

**RULES FOR CLIENT PROTECTION FUND OF THE STATE BAR  
ASSOCIATION OF NORTH DAKOTA**

Adopted by the SBAND Board of Governors as Rules for Client  
Protection, January 26, 2008 and amended and approved on  
November 22, 2014

## **RULE 1. PURPOSE AND SCOPE**

- A. The purpose of the Client Protection Fund is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers licensed or authorized to practice law in the courts of this jurisdiction occurring in the course of the client-lawyer or other fiduciary relationship between the lawyer and the claimant.
- B. Every North Dakota lawyer accepts the obligation to the public to participate in the collective effort of the bar to reimburse persons who have lost money or property as a result of the dishonest conduct of another lawyer. Our private, non-taxyer, contribution to the Client Protection Fund is an acceptable method of meeting this obligation.

### **Comment**

[1] Paragraph A expresses the general purpose of a Client Protection Fund: promoting public confidence in the administration of justice and the integrity of the legal profession. The term "dishonest conduct" is defined in Rule 10.

[2] Paragraph B, drawn from the Comment to Rule 1.15 of the ABA *Model Rules of Professional Conduct*, recognizes that lawyers individually and the bar collectively, have the obligation to participate in a Lawyers' Fund for Client Protection.

## **RULE 2. DEFINITIONS**

- A. **Board** means the Board of Governors of the State Bar Association of North Dakota (SBAND).
- B. **Client** means any person or entity, other than a governmental entity or agency, entering into an attorney-client relationship or fiduciary relationship with a lawyer.
- C. **Committee** means the Client Protection Fund Committee of the SBAND.
- D. **Disciplinary Board** means the Disciplinary Board of the North Dakota Supreme Court.
- E. **Disciplinary Counsel** means the disciplinary counsel of the Disciplinary Board.
- F. **Fund** means the Client Protection Fund of the SBAND.
- G. **Lawyer** means a person who, at the time of the conduct complained of, was (i) an active member in good standing of the SBAND and (ii) engaged in the active practice of law in North Dakota, or admitted pro hac vice.
- H. **Claim** means the application to the Committee for recovery of a loss.
- I. **Claimant** means the one making a claim.

### **RULE 3. FUNDING**

- A. SBAND shall provide for funding by the lawyers admitted and authorized to practice law in North Dakota in amounts adequate for the proper payment of claims and the costs of administering the Fund.
- B. The Board shall set the amount each lawyer is to pay.

#### **Comment**

[1] Paragraph A suggests that the single most important factor in establishing and maintaining an effective client reimbursement program is ensuring adequate and continuous funding through a reliable source.

[2] In the exercise of its authority, the Board may assess lawyers an annual fee to finance systems that implement the Client Protection Fund.

### **RULE 4. FUND**

All monies or other assets of the Fund shall constitute a trust and shall be held in the name of the Fund, subject to the direction of the Committee and the Board.

#### **Comment**

[1] Matters and expenses for which the Fund may be used should be considered and delineated by the Committee in written policies to ensure that claimants receive the maximum benefit possible from available sources. Segregating any accounts in the name of the Fund is fundamental in preventing the use of monies by other entities for purposes unrelated to reimbursement and client protection.

[2] Administrative expenses will be incurred by operating the Fund even though members traditionally serve on the Committee without compensation. The cost of administering the Fund, e.g., expenses of Committee members, hearing of claims, record keeping, and salaries for staff and other overhead, should be paid out from the Fund.

### **RULE 5. COMPOSITION OF THE COMMITTEE**

- A. **Composition:**
  - (1) The Committee shall consist of the President of SBAND and three members of the Board appointed by the President to serve for one year. One of the three appointees shall be designated as the chair of the committee by the President.
  - (2) The Executive Director of the SBAND shall be the Secretary/Treasurer of the Committee and shall maintain all necessary records.
- B. **Vacancies:** Vacancies in an unexpired term shall be filled by appointment by the President of SBAND.
- C. **Meetings:**
  - (1) The Committee shall meet at the call of the Chair.

