

ABA

American Bar Association  
Model Rules for Lawyers' Funds  
for Client Protection

(Model Rules, Rule 1, et seq.)

This page is for information only and is Not part of the attached document(s). It was created by Kenneth F. Irek for clarification and indexing.

# Model Rules for Lawyers' Funds for Client Protection - Preamble

## Preamble

The Model Rules for Lawyers' Fund for Client Protection are intended to serve as a national model for establishment and administration of a client protection fund. However, they cannot expect to accommodate every need of each Fund in the diverse constituency of the legal profession. The Model Rules aspire to establish standards for effective financing and efficient administration of Funds to achieve the purpose of client protection. They continue the basic intent and aspiration of the original Model Rules: to provide meaningful, prompt, and cost-free reimbursement to clients who have been injured by a lawyer's dishonest conduct.

Despite the best attempts of the legal profession to establish high standards of ethics and severe disciplinary sanctions for their breach, it is a fact that some lawyers misappropriate money from their clients. Typically, those lawyers lack the financial wherewithal to make restitution to their victims.

The organized bar throughout the United States has responded by creating Client Protection Funds to provide necessary reimbursement. The funds were either created by court rule, legislation or by the voluntary action of bar associations. In jurisdictions in which the bar is unified (i.e., membership in the state bar association is required for a license to practice law), the Fund may be part of the unified bar, which performs a variety of functions related to professional responsibility (e.g., administration of the lawyer regulatory system).

Funding can be generated from a variety of sources including mandatory assessment, legislative budget appropriation, and voluntary contribution. Mandatory assessment by court rule has proven to be the preferred method of assuring continual funding and staffing. Funds that receive revenues through mandatory assessment are preferred because the result is a reliable and predictable source of income. This allows a Fund to fully reimburse losses and to engage in public information, continuing legal education programs, and related activities. Voluntary contribution is the weakest funding method; it does not provide the Fund with broad-based and permanent income.

# Model Rules for Lawyers' Funds for Client Protection - Rule 1

## RULE 1 - PURPOSE AND SCOPE

A. The purpose of the Lawyers' Fund for Client Protection 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 otherwise 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. For purposes of these Rules, "lawyer" shall include a person:

- (1) licensed to practice law in this jurisdiction, regardless of where the lawyer's conduct occurs;
- (2) admitted as in-house counsel;
- (3) admitted *pro hac vice*;
- (4) admitted as a foreign legal consultant;
- (5) admitted only in a non-United States jurisdiction but who is authorized to practice law in this jurisdiction; or
- (6) recently suspended or disbarred whom clients reasonably believed to be licensed to practice law when the dishonest conduct occurred.

C. Every lawyer has an 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. Contribution to the Lawyers' Fund for Client Protection is an acceptable method of meeting this obligation.

## **Comment**

[1] Paragraph A expresses the general purpose of a Lawyers' Fund for Client Protection: 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] The definition of lawyer, found in Paragraph B, includes not only persons licensed or otherwise authorized to practice law in the jurisdiction, but also lawyers practicing law in the jurisdiction by virtue of in-house counsel admission, *pro hac vice* admission, foreign legal consultant admission, authorization for temporary practice of law by a foreign lawyer and by former or suspended lawyers reasonably believed by clients to have been authorized to practice law. Lawyers admitted as in-house counsel, *pro hac vice*, or as foreign legal consultants should both pay into the Fund as provided under Rule 3 and have their conduct covered by the Fund.

[3] The Fund is part of this jurisdiction's system of lawyer regulation. The Fund therefore has jurisdiction to recognize claims filed against lawyers licensed to practice law in this jurisdiction regardless of where the lawyer's conduct occurs. This is consistent with the jurisdictional authority set forth in Rule 8.5 (a) of the ABA *Model Rules of Professional Conduct*: "A lawyer admitted in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." Pursuant to Paragraph B, if necessary, this Fund is authorized to "follow" the lawyer and compensate eligible claimants who have suffered losses as a result of the lawyer's dishonest conduct.

