet- Connecticut has received assistance from our Attorney General's office, largely for pursuing restitution in some of our larger cases.

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

---

From: Tim O'Sullivan [mailto:tos@nylawfund.org]  
Sent: Monday, August 29, 2005 9:25 AM  
To: Holtaway, John  
Subject: Re: Query from Maryland

Janet - New York has had both.

For many years, we have had representation in restitution litigation from our State Attorney General. Since 2000, we have had an arrangement whereby we finance the salary of an Assistant Attorney General who is assigned exclusively to our collection matters. It has been economical and productive. We not only get the Assistant AG, we get the full support staff and resources of the Attorney General's office. Prior to 2000, we did retain private counsel for a restitution case when the Attorney General was unable to represent us due to a conflict.

That representation was also successful.

I will be glad to offer any additional information you are interested in.

Hope all is well.  
Tim O'Sullivan  
NY Fund

---

Michigan hires outside counsel to handle our subrogation matters. We are very fortunate that the attorney has agreed to a contingent fee arrangement. We simply do not have sufficient attorney staff to handle subrogation on a consistent and thorough basis.

This attorney, a solo, has worked out very well. The Bar has hired firms in the past who have discontinued the relationship because it is just not profitable enough for a medium size or large firm to pursue.

Let me know if you would like to know more. Thanks.

Victoria Kremski

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]  
Sent: Monday, August 29, 2005 9:43 AM  
To: Holtaway, John; Tonimoss@aol.com  
Subject: RE: Query from Maryland

Janet: by law, Minnesota's client protection fund uses the Attorney General's Office for all representation; we do not pay any legal fees for their services; we are responsible for any costs/expenses. We are not authorized to hire private counsel. The AG assigns one attorney and one paralegal to handle our work - they each have other agency clients as well.

---

From: Kathy Peifer [mailto:kpeifer@palawfund.com]  
Sent: Monday, August 29, 2005 9:44 AM  
To: Holtaway, John  
Subject: Re: Query from Maryland

In PA, we have a Counsel to the Board, Lisa A. Watkins. She handles some matters in the Philadelphia area, where she is located. For other matters around the Commonwealth, we usually retain outside counsel. Lisa monitors the representation, billings, etc.

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

---

From: Jackie Rogers [mailto:JRogers@mebaroverseers.org]  
Sent: Monday, August 29, 2005 11:13 AM  
To: Holtaway, John  
Subject: RE: Query from Maryland

In Maine, the fund pays the Board's Bar Counsel to investigate claims. I do not believe they have ever hired private counsel.

---

From: Ann Hetzler [mailto:Ann.Hetzler@staff.azbar.org]  
Sent: Monday, August 29, 2005 11:15 AM  
To: Holtaway, John  
Subject: RE: Query from Maryland

Arizona's Client Protection Fund does not have private counsel, nor is it assisted by the Attorney General's Office.

---

In Massachusetts the Fund has hired private counsel from time to time to handle collection matters and complex bankruptcy matters. The Office of Attorney General represents the Fund when the Fund is sued and only then.

Karen O'Toole

---

In Florida we have neither private counsel nor use of an Assistant Attorney General. The Florida Bar's experience with efforts to recover sums from defalcating attorneys were sufficiently unproductive to discourage recovery efforts in general.

The Board of Governors has the discretion to approve the engagement of counsel to sue on behalf of the Bar and might do so in unusual circumstances.

Irwin Gilbert

---

From: Sylvia Stevens [mailto:sstevens@osbar.org]  
Sent: Monday, August 29, 2005 1:32 PM  
To: Holtaway, John  
Subject: RE: Query from Maryland

In Oregon, our fund administrator has always been a lawyer. We occasionally get help from committee members who are attorneys. We have never had to go to court on any issue but if we did it would be me, the administrator. The AG's office is not involved in operation of our fund.

---

In Washington, we have employed private counsel to pursue restitution, but the attempts have been largely unsuccessful. We were once aggressively marketed by a collection agency that specializes in collecting law firm fees. After 1 year, they returned all of the files they had taken and reported they could not recover anything.

Bob Welden  
General Counsel  
Washington State Bar Association

---

Toni: The Florida Bar general counsel is counsel to the Florida Fund. If it is necessary to go to court, they seek out volunteer attorneys (usually someone on the Fund) in the jurisdiction where the court hearing is located.