(2) A quorum for any meeting of the Committee shall be three members. The Committee shall act by majority vote of those in attendance. No action shall be taken by the Committee in the absence of a quorum.

- D. Expenses:** Committee members may be entitled to reimbursement for expenses incurred in the performance of their duties as Committee members pursuant to SBAND reimbursement policies.

### **Comment**

[1] Regular and frequent meetings of the Committee throughout the year are necessary to ensure that the Fund has the ability to respond promptly and effectively. The Committee should meet at least quarterly if any claims are pending. Telephone conferences should be encouraged where necessary. Claims should be handled in as expeditious a manner as possible consistent with their just resolution.

### **RULE 6. DUTIES AND RESPONSIBILITIES OF THE COMMITTEE**

- A. To receive, evaluate, determine and, in its discretion, make recommendations to the Board regarding the payment of claims;
- B. To provide an annual report on its activities to the Board;
- C. To report to and make recommendations to the Board regarding the prosecution of claims for restitution or other relief to which the Fund may be entitled;
- D. The Committee may, with approval of the Board, employ and compensate investigators, legal counsel and such other persons as it deems reasonably necessary and appropriate;
- E. To publicize its activities to potential claimants, the public and the bar;
- F. To promote effective communication between lawyer disciplinary authorities and the Fund, and
- G. To perform all other acts necessary or proper for the fulfillment of the purposes and effective administration of the Fund.

### **RULE 7. CONFLICT OF INTEREST**

- A. A member of the Committee who has or has had a lawyer-client relationship or financial relationship with a Claimant or any lawyer who is the subject of a Claim shall not participate in the investigation or adjudication of that Claim. The President shall appoint a temporary committee member from the Board to fill the vacancy.
- B. A member of the Committee with a past or present relationship, other than as provided in Paragraph A, with a claimant or the lawyer whose alleged conduct is the subject of the claim, or who has other potential conflicts of interest, shall disclose such relationship to the Committee and, if the

Committee deems appropriate, that member shall not participate in any proceeding relating to such claim.

**Comment**

The Committee must be sensitive to the perceptions of both the public and the legal profession in its determination of claims. Disqualification of members of the Committee tainted by real or apparent conflicts of interest helps to ensure confidence in the impartiality in the proceeding. Potential conflicts of interest that should be disclosed include relations with other parties, such as with potential third-party sources of recovery.

**RULE 8. IMMUNITY**

The Members of the Committee, employees and agents of the Board, and employees of SBAND, shall be absolutely immune from civil liability for all acts in the course of their official duties. Absolute immunity shall also extend to claimants and lawyers who assist claimants for all communications to the Fund.

**Comment**

[1] Immunity from civil liability encourages service on the Committee, and protects independent judgment in the evaluation of claims. Immunity also protects the fiscal integrity of the Fund, and encourages claimants and lawyers to participate in seeking reimbursement for eligible losses.

[2] As a matter of public policy, immunity should attach to the Fund's activities and proceedings in the same way that absolute immunity attaches in lawyer disciplinary proceedings.

[3] In the absence of court rule or statute, immunity may not be available in proceedings involving voluntary funds. Insurance may therefore be required to protect members, staff, claimants, and the volunteer lawyers who assist claimants in processing their claims.

**RULE 9. ELIGIBLE CLAIMS**

- A. The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant.
- B. The claim shall have been filed no later than two years after the claimant knew or should have known of the dishonest conduct of the lawyer.
- C. As used in these Rules, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including:
  - (1) Failure to refund unearned fees received in advance as required by Rules 1.5, 1.15, and 1.16 of the North Dakota Rules of Professional Conduct; and

