

CLIENT PROTECTION fund RULEBOOK



SBM
STATE BAR OF MICHIGAN

CLIENT
PROTECTION FUND

STATE BAR OF MICHIGAN

CLIENT PROTECTION FUND RULES

Effective for claims filed January 1, 2004

RULE 1

PURPOSE AND SCOPE

- A** The purpose of the Michigan Client Protection Fund [Fund] is to promote public confidence in the administration of justice and integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in Michigan. Reimbursable losses must have occurred in the course of the lawyer-client or other fiduciary relationship between the lawyer and claimant, and must have a significant contact with Michigan.
- B** For purposes of these Rules, the term “lawyers admitted and licensed to practice law” includes lawyers admitted pro hac vice and lawyers recently suspended or disbarred whom clients reasonably believed to be licensed or admitted to practice at the time the dishonest conduct occurred. If the lawyer was under an order of interim suspension, suspension or revocation issued at least six months prior to the dishonest conduct, it may be presumed that the client was unreasonable in believing that the lawyer was licensed or admitted to practice law at the time of dishonest conduct.

RULE 2

ESTABLISHMENT

- A** The Fund is established to reimburse claimants for losses that arise out of dishonest conduct that has a significant contact with Michigan committed by lawyers admitted to practice in Michigan.
- B** The Fund is under the supervision of the Board of Commissioners of the State Bar of Michigan, which shall receive, hold, manage and disburse from the Fund the monies the Fund receives through per lawyer assessments, voluntary contributions, unused judicial campaign funds and otherwise.
- C** These Rules shall be effective for claims filed with the Fund on or after January 1, 2004.

RULE 3**FUNDING AND MANAGEMENT**

- A** The Supreme Court has provided for the financing of the Fund through imposition of an annual, per lawyer assessment of all Michigan lawyers, beginning with the 2003-2004 fiscal year.
- B** The Fund also receives unused judicial campaign contributions pursuant to Canon Seven (B) of the Michigan Code of Judicial Conduct, voluntary contributions and other miscellaneous contributions as appropriate.
- C** The Board of Commissioners shall:
1. Take all appropriate and available measures to ensure that the Fund is financed at an amount adequate to provide for the proper payment of claims and costs of administering the Fund.
 2. Prudently invest such monies of the Fund that may not be needed currently to pay losses and to maintain sufficient reserves as appropriate.
 3. Employ adequate staff to assure the effective and efficient performance of the Fund functions and purposes.
 4. Retain and compensate consultants, administrative staff, investigators, actuaries, agents, legal counsel and other persons as necessary.
 5. Prosecute claims for restitution to which the Fund is entitled

RULE 4**FUNDS**

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 of Commissioners.

RULE 5**THE CLIENT PROTECTION FUND COMMITTEE**

A Standing Committee (Committee) of at least seven members of the State Bar of Michigan shall administer the Fund. The appointment and tenure of Committee members shall be in accordance with Article VI, Section 2 of the Bylaws of the State Bar of Michigan unless the Board of Commissioners specifically authorizes otherwise.

RULE 6**COMMITTEE MEETINGS**

- A** The Committee shall meet as frequently as necessary to conduct the business of the Fund and to timely process claims.
- B** The chairperson may call a meeting at any reasonable time and shall call a meeting upon the request of at least two members.
- C** A majority of the members of the Committee shall constitute a quorum for the transaction of its business.
- D** Minutes of the meetings shall be taken and maintained.
- E** Attendance at Standing Committee meetings shall normally be in person. Votes regarding claims will not be valid, if cast by telephone, letter or electronic transmission unless otherwise directed by the chairperson of the Standing Committee. Any Committee member missing three consecutive meetings without an excused absence from the Chairperson shall be deemed to have resigned from the Committee and the member's seat on the Committee shall be open to appointment.

Any Committee member missing three consecutive meetings with an excused absence may be subject to a review of whether their appointment on the Committee remains feasible and is the best interest of the Committee.

RULE 7**DUTIES AND RESPONSIBILITIES OF THE COMMITTEE**

- A** The Committee shall have the following duties and responsibilities to:
 1. Review all claims submitted to the Committee by staff after investigation and analysis;
 2. Make a recommendation to the Board of Commissioners regarding whether the claims should be paid or denied, why the claim is recommended for payment or denial and the amount which should be paid on the claim;
 3. Make recommendations to the Board of Commissioners regarding policies and procedures involving the Fund as it deems necessary and appropriate;
 4. Provide a full report at least annually to the Board of Commissioners and to provide other necessary reports;
 5. Publicize its activities to the public and the Bar;
 6. Retain legal counsel for subrogation recovery efforts for restitution to which the Fund is entitled; and
 7. Authorize studies and programs for client protection and prevention of dishonest conduct by lawyers.

