

IN THE SUPREME COURT OF THE STATE OF KANSAS

FILED

Administrative Order

December 31, 2020

2020-RL-135

**DOUGLAS T. SHIMA
CLERK OF APPELLATE COURTS**

Rule Relating to the Lawyers' Fund for Client Protection

The attached Supreme Court Rule 227 is amended and renumbered to Rule 241, effective January 1, 2021.

Dated this 31st day of December 2020.

FOR THE COURT



MARLA LUCKERT
Chief Justice

Rule ~~227~~ 241

RULES RELATING TO THE LAWYERS' FUND FOR CLIENT PROTECTION

~~RULE 1. PURPOSE AND SCOPE~~

(a) Purpose and Scope.

- ~~A.~~(1) The purpose of the Lawyers' Fund for Client Protection (~~LFCP or the Fund~~) is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing the losses to a clients caused by the dishonest conduct of a lawyers admitted and licensed to practice law in Kansas when the courts of this State, occurring loss occurs in the course of a lawyer-client relationship between the lawyer and the claimant.
- ~~B.~~(2) The ~~Kansas~~ Supreme Court, in the exercise of its inherent power to oversee the administration of justice and to regulate the practice of law and ~~the Kansas~~ attorneys ~~at law in this State~~ in the exercise of their professional responsibility, finds the need to participate in collective efforts of the bar to reimburse and to protect, insofar as reasonably possible, ~~those~~ persons who may be injured by the dishonest conduct of lawyers. Therefore, the Supreme Court adopts this ~~Rule for such~~ rule to carry out that purpose.
- ~~C.~~(3) The Fund is not a guarantor of honesty 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 the lawyer's misconduct. The Fund is a lawyer-financed public service, and the payment of reimbursement is a matter of grace and discretion by the Client Protection Fund Commission.
- ~~D.~~(4) Losses caused by the dishonest conduct of lawyers serving as fiduciaries, ~~in other than~~ outside of a lawyer-client relationships, are not reimbursable.

~~RULE 2. ESTABLISHMENT~~

(b) Establishment.

- ~~A.~~(1) ~~There is established~~ The Lawyers' Fund for Client Protection is established.

~~B.~~(2) ~~There is established, u~~Under the supervision of the Kansas Supreme Court, the Client Protection Fund Commission, ~~which is established.~~ The Commission may award payments to qualified claimants and authorize disbursements from the Fund under this rule ~~these Rules~~.

~~C.~~(3) ~~These Rules~~ This rule is shall be effective for claims arising out of conduct occurring on or after July 1, 1993.

~~D.~~(4) The Chief Justice ~~shall have~~ has authority to contract on behalf of the Commission for the investment of moneys with the ~~p~~Pooled mMoney ~~i~~Investment bBoard established under K.S.A. 75-4221a prior to the organizational meeting of the Commission.

~~RULE 3. FUNDING~~

(c) Funding.

~~A.~~(1) The Supreme Court may provide for funding by ~~the~~ Kansas lawyers ~~of the State~~ through annual assessments ~~on active Kansas lawyers~~ and from transfers of moneys from the ~~bar discipline~~ disciplinary fee fund.

(2) The Fund ~~shall is~~ not be a part of the state treasury. Any money recovered by the Commission ~~shall will~~ be redeposited into the Fund.

~~B.~~(3) Any lawyer whose actions have caused payment of funds to a claimant from the Fund ~~shall must~~ make restitution or be subject to an action for restitution to the Fund for all moneys paid ~~out~~ as a result of ~~his or her~~ the lawyer's conduct with interest at the prejudgment rate under K.S.A. 16-201, in addition to payment of the procedural costs of processing the claim, including any attorney fees.

~~RULE 4. FUNDS AND DISBURSEMENTS~~

(d) **Funds and Disbursements.** All moneys or other assets of the Fund ~~shall will~~ be held in the name of the Fund. All disbursements and expenditures ~~shall must~~ be made upon warrants of the ~~D~~Director of Accounts and ~~R~~Reports issued ~~pursuant to~~ through vouchers prepared by the Commission and approved by the Chief Justice ~~of the Supreme Court or by a person or persons designated by~~ or the Chief Justice's designee. The chief financial officer with the Office of Judicial Administration will conduct an annual review of financial internal controls, processes and procedures, and reports.

~~RULE 5. COMPOSITION AND OFFICERS OF THE COMMISSION~~

A.(e) **Composition and Officers of the Commission.**

(1) The Commission ~~shall~~ is comprised of four ~~active~~ lawyers registered as active under ~~Supreme Court Rule 2068~~; one active or retired district judge, Court of Appeals judge, or Supreme Court justice; and two nonlawyers appointed by the Supreme Court for initial terms as follows:

(1A) two lawyers for one year;

(2B) one nonlawyer for two years;

(3C) one judge or justice and one lawyer for two years;

(4D) one nonlawyer for three years; and

(5E) one lawyer for three years.

(2) Subsequent appointments ~~will~~ shall be for a ~~term of three-year term~~ years. The Supreme Court will fill ~~Any~~ vacancy occurring on the Commission ~~shall be filled by the Supreme Court~~. A person appointed to fill a vacancy on the Commission ~~shall be appointed to~~ will serve the unexpired term of the previous member. No member ~~shall~~ will serve more than two consecutive three-year terms, except that any person initially appointed for less than three years may then serve two consecutive three-year terms thereafter.