- (2) The borrowing of money from a client without intention to repay it, or with disregard of the lawyer's inability or reasonably anticipated inability to repay it.
- D. Except as provided by Paragraph E of this Rule, the following losses shall not be reimbursable:
- (1) Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates and employees of lawyer(s) causing the losses;
  - (2) Losses covered by a bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest;
  - (3) Losses incurred by any financial institution that are recoverable under a "banker's blanket bond" or similar commonly available insurance or surety contract;
  - (4) Losses incurred by any business entity controlled by the lawyer(s), any person or entity described in Subparagraph D (1), (2) or (3) of this Rule;
  - (5) Losses incurred by any governmental entity or agency;
  - (6) Losses arising from business or personal investments not arising in the course of the client-lawyer relationship; and
  - (7) Consequential or incidental damages, such as lost interest, or lawyer's fees or other costs incurred in seeking recovery of a loss.
- E. In determining whether it would be more appropriate for this Fund or another Fund to pay a claim, the Committee should consider the following factors:
- (1) the Fund(s) into which the lawyer is required to pay an annual assessment or into which an appropriation is made on behalf of the lawyer by the bar association;
  - (2) the domicile of the lawyer;
  - (3) the domicile of the client;
  - (4) the residence(s) of the lawyer;
  - (5) the number of years the lawyer has been licensed in each jurisdiction;
  - (6) the location of the lawyer's principal office and other offices;
  - (7) the location where the attorney-client relationship arose;
  - (8) the primary location where the legal services were rendered;
  - (9) whether at the time the legal services were rendered, the lawyer was engaged in the unauthorized practice of law as defined by the jurisdiction in which the legal services were rendered; and
  - (10) any other significant contacts.
- F. The Board may enter into an agreement with the Fund of another jurisdiction to reimburse a portion of the loss suffered by a claimant whose claim may be eligible for payment under both Funds. The Board may take into consideration the other Fund's rules on payment of claims for reimbursement prior to entering into such an agreement.
- G. In cases of extreme hardship or special and unusual circumstances, the Board may, in its discretion and consistent with the purpose of the Fund, pay a claim that would otherwise be excluded under these Rules.

- H. In cases where it appears that there will be unjust enrichment, or the claimant unreasonably or knowingly contributed to the loss, the Board may, in its discretion, deny the claim.

### Comment

[1] Set forth in Paragraph A is the basic criteria for compensability of losses. An eligible claim must include: (1) a demonstrable loss; (2) caused by the dishonest conduct of a lawyer; and (3) within or arising out of a client-lawyer or fiduciary relationship.

[2] Fiduciary relationships are included because lawyers traditionally serve in that capacity as executors, conservators and guardians *ad litem*. Rejection of claims based upon technical distinctions between this sort of service and a client-lawyer relationship would not serve the purpose or mission of the Fund.

[3] Paragraph C adds to the Rules a definition of "dishonest conduct." The basic concept is one of conversion or embezzlement. Subparagraphs (1) and (2) make clear that if the essential nature of the transaction was conversion, dishonest conduct will be found even where the lawyer took money in the guise of a fee, a loan or an investment. Indeed, employing such a ruse is part of the dishonesty. Subparagraph (1) sets forth a standard for the handling of difficult unearned fee claims in accordance with The Rules of Professional Conduct. It is not intended to encompass bona fide fee disputes. Where money received by a lawyer was clearly neither earned nor returned, however, the client feels violated, hardship can result, and the Board may find dishonest conduct. Subparagraph (2) anticipates overreaching by a lawyer, in the context of a loan to the lawyer by the client, to such an egregious extent as to be tantamount to theft. Similarly, use by the lawyer of a purported "investment" to induce a client to turn over money should not preclude a finding of dishonest conduct where the "investment" is worthless, non existent and so forth.

[4] Paragraph C must be read in light of Paragraph A. In focusing on dishonest conduct, it must be kept in mind that such conduct must occur within or as a result of a client-lawyer or fiduciary relationship in order to be compensable.

[5] A five-year limitation on the filing of claims from the date the claimant knew or should have known of the dishonest conduct is contained in Paragraph B. Under Paragraph E, the Board should provide liberal leeway for extension, however, especially in light of the extent to which the Fund publicizes itself. It is not knowledge of the dishonest conduct but the lack of knowledge of the existence or purpose of the Fund that is the problem for many prospective claimants.