RULE 8**CONFLICT OF INTEREST**

- A** A Committee member or Commissioner who has or has had a lawyer-client relationship or 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 Committee member or Commissioner 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 the Board of Commissioners and, if the Committee and Board of Commissioners deems appropriate, that Committee member or Commissioner shall not participate in any proceeding relating to such claim.

RULE 9**ELIGIBLE CLAIMS**

- A** The loss must be caused by dishonest conduct that has a significant contact with the State of Michigan and shall have arisen out of and by reason of a lawyer-client relationship or other fiduciary relationship between the lawyer and the claimant where the lawyer was admitted or licensed to practice law in Michigan at the time of the dishonest conduct or the lawyer was suspended or disbarred but whom the client reasonably believed to be licensed or admitted when the dishonest conduct occurred. If the lawyer was under an order of interim suspension, suspension or revocation issued at least six months prior to the dishonest conduct, it may be presumed that the client was unreasonable in believing that the lawyer was licensed or admitted to practice law at the time of the dishonest conduct.
- B** The dishonest conduct upon which the claim is predicated must have been reported to either the Attorney Grievance Commission, or a law enforcement authority, or the claimant must have filed a claim in any court or tribunal having jurisdiction within two years after the dishonest act, or, if the dishonest act could not then have reasonably been discovered, within six months after the claimant did or reasonably should have discovered the dishonest conduct upon which the claim is predicated, whichever is later.

A claim must be filed with the Client Protection Fund no later than one (1) year after the determination by the Attorney Grievance Commission and/or Attorney Discipline Board.

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 Michigan Rules of Professional Conduct.
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.
3. Settling a case without the authorization and knowledge of the client, and misappropriating the settlement proceeds. In such instances the Committee may, in its discretion, presume that the lawyer settled the case for less than full value and waives the right or is estopped from receiving a credit for the attorney’s fees.
4. Receiving funds or property from a claimant for purposes of investing the funds or property where:
 - a. The lawyer knew the claimant(s) had funds to invest because of information acquired through an attorney-client relationship regardless of whether there was an on-going or existing attorney-client relationship at the time of the investment, and
 - b. The attorney possessed a higher degree of sophistication and knowledge than the claimant or where there is a historical relationship of trust and reliance on the attorney by the client, and
 - c. The investment vehicle or project:
 - (1). Did not exist, or
 - (2). The actual nature and characteristics of the investment vehicle or project differed substantially from the representations made to the claimant regarding the investment vehicle or project, or
 - (3). The disbursement was made directly to the lawyer, friend, relative of the lawyer or an entity controlled by either, where the investment vehicle or project could reasonably be viewed as a non-legitimate investment vehicle or project under the totality of the facts.

D Except as provided by section F of this Rule, the following losses shall not be reimbursable:

1. Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates, employers and employees of lawyer(s) 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 bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest;
3. Losses incurred by any financial institution which 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, or any person or entity described in section D(1), (2), or (3) hereof;
5. Losses incurred by any governmental entity or agency;
6. Loss of money or property paid to a lawyer for services rendered or to be rendered unless there was a failure to refund unearned legal fees or the fee was unreasonable in light of the work performed under the factors set forth in Michigan Rule of Professional Conduct 1.5 and the State Bar of Michigan Ethics Opinions regarding attorneys fees;
7. Consequential or incidental damages such as lost interest or attorneys fees or other costs incurred in seeking recovery of a loss;
8. Losses arising from the inadequate, insufficient or negligent rendition of services; or
9. Losses incurred by a claimant who is not the client but is merely a payor of the attorney fees are excluded unless the claimant provides proof of payment and the totality of the facts warrant payment to the claimant/payor.

E Claims are excluded if the acts from which they arise occurred during a period when the lawyer was under an order of interim suspension, suspension or revocation issued at least six months prior to the dishonest conduct and the client was unreasonable in believing that the lawyer was licensed or admitted to practice law at the time of the dishonest conduct.

F In cases of extreme hardship or special and unusual circumstances, the Committee may recommend and the Board may, in its discretion, authorize payment of a claim that would otherwise be excluded under these Rules.

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.