(3) The Supreme Court may appoint a temporary ~~Commissioner or Commissioners upon~~ Commission member on the request of the Commission.

~~B.~~(4) Commission members ~~shall~~ will serve without compensation but ~~shall~~ will be reimbursed for their ~~actual and~~ necessary expenses incurred in the discharge of their duties.

~~C.~~(5) The Commission ~~shall~~ must elect a chair and vice-chair, ~~each of whom shall to~~ serve for a term of one year and until a successor is elected. The vice-chair ~~shall~~ will perform all of the duties and exercise the authority of chair, in the chair's absence.

~~D.~~(6) ~~The Clerk of the Appellate Courts shall serve as secretary of the Commission. The disciplinary administrator will~~ Clerk shall not be a member of the Commission but shall act as the custodian of the official

files and records of the Commission and perform such other ministerial functions as the Commission shall direct. All papers and pleadings shall will be filed with the disciplinary administrator ~~secretary~~ of the Commission.

RULE 6. COMMISSION MEETINGS

(f) Commission Meetings.

- A.(1) The Commission shall will meet as frequently and in a manner agreed by ~~the Commission~~ as necessary to conduct the business of the Fund and to timely process claims.
- B.(2) A quorum for any meeting of the Commission shall be is four members of the Commission.
- C.(3) Minutes of meetings shall will be taken and maintained by the ~~secretary~~ disciplinary administrator.

RULE 7. DUTIES AND RESPONSIBILITIES OF THE COMMISSION

(g) Duties and Responsibilities of the Commission. The Commission shall ~~have~~ has the following duties and responsibilities:

- A.(1) to receive, investigate, evaluate, and pay or deny ~~such~~ claims, or portions thereof, as the Commission deems appropriate;
- B.(2) to promulgate rules of procedure not inconsistent with this rule ~~these Rules~~;
- C.(3) to contract with the ~~p~~Pooled ~~m~~Money ~~i~~Investment ~~b~~Board— established under ~~K.S.A. 75-4221a~~ for investment of Fund moneys. All moneys received as interest earned by the investment of Fund moneys by the pooled money investment board shall be credited to the Fund. ~~The Commission's status to contract and authority for such contract is established by this Supreme Court Rule;~~

~~All moneys transferred from the K.S.A. 20-1a01 bar discipline fee fund under Kansas Supreme Court Rule 227 shall be credited to the Fund, which has been created by Kansas Supreme Court Rule 227.~~

- (4) ~~The Commission shall~~ to advise and consult with the ~~p~~Pooled ~~m~~Money ~~i~~Investment ~~b~~Board on as to appropriate general investment objectives and cash flow needs of the Fund. ~~Any return on investment is to be compatible~~

~~with the Fund's responsibility to consider and pay, in full or in part, legitimate claims as determined within the sole discretion of the Commission;~~

- ~~D.~~(5) to provide a full an annual financial report at least annually to the Supreme Court and to make other reports as necessary;
- ~~E.~~(6) to publicize its activities to the public and the bar;
- ~~F.~~(7) to retain and compensate legal counsel to make or supervise ~~the making of~~ an investigation and the gathering of evidence, ~~and~~ to present evidence to the Commission, and to take any other legal action necessary to effectuate the purpose of the Fund;
- ~~G.~~(8) to prosecute claims for restitution to which the Fund is entitled;
- ~~H.~~(9) to participate in studies and programs for client protection and prevention of dishonest conduct by lawyers; and
- ~~I.~~(10) to perform all other acts necessary or proper for the fulfillment of the purposes of the Fund and its effective administration.

~~RULE 8. CONFLICT OF INTEREST~~

(h) Money and Investments.

- (1) All money received as interest earned by the investment of Fund money by the Pooled Money Investment Board will be credited to the Fund.
- (2) All money transferred from the disciplinary fee fund under this rule will be credited to the Fund.
- (3) Any return on investment is to be compatible with the Fund's responsibility to consider and pay, in full or in part, legitimate claims as determined within the sole discretion of the Commission.

(i) Conflict of Interest.

- ~~A.~~(1) A Commissioner member 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~~ must not participate in the investigation or determination of a claim involving that claimant or lawyer.

~~B.~~(2) A Commissioner member with a past or present relationship, other than as provided in ~~section A of this rule~~ subsection (i)(1), with a claimant or the lawyer ~~whose alleged conduct~~ who is the subject of the claim, ~~shall~~ must disclose such relationship to the Commission and, if the Commission deems appropriate, that Commissioner member ~~shall~~ will not participate in any proceeding relating to such claim.

~~RULE 9. IMMUNITY~~

(j) **Immunity.** ~~Members of the Commission~~ members, the commission secretary, commission counsel, commission staff, a person investigating a claim on behalf of the Commission, the disciplinary administrator, members of the Office of the Disciplinary Administrator, claimants, and lawyers who assist claimants ~~shall~~ are be entitled to judicial immunity from civil liability for all acts in the course of their official duties.