[6] Paragraph D describes claims that are not reimbursable. Subparagraphs (1), (4), and (5) declare certain classes of potential claimants to be ineligible for policy reasons. Subparagraphs (2) and (3) imply that recourse should be sought from certain third parties such as title insurance companies and banks cashing checks over forged endorsements prior to seeking it from the Fund. Such third parties lack the client-lawyer relationship necessary to prosecute a claim in their own right. Should such third parties fail or refuse to pay, the Fund should promptly pay the claim, take an assignment from the claimant, and pursue the third parties

in its own right.

[7] Subparagraph D (6) addresses the most difficult of Fund claims. Claims in which lawyers steal from their clients in the guise of "investments" should be paid, but transactions having nothing to do with the lawyer's license to practice are not compensable. Claims with facts somewhere between the two extremes often arise, and the issue is whether there is "enough of" a client-lawyer relationship. Funds have found a "but for" test helpful: "But for the lawyer enjoying a client-lawyer relationship with the claimant, such loss could not have occurred." Factors considered in applying this test include (1) disparity in sophistication and bargaining power between lawyer and claimant; (2) extent to which client-lawyer relationship overcame the normal prudence of claimant; (3) extent to which lawyer became privy to claimant's financial information as claimant's lawyer; (4) whether the transaction originated with lawyer; (5) reputation of lawyer as to law practice or business involvements; (6) amount charged by lawyer for legal services as opposed to finder's fees; and (7) number, nature, and timing of prior transactions between claimant and lawyer.

[8] Paragraph E sets forth factors to be considered by the Board when deciding whether this Fund, another jurisdiction's Fund, or both Funds should pay a claim where more than one Fund has jurisdiction over a lawyer. This situation might arise where a lawyer is licensed in two or more jurisdictions; a lawyer is licensed in only one jurisdiction and has engaged in the authorized multijurisdictional practice of law in another jurisdiction; or a lawyer is licensed in only one jurisdiction and has engaged in the unlicensed practice of law in another jurisdiction.

[9] Paragraph F recognizes that there may be situations where it is appropriate for the Board to enter into an agreement with the Fund of another jurisdiction to reimburse a portion of the loss suffered by a claimant whose claim may be eligible for payment under both Funds. However, since Funds have different maximum dollar amounts of reimbursement for individual losses, the Fund with a higher maximum amount should not be required in every case to contribute more than the other Fund, or to contribute the maximum amount. Such a requirement could result in an undue burden on the Fund. The Board may take into consideration the other Fund's rules and its own rules on payment of claims for reimbursement, as well as the factors in Paragraph (E), prior to entering into such an agreement.

[10] Paragraphs G and H reiterate the critical importance of vesting in the Board the discretion to do justice in each claim considered, without needlessly following technical rules. These paragraphs recognize that it is impossible to predict every factual circumstance that will be presented to the Committee and Board.

## **RULE 10. CLAIMS**

- A. Amount:** The amount recoverable by any one Claimant in a twelve month period shall not exceed \$25,000.00 or 10% of the total fund amount, whichever sum is smaller, or in the event that the Fund has procured a bond, insurance, reinsurance or excess coverage for such claims, then an amount not



exceeding the per claim or per occurrence amount specified in the coverage. In the event the Fund has not procured a bond, insurance, reinsurance or excess coverage, the aggregate amount recoverable by all Claimants for loss caused by any one lawyer shall not exceed \$75,000 in a twelve month period or 25% of the total fund amount, whichever sum is smaller. If the Fund has procured a bond, insurance, reinsurance or excess coverage, then the annual aggregate amount per lawyer in the coverage, if any, shall be applicable.

**B. Conditions:** For a Claimant to recover a loss, the Claimant must show that reasonable efforts have been made to obtain reimbursement for the loss from the lawyer or from other reasonably available sources, including by way of example, the lawyer's partner(s), the lawyer's firm, the lawyer's estate, or any applicable bond or insurance.

**C. Claim:** The Claimant shall submit a Claim made under oath on forms provided by the Committee.

**D. Consideration:**

(1) The Committee shall have discretion to determine whether or not a recommendation to the Board for payment of any Claim shall be made in whole or in part.

(2) In making its decision, the Committee shall be guided, but not necessarily bound, by the following factors:

(a) The amount in the Fund available for the payment of Claims.

(b) The nature and size of the loss.

