

REGULATIONS OF THE CLIENTS' SECURITY FUND

In order to carry out the purposes and achieve the objectives of the provisions of chapter 7, Rules Regulating The Florida Bar, the Clients' Security Fund Committee, with the approval of the Board of Governors of The Florida Bar, promulgates the following regulations to serve as a guide, but not to bind, the operation of the Clients' Security Fund. The regulations may be amended by the committee with the approval of the board.

A. CLAIM PROCESSING

1. The Clients' Security Fund Program shall serve as the staff agency for Clients' Security Fund matters with primary responsibility for (a) investigating and reporting on claims for amounts of \$1,000 or less; (b) closing claims received which are clearly not covered by the Fund; (c) except as provided in chapter 7 of the Rules Regulating The Florida Bar, closing claims when the underlying grievance matter has been closed by the bar without discipline, when the attorney remains a member in good standing, or the claimant has withdrawn the claim; (d) preparation of the committee agenda and recording the minutes of the committee meetings; (e) presentation of claims to the board of governors; (f) notifying claimants of ultimate disposition; (g) coordinating payouts with the finance and accounting department; (h) monitoring subrogation rights on previously paid claims; and (i) preparation of annual Fund reports.

2. Investigating members of the committee will prepare a written report on a form furnished by The Florida Bar on all claims assigned to each of them. The investigating member may recommend that the claim be: approved and provide a loss amount; denied and state all reasons for denial; or tabled or deferred and state the reason.

The committee will consider the claim at the next scheduled meeting. While the recommendation of the investigating member will be given deference, the committee may agree or disagree with the recommendation, including the loss amount.

The committee's recommendation will be forwarded to the designated reviewer. The designated reviewer will promptly review the report of the committee and report his or her recommendations to staff for inclusion in the agenda for the consideration of the board of governors. The designated reviewer may recommend that the claim be: approved and provide a loss amount; denied and state all reasons for denial; or sent back to the committee for further investigation. To the extent possible, guidance will be provided to the committee.

While the recommendation of the committee will be given deference, the designated reviewer may agree or disagree with the recommendation, including loss amount.

Upon receipt of the report of the designated reviewer, the claim will be placed on the agenda of the board of governors. The board of governors may recommend that the claim be: approved and provide a loss amount; denied and state all reasons for denial; or sent back to the committee for further investigation.

While the recommendation of the designated reviewer will be given deference, the board of governors may agree or disagree with the recommendation, including loss amount.

3. A claim against a member in good standing will be held until final disposition of the disciplinary matter. A claim alleging that a suspended attorney took attorney's fees for legal services during the period of suspension will be processed in accordance with the rules and regulations. A claim alleging that an attorney who has been disbarred or resigned from the practice of law took attorney's fees after the disbarment or resignation became final will be closed by staff.

4. A claimant has a responsibility to respond to requests from staff for information that is necessary to process the claim. If a claimant fails to provide staff with the requested information after staff has made three attempts to obtain the information, staff may recommend to the chair of the CSF Committee that the claim be closed without further action. If the chair agrees, the claim will be closed without referral to the committee or designated reviewer.

COMMENT

When a claim is received by the Clients' Security Fund department, it is reviewed by staff for completeness. For example, staff will review the claim to determine whether proof of loss has been provided. Staff will write the claimant requesting any missing information that is necessary and an essential element to process the claim. The claimant is given 30 days to respond. If there is no response, staff will write again giving another 30 days. If there is no response to the second letter, staff will write a third letter once again giving the claimant 30 days to respond. The claimant is therefore given 90 days to provide information that is necessary and an essential element in processing a claim. If the claimant fails to respond after three attempts have been made, staff may recommend to the chair of the Clients' Security Fund Committee that the claim be closed. If the chair agrees, the claim will be closed without further review. Should the claimant provide the necessary information at a later date, the claim will be reopened. For purposes of determining whether the claim is timely, the date the claim was first filed will be used.

B. CLAIM PREREQUISITES

1. No claim will be considered unless a claim for relief has been filed within 2 years after the date the disciplinary action becomes final. If the claim is against a deceased lawyer, the claim will not be considered unless it has been filed within 2 years of the date of the lawyer's death. For good cause shown, the board may, in its discretion, consider a claim filed out of time. In no event will a claim not filed within 4 years of the date the disciplinary order becomes final or the date of the lawyer's death be considered.

