

HAWAII

Lawyers' Fund for Client Protection

(Rule 10 – Lawyers' Fund for Client Protection)

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Rule 10. LAWYERS' FUND FOR CLIENT PROTECTION.

10.1. Purpose; trustees; administration.

(a) Purpose; definition of "dishonest conduct." The purpose of the Lawyers' Fund for Client Protection of the Hawai'i Supreme Court ("Fund") is the reimbursement, to the extent and in the manner provided by these rules, of losses caused by the dishonest conduct of members of the bar of this State and any attorney specially admitted by any court of this State.

The words "dishonest conduct" as used herein mean wrongful acts committed by an attorney in the manner of defalcation or embezzlement of money; or the wrongful taking or conversion of money, property or other things of value; or refusal to refund unearned fees received in advance where the attorney performed no services or such an insignificant portion of the services that the refusal constitutes a wrongful taking or conversion of money; or borrowing money from a client without intention or reasonable ability or reasonably anticipated ability to repay it.

(b) Appointment of trustees. The supreme court shall appoint five trustees from nominations made by the Nominating Committee of the Hawai'i Supreme Court to administer and operate the Fund in accordance with these rules. The trustees shall consist of three lawyers and two nonlawyers appointed by the supreme court for staggered five-year terms.

(c) Organization; meetings. The trustees shall organize annually and shall then elect from among their number a chairperson and a treasurer to serve for a one-year term and such other officers for such terms as they deem necessary or appropriate. Meetings thereafter shall be held at the call of the chairperson. Three trustees shall constitute a quorum

and may transact all business except as may be otherwise provided by this rule or by the rules and regulations promulgated by the trustees.

(d) Rules. The trustees shall adopt rules, consistent with these rules and subject to meaningful review, analysis, input, and comment by the Hawai'i State Bar and ultimate approval of the supreme court, governing the administration of the Fund, the procedures for the presentation, consideration and payment of claims, and the exercise of their investment powers.

(e) Reimbursement. The trustees shall serve without compensation but shall be entitled to reimbursement from the Fund for their expenses reasonably incurred in the performance of their duties.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984; amended May 5, 1988, effective May 5, 1988; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992; amended effective March 10, 1998; amended April 8, 2002, effective July 1, 2002; further amended February 16, 2005, effective July 1, 2005; further amended February 15, 2018, effective July 1, 2018.)

10.2. Deleted.

10.3. Payment of claims.

(a) Eligible claims. The trustees may consider for payment all claims resulting from the dishonest conduct of a member of the Bar of this State or any attorney specially admitted by any court of this State, provided that:

(1) Said conduct was engaged in while the attorney was a licensed member of the Bar of this State or specially admitted by any court of this State; and

(i) the claim originates from the attorney's providing legal services in the State of Hawai'i; and

(ii) the claimant engaged the attorney's services in the State of Hawai'i; and

(iii) the dishonest conduct occurred in the State of Hawai'i; and

(2) The claim arises out of an attorney-client or fiduciary relationship customary to the practice of law such as where an attorney acts as an administrator, executor, trustee of an express trust, guardian or conservator; and

(3) The attorney has (one of the following):

(i) died;

(ii) been adjudicated a bankrupt;

(iii) been adjudicated an incompetent or incapacitated from continuing the practice of law by reason of physical or mental infirmity or illness or because of the use of drugs or intoxicants;

(iv) been disbarred or suspended from the practice of law, or voluntarily resigned from the practice of law;

(v) become a judgment debtor of the claimant, which adjudication shall have been based upon dishonest conduct while acting as specified in Rule 10.3(a) (2) and which judgment or judgments remain unsatisfied in whole or in part;

(vi) been adjudged guilty of a crime, which adjudication shall have been based upon the dishonest conduct of the attorney; or

(vii) left the jurisdiction and cannot be found.

(4) In addition to satisfaction of one of the requirements for eligibility under Rule 10.3(a) (3), the trustees may require that the application demonstrate either:

(i) that the alleged defalcating attorney is a judgment debtor of the claimant, the judgment or appeal is final, and the claimant has exhausted all remedies in attempting to collect the judgment; or

(ii) that the alleged defalcating attorney is without assets or that under the circumstances it is otherwise impracticable to obtain a judgment against the attorney, and there is no applicable insurance or bond.

(b) Nonreimbursable losses. The following losses shall not be reimbursable:

(1) Losses of a spouse, children, parents, grandparents, siblings, partners, associates, employers and employees of, or business entities or trusts owned or beneficially owned by an attorney causing the losses;

(2) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bondsman or surety or insurer is subrogated to the extent of that subrogated interest;

(3) Losses of any financial institution which are recoverable under a "banker's blanket bond" or similar insurance or surety contract.