(c) The promptness of the Claimant's action upon discovery of the loss.

(d) The degree of hardship the Claimant has suffered as a result of the loss.

(e) The degree, if any, to which the Claimant's conduct may have contributed to or made more likely the loss.

(f) In the event of multiple claims against a single lawyer, the Committee may recommend partial reimbursement on a pro rata or other equitable basis.

**E. Procedure:**

(1) The Lawyer shall be notified of a Claim by sending a certified letter to the address on file with the State Board of Law Examiners.

(2) The disciplinary counsel shall be notified by the Committee of every Claim.

(3) To the extent allowed by rules promulgated by the North Dakota Supreme Court, the Committee may review reports of investigations by the inquiry committees or disciplinary counsel for the sole purpose of determining whether a Claim should be granted. The Committee may conduct additional investigation in connection with any Claim.

(4) The Committee may request that testimony be presented. The

Claimant or the Lawyer, the personal representative, assign or successor in interest, shall, upon request, be given a reasonable opportunity to be heard. The North Dakota Rules of Evidence shall not apply except to the extent required to afford fundamental fairness to all parties.

(5) A recommendation regarding any Claim shall be determined on the basis of all information submitted to the Committee. Notice shall be given to the Claimant and the Lawyer of the Committee's action. Such notice shall be given by mail to the Claimant's last known address and to the Lawyer's address on file with the State Board of Law Examiners.

**F. Payment:** The Committee may, in its discretion, recommend payment of a loss (or any part of a loss) at any time, or may defer recommendations regarding payments of any or all losses for a reasonable time to determine the total amount of losses claimed in relation to the total amount of monies in the Fund. No Claimant or any other person or entity shall have any vested right or interest in the Fund, or any applicable bond or insurance coverage as beneficiary or otherwise.

#### **RULE 11. REQUEST FOR RECONSIDERATION**

The claimant or respondent may request reconsideration in writing within 30 days of the denial or determination of the amount of a claim. If the claimant or respondent fails to make a request or the request is denied, the decision of the Board is final and there is no further right or appeal.

#### **Comment**

[1] This Rule establishes a procedure to provide an opportunity for reconsideration of a claim. It permits claimants or respondents further consideration without creating a right of appeal or judicial review. The opportunity for reconsideration also provides a safeguard against dismissal of a claim not fully presented earlier.

#### **RULE 12. PAYMENT OF CLAIMS FOR REIMBURSEMENT**

- A. Payment of reimbursement shall be made in such amounts and at such times as the Board deems appropriate and may be paid in lump sum or installment amounts.
- B. If a claimant is a minor or an incompetent, the reimbursement may be paid to any person or entity authorized to receive the reimbursement for the benefit of the claimant.

## **Comment**

[1] Full reimbursement is the goal of a Fund, and adequate financing is essential to its achievement. Realistically, however, this ideal must be tempered with a Fund's need to provide all eligible claimants with meaningful, if not total, reimbursement for their losses.

[2] A maximum limitation on reimbursement permits the assets of a developing Fund to accumulate while an historical "claims presented" record is established. It also serves to protect established Funds from catastrophic losses. Toward that end, Paragraph A authorizes the Board to fix a maximum limitation on reimbursement, whether for individual losses, or for the aggregate for all losses sustained by the clients of an individual lawyer.

[3] An aggregate limitation is permitted under Paragraph A, but it is not encouraged. An aggregate limitation has the potential of unfairness and is inconsistent with the goal of providing full reimbursement to all eligible claimants. Unless clearly required by a new and developing Fund, it should not be utilized. When utilized, the Board should aim for its elimination as soon as the Fund's fiscal conditions permit.

[4] Maximum limitations, whether individual or aggregate, should be reviewed periodically in light of the Fund's actual experience in providing reimbursement to eligible claimants for their documented losses.

[5] Paragraph B assigns responsibility for the determination of the actual amount of each reimbursement to the discretion of the Board.

[6] Paragraph B also grants the Board flexibility in paying reimbursement. Depending on a Fund's financial and administrative needs, periodic payment dates can be established, and reimbursement can be paid in lump sums or in installments.