~~RULE 10. REIMBURSEMENT FROM FUND IS A MATTER OF GRACE~~

(k) **Reimbursement from Fund Is a Matter of Grace.** No person ~~shall have~~ has the legal right to reimbursement from the Fund ~~whether as claimant, third party beneficiary, or otherwise.~~

~~RULE 11. ELIGIBLE CLAIMS~~

(l) **Eligible Claims.**

~~A.~~(1) The claimant's loss must be caused by the dishonest conduct of ~~an active a~~ member or former member of the Kansas bar ~~of this State~~ and ~~shall~~ must have arisen under the following circumstances:

(A) in the course of a lawyer-client relationship between the lawyer and the claimant; and

(B) in Kansas or as a result of the lawyer's federal practice based on the lawyer's Kansas license. ~~and by reason of that relationship.~~

~~B.~~(2) The claim ~~shall~~ must have been filed no later than one year after the claimant knew or should have known of the dishonest conduct of the lawyer.

~~C.~~(3) As used in this rule ~~these Rules~~, "dishonest conduct" means any of the following:

- (~~1~~A) acts committed by a lawyer in the wrongful taking or conversion of money, property, or other things of value;
- (~~2~~B) refusal to refund unearned fees received in advance where the lawyer performed no services or such an insignificant portion of the service that the refusal to refund the unearned fees constitutes a wrongful taking or conversion of money;
- (~~3~~C) the borrowing of money from a client without an intention to repay it or with disregard of the lawyer's ~~his or her~~ inability or reasonably anticipated inability to repay it; or
- (~~4~~D) a lawyer's act of intentional dishonesty that ~~which~~ proximately leads to the loss of money or property.

~~D~~.(4) Except as provided by subsection (1)(5) ~~E of this Rule~~, the following losses and damages ~~shall~~ are not be reimbursable:

- (~~1~~A) a losses incurred by a spouses, children, parents, grandparents, siblings, partners, associates, or ~~and~~ employees of the lawyer(s) causing the losses;
- (~~2~~B) a 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~~C) a losses incurred by any business entity controlled by the lawyer or any person or entity described in subsection (1)(4)(A) ~~D(1)~~;
- (~~4~~D) a losses incurred by any governmental entity or agency; and
- (~~5~~E) interest and other incidental and out-of-pocket expenses.

~~E~~.(5) In a cases of extreme hardship or special and unusual circumstances, the Commission may, in its discretion, recognize a claim arising out of conduct occurring on or after July 1, 1993, ~~which~~ that would otherwise be excluded under this rule ~~these Rules~~.

~~RULE 12. PROCEDURES AND RESPONSIBILITIES FOR FILING A CLAIM~~

(m) **Procedures and Responsibilities for Submitting a Claim.**

- ~~A.~~(1) The Commission ~~shall~~ must prepare and approve a form ~~of~~ for submitting a claim for reimbursement.
- ~~B.~~(2) The form ~~shall~~ will require at least the following information provided by the claimant under penalty of perjury:
- (~~1~~A) the name and address of the claimant, home and business telephone number, occupation and employer, and social security number or federal tax identification number;
 - (~~2~~B) 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~~C) the legal or other fiduciary services the lawyer was to perform for the claimant;
 - (~~4~~D) the amount paid to the lawyer;
 - (~~5~~E) a copy of any written agreement pertaining to the claim;
 - (~~6~~F) the form of the claimant's loss, (e.g., money, securities, or other property);
 - (~~7~~G) the amount of the loss and the date when the loss occurred;
 - (~~8~~H) the date when the claimant discovered the loss and how the claimant discovered the loss;
 - (~~9~~I) a description of the lawyer's dishonest conduct and the names and addresses of any persons who ~~have~~ has knowledge of the loss;
 - (~~10~~J) the name of ~~the person, if any,~~ person 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;
 - (~~11~~K) any ~~the~~ source, ~~if any,~~ from which the loss can be reimbursed, including any insurance, fidelity, or surety agreement;

- (~~12~~L) a description of any steps taken to recover the loss directly from the lawyer or any other source;
- (~~13~~M) 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 Commission of any reimbursements the claimant receives during the pendency of the claim;
- (~~14~~N) any other facts believed to be important to the Commission's consideration of the claim;
- (~~15~~O) the manner in which the claimant learned about the Fund;
- (~~16~~P) the name, address, and telephone number of the claimant's present lawyer, if any;
- (~~17~~Q) a statement that the claimant agrees to cooperate with the Commission in reference to the claim or as required by subsection (q) Rule 16 in reference to civil actions ~~which that~~ may be brought in the name of the Commission ~~pursuant to~~ under a subrogation and assignment clause ~~which shall also be~~ contained within the claim;
- (~~18~~R) the name and address of any other state's ~~F~~fund to which the claimant has applied or intends to apply for reimbursement, together with a copy of the application; and
- (~~19~~S) 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~~.(3) The claimant has ~~shall have~~ the responsibility to complete the claim form and provide satisfactory evidence of a reimbursable loss.

~~D~~.(4) The claim will ~~shall~~ be submitted to the Commission by filing the statement of claim form with the Clerk Office of the Disciplinary Administrator, 701 Southwest Jackson Street, First Floor Appellate Courts, 301 S.W. 10th Avenue, Topeka, Kansas 66603 66612-1507.

~~E~~.(5) As a condition precedent to the filing of a claim, the claimant must report the dishonest conduct to ~~a county or district attorney or to the D~~disciplinary Aadministrator.

RULE 13. PROCESSING CLAIMS

(n) Processing Claims.