I handled a matter once for the Fund in Fort Lauderdale. On a protracted basis the Bar/Fund would retain counsel, I am sure on a reduced fee.

Bill Ricker

---

Neither NH nor RI have staff counsel, nor receive assistance from the AG. While either Fund could employ counsel to pursue a viable subrogation claim, those circumstances have not presented themselves.

John Bomster for NH & RI

## Pro Hac Vice

- 1) Does your Fund receive any portion of the fee charged for pro hac vice admission in your jurisdiction?
- 2) If so, how much does your Fund receive per admission fee (in dollar amount)?

Thanks much.

John Holtaway  
ABA

---

- 1) No
- 2) N/A

Ann Hetzler

---

From: Tim O'Sullivan [mailto:tos@nylawfund.org]  
Sent: Tuesday, January 11, 2005 3:51 PM  
To: Holtaway, John  
Subject: Re: Query: Pro Hac Vice Admission Fees

John:

1. The NY Fund does not receive any portion of any pro hac vice fees. The present rules in NY do not require lawyers admitted pro hac vice to pay the regular registration fee required of NY lawyers. We are working on that.

2. Our registration statute states that payment of a biennial \$350 registration fee is required of every attorney admitted and licensed to practice in New York State, whether or not the attorney is engaged in the practice of law in New York or elsewhere. The only exception in the statute is for attorneys who certify that they have retired from the practice of law.

3. Noncompliance with the registration requirement constitutes professional misconduct and "shall be referred to the appropriate appellate division for disciplinary action".

Sometimes the "appropriate" disciplinary office does not vigorously pursue non payment of the registration fee if that is the only misconduct - there is unfortunately sometimes a feeling that the committees are not collection agencies.

Tim O'Sullivan  
NY Lawyers' Fund

---

## Sanction For Failure to Pay Assessment

From: Christopher Blanchard  
[mailto:Christopher.Blanchard@jud.state.ct.us]  
Sent: Monday, January 10, 2005 12:49 PM  
To: Holtaway, John  
Subject: Question for Client Protection Administrators

John- I have a question I was hoping could be posed to other Client Protection Fund administrators on the client protection listserve:

- 1.) What is the penalty in your jurisdiction for failure to pay the assessment used to fund your jurisdiction's client protection fund? (i.e., suspension from the practice of law, administrative suspension, etc.)
- 2.) What is the process used to impose the penalty? Is there an initial notice to the attorney followed by some other action? (for example, in CT, an initial notice by certified mail is followed by an actual court hearing).
- 3.) What must an attorney do to reinstate or reactivate his license if the penalty involves an inactivation or suspension of his license?

Thank you for your assistance- I'm trying to do some research on how other jurisdictions handle non-payment of assessments.

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

---

1. In Washington, failure to pay results in administrative suspension from practice.
2. The assessment is collected as part of the annual license fee. Delinquent payers are given 60-days notice by certified mail before the suspension recommendation is submitted to the Supreme Court.
3. If the assessment (and any other delinquent fee) is paid within the year, reinstatement is automatic. If it is more than a year, the member may also have CLE or other requirements to meet.

Bob Welden  
General Counsel  
Washington State Bar Association

---

Colorado: 1. Administrative suspension. 2. Certified mail after one regular mailing. We then notify the court and they issue a suspension order w/ notice to all. 3. Pay all fees + up to \$250 in late fees.

Requires a court order of reinstatement. Remember, in Colorado my office does it all...we do the registration process as well as administer the Fund, etc. When someone fails to pay we are the first to know so we begin the failure to pay process quickly. Frankly my budget relies on the fact that several thousand attorneys fail to timely pay and as such get hit with late fees.

John Gleason

---

From: Karen O'Toole [mailto:k.otoole@massbbo.org]  
Sent: Monday, January 10, 2005 2:47 PM  
To: Holtaway, John  
Subject: RE: Question for Client Protection Administrators-CT-Sanction for Failure to Pay Assessment

Chris,

In Massachusetts, an atty who fails to pay his registration fee is administratively suspended. Such a suspension is obtained directly between the administration dept. of the Board of Bar Overseers and the Supreme Judicial Court. To be reinstated from an admin. suspension - where there has been NO subsequent misconduct - the atty. must pay all the \$\$ that is due. If a suspension is for more than one year and a day, then the atty. must go through an elaborate reinstatement process.