(c) Discretion of trustees. In cases of extreme hardship, or if other interests of justice so warrant, the trustees may, in their discretion, recognize a claim which would otherwise be excluded under these rules.

(d) Consideration of trustees. In making determinations on claims, the trustees shall consider, among other appropriate factors, the following:

(1) The amounts available and likely to become available to the Fund for the payment of claims and the size and number of claims which are likely to be presented;

(2) The amount of the claimant's loss as compared with the amount of losses sustained by other eligible claimants;

(3) The degree of hardship suffered by the claimant as a result of the loss;

(4) The degree of negligence, if any, of the claimant which may have contributed to the loss;

(5) The existence of any collateral source for the reimbursement of the claim.

(e) Limitation on payments. The trustees shall, by rules, fix the maximum amount which any one claimant may recover from the Fund and the aggregate maximum amount which may be recovered because of the dishonest conduct of any one attorney.

(f) Rights to fund. No claimant or any other person or organization shall have any right in the Fund as beneficiary or likewise. All awards by the trustees are a matter of discretion.

(g) Conditions of payment. The trustees may require as a condition of payment that the claimant execute such instruments, take such action or enter into such agreements as the trustees require, including assignments, subrogation agreements, trust agreements, exhaustion of other remedies, and promises to cooperate with the trustees in making or prosecuting claims or charges against any person.

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

(i) Investments. Losses arising from investment advice given by the claimant's attorney, although such advice may result in loss of the claimant's monies, is not in and of itself a ground for seeking reimbursement from the Fund.

Claims arising out of investments may be considered for payment. However, when an attorney advises a claimant to invest funds he or she obtained from the claimant, by virtue of an attorney-client or fiduciary relationship, in a business or other venture, and the attorney then

converts the claimant's monies, in no event will interest on such investments be reimbursable. All payments on the investment, representing principal or interest received by the claimant, will be deducted from the claimant's initial investment in order to determine, for Fund purposes, the valid amount of the claim.

(Added July 29, 1981, effective July 29, 1981; amended May 24, 1984, effective May 24, 1984; renumbered September 1984; amended effective May 5, 1988; further amended February 7, 1992, effective February 7, 1992; further amended August 14, 2000, effective January 1, 2000; further amended October 15, 2012, effective January 1, 2013; further amended February 15, 2018, effective July 1, 2018.)

10.4. Powers and duties of the trustees. The trustees shall have the following duties and responsibilities:

(a) The Fund shall be audited annually and at such other times as the supreme court shall direct. The audits shall be at the expense of the Fund. The annual audit shall be included in a report to be submitted annually by the trustees to the Hawai'i State Bar and the supreme court reviewing in detail the administration of the Fund during the preceding year;

(b) The trustees may apply to the supreme court for interpretations of these rules and of the extent of their powers and duties and for advice regarding the proper administration of the Fund;

(c) The treasurer shall maintain the assets of the Fund in a separate account and shall disburse monies therefrom only upon the action of the trustees pursuant to these rules. The treasurer shall obtain a bond annually covering all of the trustees with such surety as may be approved by the trustees and in such amount as they may fix, or the treasurer may transfer the assets of the Fund to the custody of a corporate trustee authorized to do business as a trust company in the State of Hawai'i;

(d) To cause to be investigated all applications for reimbursable losses brought to the trustees' attention;

(e) To determine the order and manner of payment of applications for reimbursement;

(f) To reject or allow applications in whole or in part to the extent that funds are available;

(g) To use or employ the Fund for any of the following purposes within the scope of the Fund's objectives:

(1) to make reimbursements on approved applications;

(2) to purchase insurance to underwrite such losses in whole or in part;

(3) to invest such portions of the Fund as may be permitted under state law for such entities;

(4) to deposit monies in interest-bearing accounts in federally insured banks, federally insured savings and loan associations, or any other federally insured financial institution located in the state; the interest or other income will be a part of the Fund;

(h) To provide a full report of the Fund's activities at least annually to the supreme court and make other reports of its activities and publicize its activities as the trustees may deem advisable;

(i) To enforce claims which the Fund may have for restitution;

(j) To employ and compensate consultants, counsel and employees as the trustees deem appropriate;

(k) To make reimbursements for administrative expenses incurred in the administration of the Fund;

(l) (i) to develop an annual budget for operating the Fund and performing the functions of the trustees, to develop appropriate financial policies for managing all funds received by the trustees, and to propose an annual fee;