[4] It is particularly equitable to require that this Fund, into which lawyers have paid annual assessments, have the primary responsibility to compensate clients who have suffered losses. Such lawyers would include those admitted as in-house counsel, by *pro hac vice* admission and foreign legal consultants. Lawyers admitted only in a non-United States jurisdiction may have their conduct covered by the Fund because the highest court in this jurisdiction has authorized them to provide legal services on a temporary basis in this jurisdiction.

[5] Rule 10(E) provides for an equitable balancing test to determine whether the Fund, another jurisdiction's Fund, or both Funds should pay claims filed against lawyers not admitted or authorized to practice law exclusively in this jurisdiction.

[6] Paragraph C, 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.

# Model Rules for Lawyers' Funds for Client Protection - Rule 2

## RULE 2 ESTABLISHMENT

- A. There is established the Lawyers' Fund for Client Protection ("Fund") to reimburse claimants for losses caused by dishonest conduct committed by lawyers admitted to practice in this state.
- B. There is established, under the supervision of the highest court in this jurisdiction ("Court"), the Lawyers' Fund for Client Protection Board of Trustees ("Board"), which shall receive, hold, manage and disburse from the Fund such monies as may from time to time be allocated to the fund.
- C. These rules shall be effective for claims filed with the Board after [date] and the Board shall not pay claims for losses incurred as a result of dishonest conduct committed prior thereto.

### Comment

The practice of law is so directly connected to the exercise of judicial power and the administration of justice that the right to define and regulate it belongs to the judicial department. It is the court that bears the responsibility for establishing qualifications for practice and for seeing that lawyers subject to its jurisdiction adhere to the standards of conduct the Court mandates.

Paragraph B links the establishment of a Fund to the Court's power to regulate the practice of law. The Court has the inherent power to establish a Fund and require lawyers admitted to

practice in this jurisdiction to contribute to it. The Court not only has the power but also the duty to provide a system for reimbursement to clients whose lawyers have mishandled their funds.

The limitation imposed in Paragraph C is necessary to prevent the possibility of an immediate bankrupting of the Fund caused by the payment of claims for dishonest conduct committed before the Fund was established. The provision sets a time certain after which losses will be reimbursable.

## Model Rules for Lawyers' Funds for Client Protection - Rule 3

### RULE 3 FUNDING

- A. The Court shall provide for funding by the lawyers admitted and licensed to practice law in the jurisdiction in amounts adequate for the proper payment of claims and the costs of administering the Fund.
- B. A lawyer's failure to pay any fee assessed shall be a cause for suspension from practice until payment has been made.

#### **Comment**

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. The Court, pursuant to its power to regulate lawyers and the practice of law, has the power to impose a fee to support the regulatory system. In the exercise of its authority, the Court may assess lawyers an annual fee to finance systems that implement the Court's regulatory authority.

Paragraph B is the enforcement mechanism for the failure to pay the assessment. [See Paragraph A of Rule 16](#) for restitution and subrogation enforcement standards.

## Model Rules for Lawyers' Funds for Client Protection - Rule 4

### 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 Board.

### **Comment**

Under Rule 3, the fees assessed by the Court against the jurisdiction's lawyers are to be used for a stated purpose, the Fund.

Matters and expenses for which the Fund may be used should be considered and delineated by the Board 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.

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

## **Model Rules for Lawyers' Funds for Client Protection - Rule 5**

### **RULE 5 COMPOSITION AND OFFICERS OF THE BOARD**

- A. The Board shall consist of five lawyers and two nonlawyers appointed by the Court for initial terms as follows:
- B.
  - 1. two lawyers for one year;
  - 2. one nonlawyer for two years;
  - 3. two lawyers for two years;
  - 4. one nonlawyer for three years; and
  - 5. one lawyer for three years.

Subsequent appointments shall be for a term of three years. The Court may limit the number of successive terms that Trustees may serve on the Board.