- ~~A.~~(1) When a claim is filed, the accused lawyer ~~will shall forthwith~~ be notified and given an opportunity to respond to the claim. A copy of the claim ~~will shall~~ be mailed by certified mail return receipt requested to the lawyer's last registered address ~~under (Rule 206.8), and t~~The lawyer will shall have 20 days from the date of the mailing ~~in which~~ to respond. A response is not required from the lawyer.
- (2) The disciplinary administrator will investigate the claim, or the Commission will retain and compensate legal counsel as provided in subsection (g)(7).
- ~~B.~~(3) Whenever it appears that a claim is not eligible for reimbursement ~~pursuant to these Rules,~~ the Commission will advise the claimant and lawyer shall be advised of the reasons that the claim is not eligible for reimbursement and that, unless additional facts to support eligibility are submitted to the Commission within 30 days, the claim will be dismissed.
- ~~C.~~(4) A copy of an order disciplining a lawyer for the same act or conduct alleged in a claim, or a final judgment imposing civil or criminal liability, is therefor, shall be evidence that the lawyer committed such act or conduct.
- ~~D.~~(5) ~~The Office of the Disciplinary Administrator shall be promptly notified of the claim and requested to~~ disciplinary administrator will furnish a report of ~~its~~ the investigation of on the matter to the Commission.
- ~~E.~~(6) Upon receipt of the disciplinary administrator's report of the investigation of the Disciplinary Administrator, the Commission ~~shall will~~ evaluate whether the investigation is complete and determine whether the Commission 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.
- ~~F.~~(7) The Commission may conduct additional its own investigation or may request the ~~D~~disciplinary ~~A~~administrator to conduct additional investigation and to investigate and verify any claim not previously investigated by the ~~D~~disciplinary ~~A~~administrator.
- ~~G.~~(8) The Commission may request that testimony or evidence be presented to complete the record. Upon request, the claimant or lawyer, or their personal

representatives, ~~will shall~~ be given an opportunity to be heard. The chairman, ~~vice-chairman secretary~~, or any member of the Commission, acting under ~~this rule these Rules~~, may administer oaths and affirmations and compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents. All subpoenas ~~will in connection with proceedings hereunder shall~~ be issued by and returned to the ~~disciplinary administrator secretary of the Commission~~. A judge of the district court of any judicial district in which the attendance or production is required ~~must shall~~, upon proper application, enforce the attendance and testimony of any witness and the production of any documents subpoenaed. Subpoena and witness fees and mileage ~~are shall be~~ the same as in the district court.

H.(9) The Commission may make a finding of dishonest conduct for purposes of determining a claim. ~~Such a~~ The determination is not a finding of dishonest conduct for purposes of disciplinary proceedings or for civil or criminal judgments and is inadmissible in any other proceeding.

I.(10) When the record is complete, the claim ~~will shall~~ be determined on the basis of all available evidence, and ~~the Commission will notify notice shall be given to~~ the claimant and the lawyer of ~~its the Commission's~~ determination and reasoning ~~the reasons therefor~~. The approval or denial of the claim ~~shall~~ requires the affirmative votes of at least four Commissioners members.

J.(11) Any proceeding ~~upon~~ a claim need not be conducted according to technical rules relating to evidence, procedure, and witnesses. Any relevant evidence ~~will shall~~ be admitted if it is the sort of evidence ~~that on which~~ responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of the existence of any common-law or statutory rule ~~that which~~ might make improper the admission of such evidence ~~upon objection~~ in court proceedings. The claimant has ~~shall have~~ the duty to supply relevant evidence to support the claim.

K.(12) The Commission ~~will shall~~ determine the order and manner of payment and pay all approved claims.

RULE 14. PAYMENT OF REIMBURSEMENT

(o) Payment of Reimbursement.

A.(1) The Commission is vested with the power, which it ~~will shall~~ exercise in its sole discretion, to determine whether a claim merits reimbursement from

the Fund and, if so; the amount of such reimbursement, not to exceed \$125,000 for any claimant, with an aggregate limit of \$350,000 for claims against any one lawyer; the time, place, and manner of its payment; the conditions upon which payment will ~~shall~~ be made; and the order in which payment will ~~shall~~ be made. In making such determinations the Commission may consider, together with such other factors as it deems appropriate, the following:

- (~~1~~A) the amounts available and likely to become available to the Fund for payment of claims;
- (~~2~~B) the size and number of claims that ~~which~~ are likely to be presented in the future;
- (~~3~~C) the total amount of losses caused by the dishonest conduct of any one lawyer or associated groups of lawyers;
- (~~4~~D) the unreimbursed amounts of claims recognized by the Commission in the past as meriting reimbursement, but for which reimbursement has not been made in the total amount of the loss sustained;
- (~~5~~E) the amount of the claimant's loss as compared with the amount of the losses sustained by others who may merit reimbursement from the Fund;
- (~~6~~F) the degree of hardship the claimant has suffered by the loss; and
- (~~7~~G) any conduct of the claimant that ~~which~~ may have contributed to the loss.

~~B~~-(2) If a claimant is a minor or an incompetent person, the reimbursement may be paid to another ~~any~~ person or an entity for the benefit of the claimant.

~~RULE 15. RECONSIDERATION~~

(p) **Reconsideration.** The claimant may request reconsideration within 30 days of the denial or the determination of the amount of reimbursement of the ~~a~~ claim. If the claimant fails to make a request or the request is denied, the decision of the Commission is final.