(ii) to submit, no later than September 15 each year, the developed budget, financial policies, and fee structure to the Hawai'i State Bar to allow an opportunity for meaningful review, analysis, input, and comment by the Hawai'i State Bar prior to submission to the supreme court;

(iii) to receive written comments, if any, from the Hawai'i State Bar regarding the budget, financial policies, and fee structure;

(iv) to reply in a timely fashion in writing to any written comments from the Hawai'i State Bar regarding section (iii), provided the comments were received no later than October 15; and

(v) to submit, no later than November 1 each year, the budget, financial policies, and annual fee along with any and all written comments received from the Hawai'i State Bar, and any replies thereto, to the supreme court for its review and approval.

(m) Trustees shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. If, in any given case, it shall become necessary for the continuation of a case, or the orderly operation of the Fund, the supreme court may appoint, for that case only, one or more ad hoc Trustees as it deems necessary. Each ad hoc Trustee shall fulfill all the responsibilities of a Trustee.

(Added July 29, 1981, effective July 29, 1981; amended May 24, 1984, effective May 24, 1984; renumbered September 1984; further amended July 1, 1986, effective July 1, 1986; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992; further amended April 8, 2002, effective July 1, 2002; further amended June 25, 2003, effective July 1, 2003; further amended April 4, 2005, effective July 1, 2005.)

10.5. Claims for reimbursement.

(a) **Application.** The claimant shall prepare or cause to be prepared an application for reimbursement containing the following information:

- (1) The name and address of the attorney;
- (2) The amount of the loss claimed;
- (3) The date or period of time during which the alleged loss was incurred;
- (4) Name and address of the claimant;
- (5) A general statement of facts relative to the claim;
- (6) Verification by the claimant;
- (7) Other information which the trustees require.

(b) **Investigation.** The trustees shall conduct an investigation to determine whether the claim is for a reimbursable loss and to guide the trustees in determining the extent, if any, to which reimbursement shall be paid. A copy of the application shall be personally served upon the attorney or sent by certified mail to the attorney's last known address as shown on the attorney's registration statement on file with the Disciplinary Board of the Hawai'i Supreme Court ("Disciplinary Board"). When the claim is for a nonreimbursable loss, or otherwise barred, no further investigation need be conducted.

(c) **Report.** Reports on investigations shall be submitted to the chairperson within a reasonable time.

(d) **Action by trustees upon report.** The trustees may approve, reject or modify the reimbursement, or order further investigation as they deem necessary. Any trustee may request that testimony or documentary information be presented. Absent such recommendation or request, claims shall be processed on the basis of information contained in the report. The alleged defalcating attorney or the attorney's personal representative will be given an opportunity to be heard by the trustees.

(e) **Notice of determination.** Written notice of the trustees' determination shall be provided the claimant and the attorney whose alleged conduct gave rise to the claim, or their representatives. The claimant and the attorney whose alleged conduct gave rise to the claim may request that the trustees reconsider the determination by filing a written request to the Fund no later than 20 days following receipt of the trustees' determination. The request shall be supported by written reasons for being given an opportunity to be heard by the trustees. If such a request for reconsideration is timely made, the trustees shall set a date, time and place for hearing. The trustees, in their discretion, may limit the scope of any such hearing and the trustees shall not order any reimbursement from the Fund until after the requested hearing has been concluded. If the claimant or the attorney whose alleged conduct gave rise to the claim failed to request reconsideration, or the original determination of the trustees is confirmed, the trustees' determination shall be final.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984; amended May 5, 1988, effective May 5, 1988; further amended February 7, 1992, effective February 7, 1992.)

10.6. Subpoenas; noncompliance.

The trustees or an individual trustee or an attorney designated to act on behalf of the trustees, upon determining that any person is a material witness to the determination of a claim made against the Fund, may issue a subpoena in the name of the clerk of the supreme court requiring such person to appear and testify either before the trustees or an individual trustee, or before an attorney designated to act on behalf of the trustees, at the time and place specified therein. The subpoena may also command such person to produce books, papers, documents or other objects designated therein. Subpoenas shall be issued in the manner prescribed by Rule 2, Rules of the Supreme Court of Hawai'i.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984; amended February 7, 1992, effective February 7, 1992; further amended January 24, 2008, effective July 1, 2008.)