- C. Trustees shall serve without compensation but shall be reimbursed for their actual and necessary expenses incurred in the discharge of their duties.
- D. Vacancies shall be filled by appointment by the Court for any unexpired terms.
- E. The Board shall select a Chair, Secretary, Treasurer and such other officers as the Board deems appropriate.

F. The Treasurer shall be bonded in such manner and amount as the Board shall determine.

### **Comment**

A Board composed of lawyers and nonlawyers results in balanced evaluation of claims within the full context of the client-lawyer relationship. Participation by nonlawyers also enhances the credibility of the reimbursement process in the eyes of the public. Trustees should reflect all segments of the profession and the general population.

A Board of seven members is small enough to accomplish the work of the Fund, yet not so large as to discourage active involvement by each member or to be cumbersome. Terms of office are staggered to encourage continuity of experience and the development of policy and precedent. Depending on local policy or experience, the Court may limit successive appointments of the Trustees.

The Trustees should serve without compensation, *pro bono publico*, but should be reimbursed for expenses incurred in the discharge of their office.

Since direct and full responsibility for the administration and management of the Fund and its assets is vested in the Board, it should select its own officers.

## **Model Rules for Lawyers' Funds for Client Protection - Rule 6**

### **RULE 6 BOARD MEETINGS**

- A. The Board shall meet as frequently as necessary to conduct the business of the Fund and to timely process claims.
- B. B. The Chair shall call a meeting at any reasonable time or upon the request of at least two Trustees.
- C. C. A quorum for any meeting of the Board shall be four Trustees. A motion shall pass upon the affirmative vote of four Trustees.
- D. D. Minutes of meeting shall be taken and permanently maintained by the Secretary.

### **Comment**

Regular and frequent meetings of the Board throughout the year are necessary to ensure that the Fund has the ability to respond promptly and effectively. The Board 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.

# Model Rules for Lawyers' Funds for Client Protection - Rule 7

## RULE 7 DUTIES AND RESPONSIBILITIES OF THE BOARD

The Board shall have the following duties and responsibilities:

- A. to receive, evaluate, determine and pay claims;
- B. to promulgate rules of procedure not inconsistent with these Rules;
- C. to prudently invest such portions of the funds as may not be needed currently to pay losses, and to maintain sufficient reserves as appropriate;
- D. to provide a full report at least annually to the Court and to make other reports as necessary;
- E. to publicize its activities to potential claimants, the public and the bar;
- F. to employ adequate staff to assure the Board's effective and efficient performance of its functions;
- G. to retain and compensate consultants, administrative staff, investigators, actuaries, agents, legal counsel and other persons as necessary;
- H. to prosecute claims for restitution to which the Fund is entitled;
- I. to engage in studies and programs for client protection and prevention of dishonest conduct by lawyers; and
- J. to promote effective communication between lawyer disciplinary authorities and the Fund, and
- K. to perform all other acts necessary or proper for the fulfillment of the purposes and effective administration of the Fund.

### **Comment**

In determining the order and manner of payment of claims, the Board should have the discretion to pay in subsequent years all or part of claims that were not fully reimbursed in a prior year.

Investing monies that are not needed to cover current claims permits a reasonable return without risking the integrity of the Fund. The Board should adopt specific guidelines for the investment of funds. Investments should be of appropriate duration to maintain liquidity of assets and enable the Board to promptly pay losses. The nature of the investments may be specifically limited to

bonds, notes or securities issued or guaranteed by a state or federal agency, interest bearing accounts or certificates of deposit.

Paragraphs D and E require public information programs. The Board has the affirmative obligation to publicize its activities to both bench and bar. Similarly it is incumbent on the Board to publicize itself to the general public. The fulfillment of both obligations is extremely important to the success of the Fund in achieving its purposes.

As suggested in Paragraph I, the Board also should study and, if appropriate, adopt other potential programs, such as trust account overdraft notification, payee notification, and random audits, to help reduce defalcation.