COMMENT

The regulation requires that a claim be filed within 2 years after the date the disciplinary action becomes final. If a claim is brought due to the death of the lawyer, the claim must be brought within 2 years after the date of the lawyer's death. However, for good cause shown, a claim filed beyond the 2 year period may be considered. The following are examples of good cause:

- (i) conduct on the part of the lawyer such that the claimant was reasonably led to believe that the lawyer was working on the case, had not resolved the matter, or would reimburse the claimant for the loss; or
- (ii) an award of restitution by a court or order by the supreme court that the lawyer must repay the claimant prior to reinstatement if the claimant reasonably relied on the award or order and delayed filing a claim in anticipation of reimbursement; or
- (iii) conduct on the part of the claimant showing the claimant was trying to exhaust remedies.

However, even if good cause is found, a claim must be filed within 4 years from the date the disciplinary action becomes final or the date of the lawyer's death. Claims filed outside of this time period will be closed.

2. Claimants should reasonably exhaust other remedies before seeking reimbursement from the Clients' Security Fund. Other remedies include bonds, professional liability policies, third party responsibility, the defalcating attorney's partners and deceased attorney's estate. In determining whether a claimant has met this requirement, the factors which the committee may consider include, but are not limited to, the following;

- (a) the availability of funds;
- (b) the likelihood of collection;
- (c) the amount of the loss;
- (d) the ability of the claimant to retain legal counsel or to proceed pro se;
- (e) the ability to locate the attorney.

3. The Clients' Security Fund Committee may require that the claimant file a complaint against the attorney with the appropriate state attorney's office; file a civil suit in an appropriate court; or cooperate with the committee in appropriate proceedings against such lawyer as prerequisites to the granting of relief from the Fund.

4. It is not a prerequisite to claims against deceased members that discipline was imposed or pending at the time of the death.

5. A claimant must provide credible evidence that the funds they seek to recover were in the attorney's possession or control before a claim may be approved. The following may be used to establish the payment or the amount of the payment or the amount of the loss:

- (a) documentary evidence; or

- (b) a finding by a court of competent jurisdiction; or
- (c) an admission by the attorney; or
- (d) a finding in an audit performed by a Florida Bar staff auditor

C. CLAIMS ORDINARILY DENIED

1. Claims by relatives, partners, or other close associates of the attorney will ordinarily be denied.

2. Except as provided in chapter 7 of the Rules Regulation The Florida Bar, the Clients' Security Fund Committee will consider for payment only those claims arising out of a lawyer-client relationship.

3. Where the lawyer, unrelated to a lawyer and client relationship, is a personal representative, testamentary trustee, guardian or escrow agent for the claimant, and the lawyer's status as the personal representative, testamentary trustee, guardian or escrow agent is not due to or the result of an existing lawyer-client relationship with the claimant, the claim will be denied.

COMMENT

The existence of a lawyer-client relationship is central to the issue of whether a loss is reimbursable. If the lawyer is not acting in the capacity of a lawyer, the loss is not reimbursable. Therefore, if an individual is acting in a capacity unrelated to a lawyer-client relationship where their status as a lawyer is not material to the claim, the loss will be denied.

4. Claims by government agencies, institutional lenders, insurance companies, publicly owned entities including their subsidiaries and affiliates, entities which fail to disclose to the Clients' Security Fund Committee the names and addresses of their direct and indirect beneficial and record owners, and subrogees, brought on their behalf and not as representatives, will not ordinarily be considered for payment.

5. No claim shall be approved where the defalcating attorney was bonded in any capacity which protected the rights of the claimant , where the defalcating attorney was insured under a lawyers' professional liability policy or a policy of a similar nature which protected the rights of the claimant, or where the claim might be payable from any other source; provided, however, that the committee, may recommend payment of the difference of what the claimant received from the bond, insurance policy, or other source and the amount of the loss if the monies from the bond, insurance policy, or other source were exhausted and additional recovery cannot be sought from the bond, insurance policy, or other source.

COMMENT

Although the regulation allows the committee to recommend payment of the difference between what the claimant received and the loss under certain

circumstances, if the claimant refuses or declines to participate in the settlement, the claim will be denied for failure to exhaust remedies.