---

From: Kathy Peifer [mailto:kpeifer@palawfund.com]  
Sent: Monday, January 10, 2005 3:18 PM  
To: Holtaway, John  
Subject: Re: Question for Client Protection Administrators-CT-Sanction for Failure to Pay Assessment

I have attached a copy of PA's rule regarding the annual assessment and ailure to pay. The amount referenced in the attached copy has not been updated. The Disciplinary Board's current annual assessment for the 2004 - 2005 fiscal year was \$130, with the Fund's assessment being \$45, for a total annual assessment of \$175.00. Other than that, the information set forth in the attached rule is accurate.

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

---

In Arkansas, the client protection fund "assessment" is included in the yearly license fees. Failure to pay the yearly license fees results in an administrative suspension. The attorney has a period of time to pay the yearly license fees but must also pay a late fee to be reinstated from the administrative suspension

Michael Harmon  
Arkansas

---

In Oregon, the CSF assessment is collected with annual membership fees. If someone omits the CSF portion, they will be administratively suspended. They get lots of notices and the suspension doesn't happen until July 1, the deadline for late payment of fees and assessments. A member who is suspended for nonpayment can be reinstated by paying the outstanding amount (includes a \$50 late penalty), plus the reinstatement fee. The reinstatement is also administrative, provided it is less than five years after the suspension.

Sylvia Stevens  
Oregon State Bar

---

From: Office of Disciplinary Counsel [mailto:odc@lava.net]  
Sent: Monday, January 10, 2005 5:45 PM  
To: Holtaway, John  
Subject: Re: Question for Client Protection Administrators-CT-Sanction  
for Failure to Pay Assessment

Hawaii.

1. Administrative Suspension
2. Please contact HSBA ([www.hsba.org](http://www.hsba.org)) The Bar Association handles registration and the collection of each Supreme Court entities' fees.

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

---

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]  
Sent: Wednesday, January 12, 2005 9:09 AM  
To: Holtaway, John  
Subject: RE: Question for Client Protection Administrators-CT-Sanction for Failure to Pay Assessment

In Minnesota, failure to pay the annual attorney registration fee results in automatic administrative suspension. There is no actual notice of the suspension - it is by rule and the annual registration payment notice informs the attorney of the penalty for nonpayment; the payment notice is sent only by regular mail; it is the attorney's obligation to be sure that the attorney registration office has a current mailing address. Failure to actually receive the payment notice is not a defense to automatic suspension. Reinstatement requires payment of delinquent registration fees and a \$50 penalty (the client protection fund does not get any share of the penalty).

---

In NJ:

- 1) Those who neither pay the assessment nor are granted an exemption are declared Ineligible To Practice Law by order of the Supreme Court. The Ineligible List is published in the two legal weekly papers. Practicing while ineligible is an Ethics infraction. This just in: the Supreme Court has just ruled that (starting with 2005's List in September) those ineligible for seven or more consecutive years will have their licenses revoked.
- 2) We do first billing in late winter/ early spring, second billing with late fee in summer, and ineligible list in September.
- 3) To reinstate, must pay all that is due, including reinstatement fee.

Query to all: We're thinking of doing a session at the next NCPO Workshop in Santa Fe on 4/1/05 on assessments; with all the list-serv activity on these issues right now, are we right to conclude this means it is a good topic?

Ken Bossong

---

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

Sent: Wednesday, January 12, 2005 9:34 AM  
To: Holtaway, John  
Subject: RE: Question for Client Protection Administrators-CT-Sanction  
for Failure to Pay Assessment

In Wisconsin, failure to pay bar dues or any court ordered assessments, including the fund assessment, results in automatic license suspension until all dues/assessments are paid. The dues/assessments are mailed from our state bar and numerous notices are sent including two or three certified mailings, closer to the October 31 deadline for payment, to those members who have not paid. Payment, with any additional late fees, will reinstate the person's license.

Kris Wenzel

---

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]  
Sent: Wednesday, January 12, 2005 10:31 AM  
To: Holtaway, John  
Subject: RE: Question for Client Protection Administrators-CT-Sanction  
for Failure to Pay Assessment

In Calif. failure to pay bar dues results in suspension for non payment until paid.