~~RULE 16. RESTITUTION AND SUBROGATION~~

(q) **Restitution and Subrogation.**

- ~~A.~~(1) A lawyer whose dishonest conduct results in reimbursement to a claimant may be liable to the Fund in an action for restitution. The Commission may bring such action as it deems advisable to determine and enforce its rights to restitution and as a subrogee or assignee of the claimant's rights.
- ~~B.~~(2) As a condition of reimbursement, a claimant is ~~shall be~~ required to provide the Fund with a transfer of the claimant's rights against the lawyer and 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, to the extent of the amount of the Fund's expenses and payments attributable to the claim. The Commission may sue to enforce such assigned or subrogated rights for the purposes of preserving its rights and recovering its expenses and payments to the claimant. The claimant retains ~~All other rights of the claimant~~ arising and accruing by reason of the lawyer's dishonest conduct ~~remain the property of the claimant.~~
- ~~C.~~(3) Upon commencement of an action by the Commission as subrogee or assignee of a claimant, the Commission will ~~it shall~~ advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses.
- ~~D.~~(4) In the event that the claimant commences an action to recover unreimbursed losses against the lawyer or another entity who may be liable for the claimant's losses, the claimant will ~~shall~~ be required to notify the Commission of such action.
- ~~E.~~(5) The claimant will ~~shall~~ be required to agree to cooperate in all efforts that the Commission undertakes to achieve restitution for the Fund.

RULE 17. JUDICIAL RELIEF

(r) **Judicial Relief.**

- ~~A.~~(1) When a claim has been filed ~~as provided herein~~, the Commission may make application to the appropriate lower court for relief to protect the interests of the claimant or the Fund where the assets of the claimant appear to be in danger of misappropriation or loss, or to secure the claimant's or Fund's right to restitution or subrogation.
- ~~B.~~(2) A court's jurisdiction in a proceeding includes ~~such proceedings shall include~~ the authority to appoint and compensate a ~~a~~ custodial receivers to

conserve the assets and to close the practices of a missing, incapacitated, or
~~and~~ deceased lawyers.

~~RULE 18. CONFIDENTIALITY~~

(s) Confidentiality.

- ~~A. (1)~~ A claim form Applications, proceedings, and reports involving a claim applications for reimbursement are confidential until the Commission authorizes reimbursement to the claimant, except as provided in this rule below. Any person violating this subsection rule of confidentiality may be subject to punishment for contempt of the Supreme Court.
- ~~B. (2)~~ The rule of confidentiality does shall not apply to the claimant or the lawyer respondent or to any information that which the Commission considers to be relevant to any current or future criminal prosecution against the lawyer.
- ~~C. (3)~~ The disciplinary administrator and anyone appointed to conduct an investigation may receive and disclose information reasonably necessary to complete the investigation.
- ~~D. (4)~~ The Commission ~~is authorized~~, in its discretion, is authorized to disclose to the Supreme Court Nominating Commission, the District Judicial Nominating Commissions, the Commission on Judicial Conduct, or the Governor all or any part of the file involving any judge or prospective nominee for judicial appointment; and to make public ~~all or~~ any part of its files involving any candidate for election to or retention in public office. ~~The Commission in its discretion is authorized to disclose relevant information and to submit all or any part of its files to the Disciplinary Administrator for use and consideration in investigating or prosecuting alleged violations of the Supreme Court Rules Relating to Discipline of Attorneys.~~
- ~~E. (5)~~ Both the claimant and the lawyer will shall be advised of the status of the Commission's consideration of the claim and will shall be informed of the final determination. After payment of reimbursement, the Commission may publicize the nature of the claim, the amount of reimbursement, and the name of the lawyer. The Commission will not publicize the name and the address of the claimant shall not be publicized by the Commission unless the claimant has granted specific written permission has been granted by the claimant.

~~RULE 19. COMPENSATION FOR REPRESENTING CLAIMANT~~

- (t) **Compensation for Representing Claimant.** It is not intended that the claimant's ~~client's~~ application for reimbursement will be an adversarial process, and for that reason, ~~generally,~~ counsel for the claimant ~~generally client~~ will not be needed. If a claimant ~~client~~ needs a lawyer, it is intended that lawyers will recognize this responsibility and provide assistance as a public service. It is also intended that all members of the Kansas ~~B~~bar will cooperate in providing any services that claimants ~~applicants~~ may need.

RULE 20. CITATION OF THE RULE

The Rules herein adopted may be referred to and cited as LFCP Rule 1.A., etc.

Comments

Rule 1. Subsection (a)—Purpose and Scope.:

[1] The Model Rules for the Lawyers' Fund for Client Protection, approved by the American Bar Association House of Delegates on August 9, 1989, as modified, have been generally adopted by ~~this~~ the Supreme Court. The comments are commentary is intended solely to explain the intent of the rules to the Commission, the bar, and the public.

[2] Subsection (a)(2) ~~Section B~~ recognizes that lawyers individually, and the bar collectively, have the obligation to support reimbursement programs for clients who have lost money or property as a result of a lawyer's dishonest conduct. The term "dishonest conduct" is defined in subsection (1) Rule 11.

[3] Despite the best attempts of the legal profession to establish high standards of ethics and severe disciplinary penalties for their breach, some lawyers steal money from their clients. Typically, those lawyers lack the financial means ~~wherewithal~~ to make restitution to their clients.

[4] The organized bar throughout the United States has responded by creating security funds to provide necessary reimbursement. The funds have been created by court rule, legislation, and voluntary action of state and local bar associations.

[5] Client protection funds reimburse claimants ~~victims, in whole or in part~~, for dishonest conduct by members of the bar within the licensing state. Generally, a reimbursable loss must occur within a lawyer-client relationship.