- A** The Committee shall prepare and approve an application form for claiming reimbursement.
- B** The form shall include at least the following information provided by the claimant under penalty of perjury:
1. The name and address of claimant, home and business telephone, occupation and 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 proof of payment;
 7. The amount of loss and the date when the loss occurred;
 8. The date when the claimant discovered the loss, and how the claimant discovered the loss;
 9. A description of the lawyer's dishonest conduct and the names and addresses of any persons who have knowledge of the loss;
 10. The name of the person, if any, to whom the loss has been reported (e.g. prosecuting attorney, police, disciplinary agency, or other person or entity) and a copy of any complaint and description of any action that was taken;
 11. The source, if any, from which the loss can be reimbursed including any insurance, fidelity or surety agreement;
 12. The description of any steps taken to recover the loss directly from the lawyer, or any other source;

13. 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 Fund of any reimbursements the claimant received during the pendency of the claim;
14. The existence of facts believed to be important to the Fund's consideration of the claim;
15. How the claimant learned about the Fund;
16. The name, address and telephone number of the claimant's present lawyer;
17. The claimant's agreement to cooperate with the State Bar of Michigan regarding the claim or with any civil actions which may be brought in the name of the State Bar of Michigan pursuant to a subrogation and assignment clause;
18. The claimant's agreement to repay the Fund if the claimant is subsequently reimbursed from another source;
19. The name and address of any other fund to which the claimant has applied or intends to apply for reimbursement, together with a copy of the application; and
20. 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.

C The claimant shall have the responsibility to complete the claim form and provide satisfactory evidence of a reimbursable loss.

D All members of the State Bar of Michigan are urged to give assistance to any claimant in presenting claims to the Fund without fee. Claimants are advised that, except in unusual circumstances, the assistance of any attorney may not be necessary in filing a claim since the Committee has available staff, which will investigate the underlying facts. The foregoing sub-paragraph shall appear prominently on the application form.

E The claim shall be filed with the State Bar of Michigan in the manner and place designated.

- A** Whenever it appears that a claim is not eligible for reimbursement pursuant to Rule 9, the claimant shall be notified of the reasons why the claim is not eligible for reimbursement, and, if appropriate, that unless additional facts to support eligibility are submitted to the Fund, the file will be closed, and that the claimant may appeal this decision to the Board of Commissioners in writing within 45 days of the date of notice.
- B** An order disciplining respondent for the same dishonest act or conduct alleged in a claim, or a final judgment imposing civil or criminal liability therefor, shall be conclusive evidence that the respondent committed such dishonest act or conduct.
- C** The Attorney Grievance Commission shall be promptly notified of the claim and requested to furnish a report of its investigation on the matter to the Committee. The Attorney Discipline Board shall be promptly notified of the payment of any claim and requested to include language in its orders requiring that restitution first be made directly to the Fund until the Fund is paid in full.
- D** The Committee may conduct its own investigation when it deems it appropriate.
- E** A copy of the claim shall be served by certified mail upon the respondent at the respondent's address on file with the State Bar of Michigan or last known address or the respondent's representative. The respondent or representative shall have 30 days in which to respond. If the certified mail is returned "unclaimed" or "refused," then all future documents may be sent to respondent via first class mail. If documents are returned as undeliverable and no forwarding address can be obtained, then the Fund is exempt from mailing a copy of the claim to respondent until such time as a current address can be obtained or a final determination has been mailed to Claimant.
- F** The Committee may request that testimony be presented to complete the record. Upon request, the claimant or respondent, or their representatives, may be given an opportunity to be heard, the decision being within the discretion of the Committee or the Board of Commissioners.
- G** The Committee may make a finding of dishonest conduct premised upon a preponderance of evidence for purposes of determining whether a claim should be approved or denied. 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 respondent of the Committee's determination and the reasons therefor. The approval or denial of a claim shall require the affirmative vote of the majority of attending Committee members provided there is a quorum for the meeting.

- 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 on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that 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 Committee may require the claimant to seek reimbursement from any other source that may be legally responsible for the loss.
- K** The Committee shall determine the order and manner of payment of claims approved by the Board of Commissioners. Unless the totality of the circumstances warrants otherwise, no claim should be approved during the pendency of a disciplinary proceeding involving the same conduct alleged in the complaint.
- L** Both the claimant and the respondent shall be advised of the Committee's findings, recommendation and reasons as soon as practicable and shall be informed of the final determination by the Board of Commissioners and the right of appeal.
- M** The claimant or respondent may request an appeal in writing within 45 days of the notice of denial or determination of the amount of a claim. If the claimant or respondent fails to make a request, the decision of the Committee is final. A timely request to appeal the Committee's decision shall be submitted to the Board of Commissioners for review and a final determination. If the final determination notice to either party is returned and a forwarding address cannot be obtained from the post office, then the appeal period begins to run 5 days after the date of the correspondence.

RULE 12**PAYMENT OF REIMBURSEMENT**

- A** The Board of Commissioners may from time to time fix a maximum amount of reimbursement that is payable by the Fund.
- B** The maximum amount payable by the Fund due to any incident or series of incidents constituting the execution of a coordinated plan or system of fraud against a single claimant, and the maximum payable to any claimant because of the dishonesty of a single lawyer or group of lawyers acting in collusion, shall be \$75,000. A "Claimant" for this purpose may be taken to mean any group of persons who shall have a mutual or common interest in the relationship with the lawyer, even though each member of such group may separately sustain a loss, as with corporations, partnerships, associations, estates of decedents, and persons having mutual, common or joint interests in property.