6. If services were performed that were useful to the claimant, the claim may be denied.

An attorney may be deemed to have provided useful services to a client when, after accepting a fee from the client, the attorney:

(a) files a pleading or other document on behalf of the client that moves the client's case or matter forward or protects the client's interests, regardless of the quality of the pleading or other document; or

(b) engages in substantive communication about the matter for which the attorney was hired; or

(c) attends a court proceeding or proceedings that advance the case or cause of the client or protects the client's interests; or

(d) engages in investigation or discovery; or

(e) attends a mediation or arbitration or other alternative dispute resolution proceeding; or

(f) prepares a document or documents minimally suitable for use by the client in a legal proceeding or transactional matter; or

(g) provides legal advice and counsel to the client.

7. Investment advice given by the claimant's lawyer, although such advice may result in the loss of claimant's money, is not, in and of itself, a ground for seeking reimbursement from the Fund. Obtaining money or property from a claimant representing that it was to be used for investment purposes when no such investment was made, or any other theft or fraud committed by a lawyer, may be considered for reimbursement. In such circumstances the theft must be the result of a direct and current lawyer-client relationship.

COMMENT

Claims based on investment advice are ordinarily not reimbursable. Therefore, failure of an investment to perform as represented to or anticipated by the claimant is not a reimbursable loss. On the other hand, the theft or misappropriation of money or property by a lawyer where the lawyer represented to the claimant that the money or property would be used for an investment when no investment was made may be considered a reimbursable loss. In such circumstances the funds were obtained by fraud or a ruse for the purpose of being misappropriated by the lawyer. No investment existed nor was it the intent of the lawyer to invest the funds. As with all other claims, all claim prerequisites must be met including that the loss was the result of a direct and current lawyer-client

relationship. Factors to consider in determining whether the loss was due to a direct and current lawyer-client relationship include the number, nature and timing of prior transactions between the claimant and the lawyer.

D. PAYMENT AND CAPS

1. The maximum amount payable for an individual fee claim will be \$5,000. Fee claims may be paid upon approval. Fee claims will be paid prior to misappropriation claims.

2. The maximum amount payable for a misappropriation claim will be \$250,000. All approved misappropriation claims will be held for payment until the end of the fiscal year in which they were approved at which time the approved misappropriation claims will be pooled for payment. The maximum amount available for payment of the pooled misappropriation claims will not exceed that fiscal year's CSF contribution less the sums used to pay approved fee claims. If there are not sufficient funds in the account to pay the approved misappropriation claims, the approved misappropriation claims will be paid on a pro rata basis with no individual claim exceeding a payment of \$250,000.

3. No reimbursement on account of a claim shall be made from the fund unless and until the same has been authorized by the board or the committee and the claimant has executed assignments and other documents as may reasonably be requested by the board and the committee. As a condition to any payment staff may require such assurances as it deems appropriate to satisfy all conditions imposed upon any such payment, and to verify that payment is made to the proper party or representative of that party. Neither The Florida Bar, the board, the committee, nor staff shall incur any liability for nonpayment of claims or for erroneous payments.

4. If any approved payment remains unclaimed at the close of the fiscal year following the fiscal year in which the claim is approved, those funds will be returned to the fund. A final request for response will be sent to the claimant(s) prior to the return of the funds.

5. If it is determined that part of the money misappropriated by the attorney included sums to be used to pay a claimed lien, the amount of the lien will not be deducted from the loss. The claimant is liable for the lien.

E. ADMINISTRATIVE AND FISCAL

1. The fund will operate on a fiscal year basis, concurrent with the fiscal year of The Florida Bar. Any sums remaining in the fund after all approved claims have been paid will be treated consistent with the Standing Board Policies.

2. An attorney representing a claimant shall be required to give to the committee a written statement that he or she will not accept a fee from the claimant for services rendered in connection with a claim against the Fund.

3. Publicity of Fund activities shall be at the discretion of the board of governors members and Clients' Security Fund Committee members in the circuit where an award is made.

4. An annual report detailing the financial activities of the Fund shall be prepared by staff, approved by the committee chair and published in The Florida Bar *Journal* or *News*.