[6] The underlying philosophy for these funds is that the legal profession functions by seeking and obtaining the trust of clients. The public is therefore vulnerable to the rare dishonest lawyer who breaches that trust. Moreover, the misdeeds of a lawyer in handling

client money frequently taint the public atmosphere of trust upon which the profession depends.

[7] Although these programs are essentially remedial in nature and do not provide preemptive public protection in the same manner as admission criteria and codes of professional responsibility, they address the growing awareness that discipline without reimbursement of ~~victims~~ to claimants does not meet the profession's responsibility to itself and the public.

Rule 2. Subsection (b)—Establishment.:

[8] 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 Supreme Court. ~~It is~~ The Supreme Court ~~which~~ bears the responsibility for establishing qualifications for practice and for ensuring ~~seeing~~ that lawyers subject to its jurisdiction adhere to the standards of conduct the Supreme Court mandates.

[9] Subsection (b)(2) ~~Section B~~ links the establishment of a Fund to the Supreme Court's power to regulate the practice of law.

[10] Under subsection (b)(3), ~~Section C.~~ The Commission ~~will~~ ~~shall~~ not pay claims for losses incurred as a result of dishonest conduct committed prior to July 1, 1993.

Rule 3. Subsection (c)—Funding.:

[11] Subsection (c)(1) ~~Section 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.

[12] The Supreme Court has the inherent power to establish a Fund and to require lawyers admitted to the practice of law in Kansas ~~the State~~ to contribute to it. For legislative acknowledgement, see Senate Concurrent Resolution No. 1644 (1992).

[13] Subsection (c)(3) ~~Section B~~ assigns potential liability for payments of restitution to the lawyer who caused the losses that ~~which~~ the Fund reimbursed. See subsection (q) ~~Rule 16 A~~ for restitution and subrogation enforcement standards.

Rule 4. Subsection (d)—Funds and Disbursements.:

[14] Matters and expenses for which the Fund may be used should be considered and stated ~~delineated~~ by the Commission in written policies.

[15] Administrative expenses will be incurred in operating ~~the~~ a Fund even though lawyers volunteer their services to ~~serve on~~ the Commission. The cost of administering the Fund, e.g., expenses of the Commission, hearings on claims, record keeping, and salaries for full-time and part-time staff, ~~will shall~~ be paid out of either the disciplinary bar discipline fee fund (~~K.S.A. 20-1a01~~) or the Fund as determined by the Supreme Court.

Rule 5. Subsection (e)—Composition and Officers of the Commission.:

[16] A Commission composed of lawyers and nonlawyers results in balanced evaluation of claims within the full context of the lawyer-client relationship.

[17] A Commission of seven members is small enough to accomplish the work of the Fund, ~~yet~~ and not so large as to discourage active involvement by each member or to be cumbersome.

[18] Terms of office are staggered to encourage continuity of experience and the development of policy and precedent.

[19] ~~The Commissioners~~ members will serve without compensation, pro bono publico, but will be reimbursed for expenses incurred in the discharge of their office.

Rule 7. Subsection (g)—Duties and Responsibilities of the Commission.:

[20] Investing moneys ~~that is which~~ are not needed to cover current claims permits a reasonable return without risking the integrity of the Fund. Investments should be of appropriate duration to maintain liquidity of assets and enable the Commission to pay losses promptly.

[21] ~~Subsections (g)(5) and (g)(6) Sections D and E~~ can require public information programs. The Commission has the affirmative obligation to publicize its activities to the bench, the bar, and the general public. It is suggested that the services of the Supreme Court's ~~P~~public ~~I~~nformation ~~O~~fficer be utilized.

[22] The assets of the Fund should not be unduly diminished by employing investigative or other personnel who would duplicate the efforts of others interested in lawyer professional responsibility. See subsection (n) Rule 13, Processing Claims, regarding the cooperative effort anticipated between the Commission and the ~~D~~disciplinary ~~A~~administrator.

[23] The Commission should make an attempt to prosecute all claims for restitution. Restitution is one way of replenishing the Fund's assets. See also subsection (q) Rule 16 which focuses on subrogation and other methods of restitution.

[24] ~~The Commissioners~~ members should also consider involvement in seminars and continuing legal educational programs focusing on client protection. As programs for client protection become more sophisticated, the Commission should take advantage of planning or participating in these educational programs as a further deterrent to dishonest conduct.

Rule 9. Subsection (j)—Immunity.

[25] Immunity from civil liability encourages lawyers and nonlawyers to serve on the Commission 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.

Rule 10. Subsection (k)—Reimbursement from Fund is a Matter of Grace.

[26] Although ~~this rule~~ ~~these Rules~~ establishes procedures for the processing of claims seeking reimbursement from the Fund, ~~the rule is~~ ~~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 the determination of claims.

Rule 11. Subsection (l)—Eligible Claims.

[27] Subsection (l)(1) ~~Section A~~ sets forth the basic criteria for compensability of a losses. The successful claimant is one who proves the following factors: (1) a demonstrable loss; (2) caused by the dishonest conduct of a lawyer; and (3) the loss was within or arising out of a lawyer-client relationship. Determining whether a loss arose out of a lawyer-client relationship can be difficult ~~present difficulties~~ especially where the loss asserted occurred following an "investment." One approach to use is a "but for" test: "The loss arose out of and in the course of a lawyer-client relationship. But for the lawyer-client relationship with the client claimant, such loss could not have occurred."² The following ~~four~~ factors may be considered in applying this test: the disparity in bargaining power between the lawyer and client, the extent to which the lawyer's status overcame the normal prudence of the client claimant, the extent to which the lawyer received information about the financial affairs of the client claimant, and whether the principal part of the transaction was an activity that ~~which~~ required a license to practice law.