---

From: Marie Connolly [mailto:mconnolly@montanabar.org]  
Sent: Wednesday, January 12, 2005 10:43 AM  
To: Holtaway, John  
Subject: RE: Question for Client Protection Administrators-CT-Sanction  
for Failure to Pay Assessment

Montana's rule is the same as Wisconsin - Failure to pay bar dues or any court ordered assessments, including the fund assessment, results in automatic license suspension until all dues/assessments are paid. The dues/assessments are mailed from our state bar and numerous notices are sent including two or three certified mailings to those members who have not paid. Payment, with any additional late fees, will reinstate the person's license.

Marie Connolly  
Program Coordinator  
State Bar of Montana

---

In Arizona the annual assessment for the Client Protection Fund is paid along with the annual dues. If a lawyer in Arizona fails to pay the annual assessment to the Client Protection Fund, or the dues, the lawyer will be summarily suspended. This is an administrative suspension and has nothing to do with discipline.

If a lawyer fails to pay their dues/CPF assessment, they are sent a letter requesting that they pay. If they do not respond, they are sent a second letter. If there is no response to that, they are sent a certified letter suspending them.

To become reinstated, the lawyer must pay the dues/assessment, a \$100 delinquent fee, and \$100 to become reinstated.

Ann Hetzler  
Arizona

---

## Day Trading Lawyers

From: Robin Lawnichak [mailto:RLAWNICHAK@mail.michbar.org]  
Sent: Wednesday, April 20, 2005 8:28 AM  
To: Holtaway, John  
Subject: Fwd: Sick, corrupt lawyer gets medical care specialized setting - day trading

Have any other states experienced claims involving "day trading"?

If yes, what prevention measures have you implemented or are you working on?

---

From: Kathy Peifer [mailto:kpeifer@palawfund.com]  
Sent: Wednesday, April 20, 2005 9:47 AM  
To: Holtaway, John  
Subject: Re: Sick, corrupt lawyer gets medical care specializedsetting - day trading

I have no information that day trading was the cause of any misappropriations which resulted in claims with the PA Fund.

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

---

## Meaning of "Arose Out Of"?

Minnesota's client security rules include the requirement that "the loss of the claimant arose out of and during the course of a lawyer-client relationship of a matter in this state, or a fiduciary relationship between the lawyer and the claimant which arose out of a lawyer-client relationship in this state."

We know the language of this rule is very clumsy; we know the ABA Model Rules do not contain the "arose out of...in this state" requirement; we know that the ABA Standing Committee has proposed an amendment to Model Rule 1 to allow funds to pay claims for dishonest conduct committed by an attorney licensed in their jurisdiction no matter where it occurs.

Nevertheless, we have this language and have to live with it; the Board assumes it has to mean something. It's only come up once before and that was a fairly easy application: lawyer lived and practiced in another state, and stole money of client who also resided in that state in a personal injury matter in that state - our Board did not pay that claim.

The current fact pattern that causes the dilemma: attorney licensed both in Minnesota and Texas. Lives in Texas. Represents Texas client in several matters. Lawyer moves to Minnesota and continues to represent client on Texas matter in Texas based upon Texas license.

Completes the representation, resulting in funds to client. Via phone from Minnesota lawyer convinces client to invest funds in business with which lawyer involved - business located in California, though money comes first to Minnesota. Business is a scam and client loses money (lots of money). Board accepts that lawyer's dishonest conduct occurred in Minnesota. Lawyer disbarred in Minnesota, reciprocal in Texas. Other victims all Minnesota residents lawyer represented as law clients in Minnesota after moving to Minnesota, and they are being paid.

Issue: Did the claimant's loss arise out of an attorney-client relationship of a matter in Minnesota? We don't care whether claimant can apply to Texas fund; the loss exceeds the aggregate cap of both states combined.

Do any other jurisdictions have similar "nexus" requirements for claims to be paid? If so, has this phrase ever been the principal issue in a claim resolution, or have you had to interpret precisely what the phrase means? Any insights? Sorry this is so long!!

Marty Cole  
Minnesota Client Security Fund

---

From: Sylvia Stevens [mailto:sstevens@osbar.org]  
Sent: Thursday, December 15, 2005 2:31 PM  
To: Holtaway, John  
Subject: RE: What does the phrase mean? MN Inquiry

Marty, Oregon recently changed our enabling statute in response to a similar situation. We had an Oregon/Idaho licensed lawyer representing clients in Oregon and taking their money without providing services. He had no office in Oregon, only Idaho. Original version of fund statute required that dishonest lawyer "maintained an office in the state of Oregon," so we couldn't pay the claim. New

version of statute requires that the dishonest lawyer "was an active member of the Oregon State Bar engaged in the practice of law in Oregon" at the time of the loss and the loss must arise "out of the person's practice of law in Oregon." I don't know if this answers your question, but it enabled us to pay several claims and presumably more in the future.