- C** The aggregate maximum amount for which the Fund shall reimburse losses as the result of the dishonesty of a single lawyer or group of lawyers acting in collusion is \$300,000. Whenever it appears to the Fund that claims may exceed this limit, additional claims against the lawyer or lawyers shall not be paid for two years following the filing of the initial claim against the lawyer or lawyers. The claims that have been processed and those approved by the Committee and not yet paid are, if necessary, apportioned on a pro-rata basis so that the total payments do not exceed \$300,000 using the following calculation:

$$\frac{\text{Individual claim amount lost}}{\text{Total amount lost}} = \% \text{ of maximum limit to be paid on claim}$$

However, the maximum amount payable to a single claimant may not exceed \$75,000.00, if so, the percentage awarded to that claimant is set at 25% or \$75,000.00 and the remainder of the funds are prorated between the remaining claimants.

- D** 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.
- E** The Board of Commissioners may approve payment of a claim at an amount that exceeds the maximum limits where the totality of the circumstances, in light of the purposes and policies of the Fund, warrants doing so.
- F** Payments shall be made in such amounts and at such times as the Committee or staff recommends and the Board of Commissioners deems appropriate, and may be paid in lump sum or installment payments.

RULE 13 REIMBURSEMENT FROM FUND IS A MATTER OF GRACE

No person shall have the legal right to reimbursement from the Fund whether as a claimant, third party beneficiary or otherwise.

RULE 14 REIMBURSEMENT, RESTITUTION AND SUBROGATION

- A** A lawyer whose dishonest conduct results in reimbursement to a claimant may be liable to the Fund for restitution and the Board of Commissioners may authorize the initiation of an action seeking reimbursement.
- 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 collection reimbursement. A lawyer's failure to make satisfactory arrangement for restitution may 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, unless the Board of Commissioners decides otherwise.
- D** To the extent the claimant has sustained a loss in excess of the amount of reimbursement received from the Fund, the claimant shall be entitled to participate in any action commenced by the State Bar of Michigan pursuant to the subrogation rights received by the Fund's reimbursement to the claimant. Upon commencement of an action by the State Bar of Michigan 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 Fund of such action.
- F** The claimant shall be required to agree to cooperate in all efforts that the State Bar of Michigan undertakes to achieve restitution for the Fund, and to repay the Fund if claimant is subsequently reimbursed from another source in an amount that exceeds the difference between the amount of total loss identified by the Fund and the Fund award. Such repayment shall not exceed the amount of the Fund award, unless the Board of Commissioners decides otherwise.
- G** The Fund may undertake all reasonable efforts to pursue subrogation rights assigned to the Fund. The Fund is authorized to obtain necessary services to pursue such subrogation rights including legal services, and to pay reasonable fees for those services. The normal legal and equitable principles regarding subrogation actions shall apply to the State Bar of Michigan's efforts to recoup the amount paid to the claimant.
- H** While all fees and costs, including attorney fees, incident to prosecution of subrogation rights shall be paid by the Fund, any recovery obtained by the Fund shall first be used to reimburse the Fund for such fees and costs, including attorney fees and second, to reimburse the Fund for the amount paid to claimant. The remainder of any recovery received by the Fund shall be paid to the claimant unless the Fund has unreimbursed claims from other claimants that involve the same attorney. In such an instance, the distribution and division of the excess recovery between the State Bar of Michigan and claimant shall be subject to negotiation between the parties, and subject to Board of Commissioners approval.
- I** 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 State Bar of Michigan of such action.

- J** The Committee or staff may make a recommendation to the Board of Commissioners that subrogation not be pursued or, pursued in a fashion that deviates from these rules when the totality of the circumstances warrant.

RULE 15

CONFIDENTIALITY

- A** Claims, proceedings and reports involving claims for reimbursement are confidential until the Board authorizes reimbursement to the claimant, except as provided below or unless provided otherwise by law. After payment of the reimbursement, the Fund may publicize the nature of the claim, the amount of reimbursement, and the name of the lawyer, if convicted or disciplined for the same matter. The name and address of the claimant shall not be publicized by the Board unless specific permission has been granted by the claimant. A protective order will be sought to preserve confidences of the claimant where appropriate.
- 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 which does not disclose the identity of the lawyer or the parties or the use of such information is necessary to pursue the Fund's subrogation rights.

RULE 16

AMENDMENTS TO THE RULES

The Committee may, by majority vote, recommend to the Board of Commissioners amendments to these Rules and the Board may amend these Rules at any time.



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