The Fund's assets should not be unduly diminished by employing investigative or other personnel whose work would duplicate the efforts of others responsible for investigating lawyers' professional conduct. *See Rule 12C* regarding the cooperative effort anticipated between the Board and the lawyer discipline agency. Moreover, the Fund shall establish mechanisms to encourage lawyer disciplinary authorities to notify complainants about the existence of the Fund.

The Board should make an attempt to prosecute all claims for restitution. Restitution is one way of replenishing the Fund's assets. *See also , Rule 16* which focuses on subrogation and other methods of restitution.

The Trustees and staff should also participate in seminars and continuing legal educational programs dealing with client protection.

## Model Rules for Lawyers' Funds for Client Protection - Rule 8

### RULE 8 CONFLICT OF INTEREST

- A. A Trustee who has or has had a client-lawyer relationship or a financial relationship with a claimant or lawyer who is the subject of a claim shall not participate in the investigation or adjudication of a claim involving that claimant or lawyer.
- B. A Trustee 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 to the claim, or who has other potential conflicts of interest, shall disclose such relationship to the Board and, if the Board deems appropriate, that Trustee shall not participate in any proceeding relating to such claim.

## **Comment**

The Board must be sensitive to the perceptions of both the public and the legal profession in its determination of claims. Disqualification of members of the Board 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.

# Model Rules for Lawyers' Funds for Client Protection - Rule 9

## RULE 9 IMMUNITY

The Trustees, employees and agents of the Board 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**

Immunity from civil liability encourages lawyers and nonlawyers to serve on the Board, and protects their 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.

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.

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 Trustees, staffs, claimants, and the volunteer lawyers who assist claimants in processing their claims.

# Model Rules for Lawyers' Funds for Client Protection - Rule 10

## RULE 10 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 five 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 but not limited to:

(1) Failure to refund unearned fees received in advance as required by [Rule 1.16 of the *ABA Model Rules for 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 Board 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, recognize 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 Rule 1.16 of the *ABA Model 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, nonexistent 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 Board.

# Model Rules for Lawyers' Funds for Client Protection - Rule 11

## RULE 11 PROCEDURES AND RESPONSIBILITIES FOR CLAIMANTS

- A. The Board shall prepare and approve a form for claiming reimbursement.
- B. The form shall include at least the following information provided by the claimant under penalty of perjury:
  - C.
    - 1. the name and address of claimant, home and business telephone, occupation and employer, social security number;
    - 2. the name, address and telephone number of the lawyer alleged to have dishonestly taken the claimant's money or property, and any family or business relationship of the claimant to the lawyer;
    - 3. the legal or other fiduciary services the lawyer was to perform for the claimant;
    - 4. the amount paid to the lawyer;
    - 5. a copy of any written agreement pertaining to the claim;
    - 6. copies of any checks, money orders, receipts, or other proofs of payment;
    - 7. the form of the claimant's loss (e.g. money, securities or other property);
    - 8. the amount of loss and the date when the loss occurred;
    - 9. the date when the claimant discovered the loss, and how the claimant discovered the loss;
    - 10. the lawyer's dishonest conduct and the names and addresses of any persons who have knowledge of the loss;
    - 11. the name of the person, if any, to whom the loss has been reported (e.g. district attorney, police, disciplinary agency, or other person or entity) and a copy of any complaint and description of any action that was taken;
    - 12. the source, if any, from which the loss can be reimbursed including any insurance, fidelity or surety agreement;
    - 13. the description of any steps taken to recover the loss directly from the lawyer, or any other source;
    - 14. the circumstances under which the claimant has been, or will be, reimbursed for any part of the claim (including the amount received, or to be received, and the source); along with a statement that the claimant agrees to notify the Board of any reimbursements the claimant receives during the pendency of the claim;
    - 15. the existence of facts believed to be important to the Fund's consideration of the claim;