[28] Subsection (l)(2) contains a ~~A~~ one-year limitation on the filing of claims from the date the claimant knew or should have known of the dishonest conduct ~~is contained in~~ Section B.

[29] Subsection (1)(3) ~~Section C~~ adds to the rule Rules a definition of “dishonest conduct.” Subsection (1)(3)(A) ~~(1)~~ sets forth the basic concept as one of conversion or embezzlement. Subsections (1)(3)(B), (C), and (D) ~~(2), (3) and (4)~~ 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. Subsection (1)(3)(B) ~~(2)~~ sets forth a standard for the handling of problematic unearned fee claims. It is not intended to encompass legitimate bona fide fee disputes. Where money received by a lawyer was clearly neither earned nor returned, however, the client may feel violated, hardship can result, and the Commission may find dishonest conduct. Subsection (1)(3)(C) ~~(3)~~ 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, under subsection (1)(4)(D) ~~(4)~~, use by the lawyer of a purported “investment” to induce a client to turn over money will not preclude a finding of dishonest conduct where the “investment” is worthless, or nonexistent, and so forth.

[30] Subsection (1)(3) ~~Section C~~ must be read in light of subsection (1)(1) ~~Section A~~. In focusing on dishonest conduct, it must be kept in mind that such conduct must occur within or as a result of a lawyer-client relationship in order to be compensable.

[31] Subsection (1)(4) presents various exclusions ~~disabilities~~ from reimbursable ~~presenting~~ claims. ~~are presented in Section D. Subparagraphs (1), (3) and (4)~~ Subsections (1)(4)(A), (C), and (D) declare classes of potential claimants to be ineligible for policy reasons. Subsection (1)(4)(E) ~~Subparagraph (5)~~ excludes as nonreimbursable such consequential damages as lost interest and a claimant’s incidental and out-of-pocket expenses. Third parties such as title insurance companies and banks cashing checks over forged endorsements are suggested in subsection (1)(4)(B); ~~subparagraph (2)~~ to the extent possible, which recourse from a third party should be sought prior to seeking it from the Fund. ~~Such~~ Third parties lack the lawyer-client relationship necessary to prosecute a claim in their own right.

[32] Subsection (1)(5) ~~Section E~~ reiterates the critical importance of vesting in the Commission the discretion to do justice in each claim considered, without strictly slavishly following technical rules. ~~This section~~ Subsection (1)(5) recognizes that it is impossible to predict every factual circumstance that ~~which~~ will be presented to the Commission.

Rule 12. Subsection (m)—Procedures and Responsibilities for Filing a Claim.:

[33] The Commission 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 Commission, yet but not so detailed as to discourage eligible claimants from applying for reimbursement.

[34] ~~Subsection (m)(3) Section C~~ assigns the ultimate burden of establishing eligibility for reimbursement upon the claimant. Consistent with the evidentiary standards in ~~subsection (n) Rule 13~~, no formal or technical quantum of proof is imposed on the claimant or the Commission. In ~~these a~~ cases where the lawyer's dishonest conduct ~~was~~ will already ~~have been~~ established in a ~~disciplinary lawyer discipline~~ action based on ~~upon~~ the "clear and convincing evidence" standard (~~see Supreme Court under Rule 226 211(f)~~) or ~~the~~ "beyond a reasonable doubt" standard in a criminal proceeding involving the same facts ~~that which~~ constitute the claim for reimbursement, the Commission may ~~decide to~~ grant a reimbursement to the claimant without further investigation or delay.

~~Rule 13. Subsection (n)—Processing Claims.:~~

[35] ~~Rule 13 addresses the procedure for consideration of claims in concert with the disciplinary process. The overall scheme presented is one of cooperation between the Fund and disciplinary authorities while respecting the different needs and autonomous functioning of the respective bodies (F and H). The Rule~~ This subsection also seeks to set forth a framework ~~that 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 ~~(A, B, G, and I). See subsections (n)(1), (3), (8), and (10).~~

[36] The overriding policy implicit in ~~subsection (n) Rule 13~~ is that the Commission exercise its discretion so as to make the best possible decision in each claim presented. ~~Under subsection (n)(11), Technical rules of evidence will shall not be employed to hinder the Commission from accomplishing its mission (J). Under subsection (n)(7), The~~ Commission may conduct any investigation it deems appropriate ~~(F)~~, including the taking of testimony ~~as provided in subsection (n)(8) (G)~~. The order and manner of payment of claims is likewise within the Commission's discretion ~~under subsection (n)(12) (K)~~. ~~Under subsection (n)(10), The~~ Commission is to articulate to each side the reason for rationale of its determination on a given claim ~~(H)~~.

[37] Note that under ~~subsection (n)(10) Section I~~ the affirmative vote of at least four ~~Commissioners~~ members is required ~~in order~~ to dispose of a claim. ~~Thus, f~~For example, if the minimum ~~four Commission members~~ necessary for a quorum ~~(also four Commissioners under Section B of Rule 6)~~ under subsection (f)(2) are ~~is~~ present, any motion ~~that which~~ cannot garner unanimous support will fail. Thus, a "majority of the quorum present" will not suffice. ~~Subsection (n)(10) This section~~ does not prevent determinations of claims by mail ballot.