[7] Similarly, where losses involve minors and incompetents, Paragraph C permits the Board to pay the reimbursement directly to a parent or legal representative, for the benefit of the claimant.

## **RULE 13. REIMBURSEMENT FROM THE FUND IS DISCRETIONARY**

No person shall have the legal right to reimbursement from the Fund. There shall be no appeal from a decision of the Board.

## **Comment**

[1] Although these Rules establish procedures for the processing of claims seeking reimbursement from the Fund, they are not intended to create either substantive rights to reimbursement, compensation, damages or restitution for a lawyer's dishonest conduct, or procedural rights subject to judicial review with respect to determination of claims.

[2] The Fund is not a guarantor of honesty and integrity in the practice of law. Dishonest conduct by a member of the bar imposes no separate legal obligation on the profession collectively, or on the Fund, to compensate for a lawyer's misconduct. The Fund is a lawyer-financed public service, and payments by the Board is discretionary.

#### **RULE 14. RESTITUTION AND SUBROGATION**

- A. A lawyer whose dishonest conduct results in reimbursement to a claimant shall be liable to the Fund for restitution; and the Board may bring such action as it deems advisable to enforce such obligation.
- B. A lawyer 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. A lawyer's failure to make satisfactory arrangement for restitution shall be cause for suspension, disbarment, or denial of an application for reinstatement.
- C. As a condition of reimbursement, and to the extent of the reimbursement provided by the Fund, a claimant shall be required to provide the Fund with a transfer of the claimant's rights against the lawyer, the lawyer's legal representative, estate or assigns; and of the claimant's rights against any third party or entity who may be liable for the claimant's loss.
- D. Upon commencement of an action by the Board as subrogee or assignee of a claim, it shall advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses.
- E. In the event that the claimant commences an action to recover unreimbursed losses against the lawyer or another entity that may be liable for the claimant's loss, the claimant shall be required to notify the Board of such action.
- F. The claimant shall be required to agree to cooperate in all efforts that the Board undertakes to achieve restitution for the Fund, and to repay the Fund if claimant is subsequently reimbursed from another source an amount that exceeds the difference between the principal misappropriated and the Fund award. Such repayment shall not exceed the amount of the Fund award.

#### **Comment**

[1] As fiduciaries of the Fund, the Board has the obligation to seek restitution, in appropriate cases, for reimbursement paid to claimants. Successful restitution efforts can enlarge the Fund's financial capacity to provide reimbursement to eligible claimants, and also reduce the need to increase assessments on lawyers to finance the operations of the Fund.

[2] The Board may seek restitution by direct legal action against the lawyer, as well as by the enforcement of rights provided by subrogation and assignment against the lawyer, the lawyer's estate, or any other person or entity who may be liable for the claimant's loss.

[3] Paragraph A is a statement of the Fund's right to seek restitution from the lawyer whose dishonest conduct resulted in a payment of reimbursement. Paragraph A creates an obligation on such a lawyer to reimburse the Fund for all payments made by the Fund to the lawyer's clients. Under Paragraph B, the making of restitution to the Fund by the lawyer is a condition precedent to the lawyer's continued practice of law, or, as applicable, the lawyer's reinstatement to practice.

[4] Paragraph C requires the Board to establish a subrogation policy that requires claimants who receive reimbursement from the Fund to contractually transfer to the Fund their rights against the lawyer and any other person or entity that may be liable for the loss which the Fund reimbursed. This ordinary transfer of rights by subrogation is to extent of the reimbursement provided by the Fund.

[5] Paragraphs D and E provide for appropriate notice and joinder of parties in subrogation actions by the Fund, or by a claimant, where the claimant has received less than full reimbursement from the Fund.

[6] Paragraph F requires a claimant agree to cooperate with the Fund in its efforts to secure restitution.

[7] The provisions of Paragraphs C, D, E, and F will ordinarily be incorporated in the Fund's subrogation agreement with the claimant.

[8] Subrogation agreements should be carefully drawn to maximize the Board's creditor rights. In appropriate cases, subrogation should be supplemented with a full or partial assignment of specific rights possessed by a claimant, such as a payee's rights as a party to a negotiable instrument, or as a judgment creditor.