16. the manner in which the claimant learned about the Fund;
  17. the name, address and telephone number of the claimant's present lawyer;
  18. the claimant's agreement to cooperate with the Board in reference to the claim or as required by Rule 16, in reference to civil actions which may be brought in the name of the Board pursuant to a subrogation and assignment clause which shall also be contained within the claim.
  19. the claimant's agreement to repay Fund if the claimant is subsequently reimbursed from another source;
  20. The name and address of any other state Fund to which the claimant has applied or intends to apply for reimbursement, together with a copy of the application; and
  21. A statement that the claimant agrees to the publication of appropriate information about the nature of the claim and the amount of reimbursement if reimbursement is made.
- D. The claimant shall have the responsibility to complete the claim form and provide satisfactory evidence of a reimbursable loss.
- E. The claim shall be filed with the Board in the manner and place designated in the Board's rules.

### **Comment**

The Board is required to develop a claim form for claimants to establish their eligibility for reimbursement. The form should be comprehensive enough to minimize the investigative burden of the Board, yet not so detailed as to discourage eligible claimants from applying for reimbursement.

The enumeration in Paragraph B has been developed from claim forms in current use in several jurisdictions. Local need may require the enumeration to be supplemented by the Board. *See also, Paragraph A of Rule 18* , which addresses confidentiality.

Paragraph C assigns the ultimate burden of establishing eligibility for reimbursement upon the claimant. No formal or technical quantum of proof is imposed on the claimant or the Board. In many cases, of course, the lawyers' dishonest conduct will already have been established in a lawyer discipline action upon the "clear and convincing evidence" standard or, "beyond a reasonable doubt" in a criminal proceeding involving the same facts which constitute the claim for reimbursement. (*See, Rule 18C of the ABA Model Rules for Lawyer Disciplinary Enforcement.*)

## **Model Rules for Lawyers' Funds for Client Protection - Rule 12**

## RULE 12 PROCESSING CLAIMS

- A. Whenever it appears that a claim is not eligible for reimbursement pursuant to Rule 10, the claimant shall be advised of the reasons why the claim may not be eligible for reimbursement, and that unless additional facts to support eligibility are submitted to the Fund, the claim file shall be closed.
- B. An order disciplining a lawyer for the same dishonest act or conduct alleged in a claim, or a final judgment imposing civil or criminal liability therefor, shall be evidence that the lawyer committed such dishonest act or conduct.
- C. The lawyer disciplinary agency shall be promptly notified of the claim and required to furnish a report of its investigation of the matter to the Board. The lawyer disciplinary agency shall allow the Fund's representative access to its records during an investigation of a claim. The Board shall evaluate whether the investigation is complete and determine whether the Board should conduct additional investigation or await the pendency of any disciplinary investigation or proceeding involving the same act or conduct that is alleged in the claim.
- D. The Board may conduct its own investigation when it deems it appropriate.
- E. The lawyer shall be notified of the claim and given an opportunity to respond to the claim. A copy of the claim shall be provided to the lawyer, or the lawyer's representative. The lawyer or representative shall have 20 days in which to respond.
- F. The Board may request that testimony be presented to complete the record. Upon request, the claimant or lawyer, or their representatives, will be given an opportunity to be heard.
- G. The Board may make a finding of dishonest conduct for purposes of adjudicating a claim. Such a determination is not a finding of dishonest conduct for purposes of professional discipline.
- H. When the record is complete, the claim shall be determined on the basis of all available evidence, and notice shall be given to the claimant and the lawyer of the Board's determination and the reasons therefor. The approval or denial of a claim shall require the affirmative votes of at least four trustees.
- I. Any proceeding upon a claim need not be conducted according to technical rules relating to evidence, procedure and witnesses. Any relevant evidence shall be admitted if it is the type of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in court proceedings. The claimant shall have the duty to supply relevant evidence to support the claim.
- J. The Board shall determine the order and manner of payment and pay all approved claims, but unless the Board directs otherwise, no claim should be approved during the pendency of a disciplinary proceeding involving the same act or conduct that is alleged in the claim.