[38] Ideally, the initial investigation should be done by the ~~D~~disciplinary ~~A~~administrator 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

Commission should be utilized to gather additional evidence or to provide evidence if necessary.

[39] In most matters, a criminal conviction or a finding during disciplinary proceedings will establish “dishonest conduct” for purposes of the Commission’s determination of the claim. ~~The Disciplinary Administrator may, however, choose not to act where the lawyer is unlikely to engage in further misconduct. This dilemma is illustrated by lawyers who have died, are mentally or physically incapacitated, or have fled the jurisdiction. The Commission may then be required under Section H to make a finding of dishonest conduct solely for the purpose of the Fund’s proceeding.~~

Rule 14. Subsection (o)—Payment of Reimbursement.:

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

[41] A maximum limitation on reimbursement permits the assets of the developing fund to accumulate while establishing a historical record of “claims presented” ~~record is established~~. It also serves to protect the Fund from catastrophic losses.

[42] 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.

[43] Subsection (o)(1) ~~Section A~~ assigns responsibility for the determination of the actual amount of each reimbursement to the discretion of the Commission not to exceed individual claimant and aggregate limits set by the Supreme Court.

[44] Subsection (o)(1) ~~Section A~~ also grants the Commission flexibility in paying reimbursement. Depending on the Fund’s financial and administrative needs, periodic payment dates can be established, and reimbursement can be paid in lump sums or in installments.

[45] Similarly, where a losses involves a minors or an and incompetents person, subsection (o)(2) ~~Section B~~ permits the Commission to pay the reimbursement directly to a parent or legal representative, for the benefit of the claimant.

Rule 15. Subsection (p)—Reconsideration.:

[46] Authorization for payment is within the discretion of the Commission. A procedure providing an opportunity for reconsideration of a claim permits an aggrieved claimants

further consideration without creating a right of appeal or judicial review. The opportunity for reconsideration also provides a safeguard against dismissal of a claim not fully presented earlier.

Rule 16. Subsection (q)—Restitution and Subrogation.

[47] As fiduciaries of the Fund, the Commission 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 Fund's operations ~~of the Fund~~.

[48] The Commission may seek restitution by direct legal action against a 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.

[49] Subsection (q)(1) Section A is a statement of the Fund's right to seek restitution from the lawyer whose dishonest conduct resulted in a payment of reimbursement.

[50] Subsection (q)(2) Section B requires the Commission to establish a subrogation policy that which 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 who may be liable for the ~~loss which the Fund~~ reimbursed loss. This ordinary transfer of rights by subrogation is to the extent of the reimbursement provided by the Fund.

[51] Subsections (q)(3) and (q)(4) Sections C and D 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.

[52] Subsection (q)(5) Section E requires that a claimant agree to cooperate with the Fund in its efforts to secure restitution.

[53] The provisions of subsections (q)(2), (3), (4), and (5) Sections B, C, D, and E will ordinarily be incorporated into the Fund's subrogation agreement with the claimant.

[54] Subrogation agreements should be carefully drawn to maximize the Commission'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.

Rule 17. Subsection (r)—Judicial Relief.:

[55] Occasionally a situation arises in which the protection of clients and this subsection ~~the LFCP~~ requires the appointment of a custodial receiver to wind down a lawyer's practice and to preserve assets. Subsection (r) Rule 17 makes explicit the Commission's authority to seek these such remedies when as are available under Kansas state law.

Rule 18. Subsection (s)—Confidentiality.:

[56] The need to protect wrongly accused lawyers and to preserve the independence of the ~~deliberation of the~~ Commission's deliberations should be balanced with the pervasive interests of protecting the public and enhancing the administration of justice.

[57] It is within the discretion of the Commission to determine which agencies other than the ~~D~~disciplinary Aadministrator should be given access to claim files. Criminal prosecutors and agencies considering judicial or administrative appointments may be assisted by access to information contained in claims for reimbursement from the Fund. ~~Paragraph B~~ Subsection (s)(2) adopts ~~Supreme Court Rule 237(c)'s 222(e)~~ excepting exclusion of the claimant and the lawyer from the rule of confidentiality.

[58] Publication of the decisions of the Commission highlights the responsiveness of the legal profession to clients and its commitment to self-regulation. The Commission should be aware that on occasion the need to protect the client's identity from the results of publicity may occur. Timing of the release may be based on other pending proceedings. Responsible public information programs are essential to achieve the Fund's purpose ~~of the Fund~~. Both the public and the news media should be kept informed of the Commission's activities ~~of the Commission~~ and the Fund's status ~~of the Fund~~. After payment of reimbursement, the Commission may publicize the reimbursement through the Supreme Court's ~~P~~public Information ~~O~~fficer or in any other manner directed by the Commission.

Rule 19. Subsection (t)—Compensation for Representing Claimant.:

[59] Claimants occasionally may appear before the Commission represented by counsel. Claimants in need of counsel in preparing or presenting a claim should receive such assistance. Since the ~~Commissioners~~ members volunteer their services, lawyers should also contribute their legal services pro bono publico. However, it is not the intent of this subsection ~~the Rule~~ to require assisting lawyers to spend their own money. They may request the Fund to reimburse out-of-pocket expenses.