[9] The Board should seek the enactment of local law, if necessary, to enhance the Fund's creditors rights. One example is a statutory grant of subrogation rights once the Fund reimburses a claimant's loss. A statutory right of subrogation can effectively supplement contractual subrogation, and may eliminate the need for individual agreements.

[10] Another enhancement that local law might provide a Fund is an automatic lien upon payment of restitution. The lien can serve a two-fold purpose: enabling the Board to intercept restitution which the lawyer is obligated to pay a claimant and preventing claimants from receiving double payments for their losses.

[11] Although most collection efforts directly against the lawyer will not be immediately successful as a practical matter, it is important that the Fund acquire the claimant's rights when it pays reimbursement. A transfer of rights has the potential for a later recoupment of restitution, and to prevent a claimant's double recovery for the same loss.

[12] Lawyer disciplinary agencies, increasingly require lawyers to make restitution to Funds, or to clients, as a condition of discipline or for reinstatement to practice. *See, ABA Model Rules for Lawyer Disciplinary Enforcement (1999).*

[13] The Board, through the exercise of subrogation and assignments rights, can also recover restitution from collateral sources, including law partners.

## **RULE 15. JUDICIAL RELIEF**

- A. The Board may make application to the appropriate court for relief to protect the interests of claimants or the Fund where:
  - (1) the assets of clients appear to be in danger of misappropriation or loss, or to secure the claimant's or Fund's rights to restitution or subrogation; or
  - (2) the lawyer disciplinary agency has failed to exercise jurisdiction.
- B. A court's jurisdiction in such proceedings shall include the authority to appoint and compensate custodial receivers to conserve the assets and practices of disciplined, missing, incapacitated and deceased lawyers.

### **Comment**

[1] Occasionally a situation arises in which the protection of clients and the Fund requires the appointment of a custodial receiver to wind down the practice and to preserve assets. Rule 15 makes explicit the Board's authority to seek just such a remedy as is available under state law. It is anticipated that the Rule would be adapted to seeking equitable remedies in each jurisdiction.

## **RULE 16. CONFIDENTIALITY**

- A. Claims, proceedings and reports involving claims for reimbursement are confidential until the Board authorizes reimbursement to the claimant, except as provided below, unless provided otherwise by law. After payment of the reimbursement, the Board shall 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 Board 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 Board shall authorize, or the release of statistical information that does not disclose the identity of the lawyer or the parties, or the use of such information as is necessary to pursue the Fund's subrogation rights under Rule 14.

### **Comment**

[1] The need to protect wrongly accused lawyers and to preserve the independence of the Board's deliberations should be balanced with the strong public interest in protecting legal consumers and promoting public confidence in the administration of justice.

[2] Publication of awards by the Board demonstrates the legal profession's responsiveness to clients and its commitment to self-regulation. Responsible

public information programs are essential to achieving the purposes of the Fund. The public, bar, and judicial leaders, and the news media should be kept informed of the activities of the Board and the status of its reimbursement efforts.

[3] The Board must also be sensitive to the privacy concerns of claimants, and of the constitutional rights of lawyers who may be the subject of criminal proceedings. Deferring publicity may therefore be appropriate where there is a pending criminal prosecution against a lawyer. Securing a claimant's consent to the release of information concerning a claimant's loss and reimbursement may also be a desirable practice.

[4] It is within the discretion of the Board to determine which public agencies should be provided access to claim files. Lawyer discipline, law enforcement, and agencies considering nominations to public offices may have a legitimate need for information contained in the Fund's records that would otherwise be confidential.

#### **RULE 17. COMPENSATION FOR REPRESENTING CLAIMANTS**

No lawyer shall accept any payment for assisting a claimant with prosecuting a claim, unless such payment has been approved by the Board.

#### **Comment**

[1] Proceedings to determine claims are not necessarily adversarial in nature, and Fund employees should be available to assist claimants in understanding and preparing claims forms. The Bar should be encouraged to assist claimants as a particularly appropriate form of *pro bono* service, and appreciation for such work ought to be expressed.