### Comment

Rule 12 addresses the procedure for consideration of claim in concert with the disciplinary process. The overall scheme presented is one of cooperation between the Fund and disciplinary authorities pursuant to Paragraph C, while avoiding duplication of effort in Paragraph B but respecting the different needs and autonomous functioning of the respective bodies identified in Paragraphs D and G.

The Rule also seeks to set forth a framework which balances the Fund's duty to address the claimant's allegations efficiently with the need to present the respondent lawyer with an opportunity to defend pursuant to Paragraphs E, F and H.

The overriding policy implicit in Rule 12 is that the Board exercises its discretion so as to make the best possible decision as expeditiously as possible in each claim presented. The Board may conduct any investigation it deems appropriate under Paragraph D, including the taking of testimony pursuant to Paragraph F. Paragraph J provides that the order and manner of payment of claims is likewise within the Board's discretion. Paragraph H requires the Board to articulate to each side the rationale for its determination on a given claim. Under Paragraph I, technical rules of evidence shall not be employed to hinder the Board from accomplishing its mission.

Note that under Paragraph H the affirmative vote of at least four Trustees is required in order to dispose of a claim, just as it is for any matter before the Board under Rule 6C. Thus, for example, if the minimum necessary for a quorum is present, any motion that cannot garner unanimous support will fail. A "majority of the quorum present" will not suffice. This Paragraph does not prevent determinations of claims by mail ballot.

Ideally the initial investigation should be done by the lawyer disciplinary agency personnel to avoid duplication of effort and inconsistent findings of both entities. The financial integrity of the Fund is preserved by using existing resources. Investigation by the Board should be utilized to gather additional evidence or to provide evidence in those jurisdictions where the discipline agency is unable to timely reveal the results of the investigation.

As noted in the Comment to Rule 11, in many matters, a criminal conviction or a finding during disciplinary proceedings will establish "dishonest conduct" for purposes of the Board's determination of the claim. A discipline or other agency may, however, lack jurisdiction or have little incentive to act where the lawyer is unlikely to engage in further misconduct. This dilemma is illustrated by lawyers who have died, become mentally or physically incapacitated, fled the jurisdiction, or been disciplined for other reasons. The Board may then be required under Paragraph G to make a finding of dishonest conduct solely for the purpose of the Fund's proceeding.

The Fund should have professional staff to assist the Board in investigating claims. Volunteers often cannot devote the same time and attention as staff members.

The Fund's investigations should be augmented by subpoena power, consistent with the local rules of civil procedure. While a claimant has the burden of providing satisfactory evidence of a reimbursable loss under Paragraph C of Rule 11, the Board should be given the opportunity to make the best possible decision on each matter before it.

# Model Rules for Lawyers' Funds for Client Protection - Rule 13

## RULE 13 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**

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.

# Model Rules for Lawyers' Funds for Client Protection - Rule 14

## RULE 14 PAYMENT OF CLAIMS FOR REIMBURSEMENT

- A. The Board may from time to time fix a maximum amount on reimbursement that is payable by the Fund.
- B. 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.
- C. 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.

### **Comments**

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.

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.

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.

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.

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

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.

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.

## Model Rules for Lawyers' Funds for Client Protection - Rule 15

### RULE 15 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

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.

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.

# Model Rules for Lawyers' Funds for Client Protection - Rule 16

## RULE 16 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

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.

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.

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 the dishonest 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 dishonest lawyer is a condition precedent to the lawyer's continued practice of law.

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.

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.

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

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

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.

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.

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.

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.

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).

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

## Model Rules for Lawyers' Funds for Client Protection - Rule 17

### RULE 17 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**

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 17 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.

## Model Rules for Lawyers' Funds for Client Protection - Rule 18

## RULE 18 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 16.

### **Comment**

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.

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.

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, particularly for a voluntary fund which may not be protected by the immunity that is afforded a court-established Fund under Rule 9.

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.

## Model Rules for Lawyers' Funds for Client Protection - Rule 19

## RULE 19 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**

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.