---

From: Irwin Gilbert [mailto:IGilbert@bizlit.net]  
Sent: Thursday, December 15, 2005 2:37 PM  
To: Holtaway, John  
Subject: RE: What does the phrase mean? MN Inquiry

We use similar language in Florida. We generally accept claims that arise against Florida lawyers for dishonest conduct occurring within the State. In some cases, such as Florida lawyers admitted pro hac vice in another state committing a defalcation in another state, the nexus problem results in a claim being denied. However, where the funds were held in a Florida trust account, the defalcation is viewed as having occurred here. We can identify that the "matter" arose in Florida based upon the attorney client relationship being created in Florida.

Your facts would probably stimulate a strenuous argument among the members of the Board of Governors here, and likely would be viewed as failing the nexus test, because the Board would view this as a Texas lawyer with a Texas client and an out of State enterprise.

Irwin Gilbert  
Chairman, FCSF

---

From: Tim O'Sullivan [mailto:tos@nylawfund.org]  
Sent: Friday, December 23, 2005 2:56 PM  
To: Holtaway, John  
Subject: Re: What does the phrase mean? MN Inquiry

Marty:

Sorry for my delay in replying.

NY did not until recently have nexus requirement language in our Regs. The only requirement was that the lawyer be "admitted to practice in New York". Over the years though our Trustees interpreted this to mean that there had to be a nexus between the loss and the practice of law in NY.

We had several claims recently with out of state losses involving a lawyer who just happened to have been admitted in NY in the distant past. There was no other connection between the loss and NY. After wrestling with the issue, our Trustees eventually paid the losses. They then amended our Regs and added the following language as a necessary element of an eligible loss:

" there is, in the trustees' discretion, a sufficient nexus between the dishonest conduct alleged in the claim and the practice of law in New York State".

My Trustees deliberately made this new language vague so as to allow themselves latitude in exercising their discretion as to what losses they can reimburse.

Not sure if this helps, but good luck. & Happy Holidays.  
Tim O'Sullivan

---

From: Kenneth.Bossong@judiciary.state.nj.us  
[mailto:Kenneth.Bossong@judiciary.state.nj.us]  
Sent: Friday, December 23, 2005 10:51 AM  
To: Holtaway, John  
Subject: Re: What does the phrase mean? MN Inquiry

Marty,  
By way of background, NJ's language is less explicit than yours on this point:

Rule 1:28-3. 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 or an attorney admitted pro hac vice acting either as an attorney or fiduciary, provided that:

(1) Said conduct was engaged in while the attorney was a practicing member of the Bar of this State or admitted pro hac vice in a matter pending in this State...

Though less explicit than your "matter in this state" and "lawyer-client relationship in this state", our language has always been read to require a claim to have a nexus to NJ. Always. And I see little prospect for that changing. The good news is that we do take full responsibility for any lawyer who is permitted to practice here. You see the explicit inclusion of pro hac lawyers; with the inclusion of in-house counsel, multi-jurisdictional practitioners, and foreign legal consultants as folks who pay the annual assessment, there is no question that we would respond to defalcations perpetrated by them with a nexus in NJ.

I think you have done a service here by spotlighting the real issue: nexus. Should a claim be required to have a nexus to the jurisdiction for it to be compensable? If so, how much of a nexus is enough? MJP is just an off-shoot of this issue.

For whatever it is worth, having some nexus is one requirement that does not offend me, as long as any reasonable nexus will do. If someone licensed in NJ gets involved in some shady land deal elsewhere, it seems a bit much to ask NJ's lawyers to pay when either (1) anyone interested could easily have investigated whether the lawyer was a lawyer there; or (2) the highest court there permitted such practice. Conversely, it would be worrisome for the well-being of NJ clients if other states' lawyers were permitted to practice here without responsibility, since there are still a number of Funds not in a position to make their own citizen/victims whole, without taking on unlimited liability for behavior everywhere.

Ken

---