10.7. Subrogation for reimbursement made.

(a) Subrogation; legal action by Fund. If reimbursement is granted, the Fund shall be subrogated in the amount of the reimbursement and the trustees may bring such action as is deemed advisable against the attorney, the attorney's assets or the attorney's estate. The action may be brought either in the name of the claimant or in the name of the Fund. The claimant shall be required to execute a subrogation agreement. Upon commencement of an action by the trustees under subrogation rights, the trustees shall advise the reimbursed claimant, who may then join in such action to pursue a claim for the claimant's loss in excess of the amount of the reimbursement from the Fund.

(b) Direct action by claimant. The claimant may bring an action for recovery of unreimbursed losses directly against the attorney, the attorney's assets or the attorney's estate if the trustees have not done so within six months of execution of the subrogation agreement.

(c) Claimant's right to amounts in excess of subrogated amount. Any amounts recovered from the attorney, either by the Fund or by the claimant, in excess of the amount to which the Fund is subrogated, less the Fund's actual costs of such recovery, shall be paid to or retained by the claimant as the case may be.

(d) Written agreement by claimant prior to receipt of payments. Before receiving a payment from the Fund, the claimant shall execute and deliver to the trustees a written agreement stating that if the claimant or the claimant's estate should ever receive any restitution from the attorney or the attorney's estate, the claimant shall agree to repay to the Fund (up to the amount of the original reimbursement from the Fund) that amount by which the original reimbursement from the Fund plus the present restitution from the attorney or the attorney's estate exceeds the claimant's actual loss, as that actual loss is or was determined by the trustees.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

10.8. Confidentiality.

(a) General rules of confidentiality. The application, the trustee's final determination

awarding or disallowing reimbursement of a claim, and the amount of the award are public records. The following records shall be confidential and shall not be accessible to the public: the work product of the Lawyers' Fund for Client Protection, reports and materials obtained from any governmental and/or judicial agency which restricts public access to the records, records of the Office of Disciplinary Counsel and the Disciplinary Board, and any other records obtained from confidential sources. Records which contain confidential and restricted information may be made available to the public with the confidential and restricted information deleted. All other records, may be made available to the public. This provision shall not be construed to deny access to relevant information by agencies as the trustees shall authorize or the release of statistical information which does not disclose the identity of the parties.

(b) Exchange of information and sharing of investigative and administrative resources with Disciplinary Board. All claims for reimbursement submitted to the trustees shall be forwarded to the Chairperson of the Disciplinary Board for institution of whatever proceedings before the Disciplinary Board which the Chairperson of the Disciplinary Board deems appropriate. The Chairperson of the Disciplinary Board may, in the Chairperson's discretion, allow the trustees to have access, during the trustees' investigation of any claim for reimbursement from

the Fund, to Disciplinary Board files which pertain to the alleged loss. The trustees shall have access to the investigative and administrative resources of the Disciplinary Board, and may also, upon agreement between the trustees and the Disciplinary Board, be housed within the office facilities of the Office of Disciplinary Counsel, but the trustees shall reimburse the Disciplinary Board for the cost of such resources and housing as determined by the Disciplinary Board.

(c) Communication with the claimant and the attorney claimed against. A claimant and the attorney claimed against shall be advised of the status of the trustees' consideration of the claim and shall be advised of the final determination of the trustees.

(d) Public statements by trustees. In any case, the trustees may issue statements as deemed appropriate in order to confirm the pendency of the investigation or to clarify the procedural aspects of the proceedings. The statement shall be first

submitted to the attorney involved or the attorney's representative for any comments and criticisms prior to its release, but the trustees in their discretion may release the statement as originally prepared.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992; further amended March 18, 1993, effective March 18, 1993.)

10.9. Immunity.

Testimony and information given regarding claims submitted to the Fund shall be absolutely privileged and no lawsuit based on the testimony and information may be instituted, except that the trustees may take such steps as are necessary to protect the interests of the Fund. Trustees and the trustees' staff and the Board of Directors and members and staff of the Hawai'i State Bar shall be immune from suit and liability for any conduct in the course of their official duties.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

10.10. Automatic suspension.

(a) Upon payment by the Fund of any claim, the Trustees shall file proof of the payment with the supreme court.

(b) When proof of the payment is filed with the supreme court, the supreme court shall, unless the interests of justice indicate otherwise, immediately suspend the attorney involved from the practice of law in this state until the Fund receives payment for all reimbursements made by the Fund, together with interest and the Fund's costs and attorney's fees.

(c) The supreme court may set aside such order suspending the attorney from the practice of law in the interest of justice and for good cause shown.

(Added February 7, 1992, effective February 7, 1992; amended January 24, 2008, effective July 1, 2008.)