

National Client Protection Organization, Inc.



**STANDARDS FOR EVALUATING
LAWYERS' FUNDS FOR CLIENT PROTECTION**
Adopted - June 2, 2006



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Acknowledgment

A draft of the Standards For Evaluating Lawyers' Funds For Client Protection ("Standards") was widely circulated for comment by the NCPO Board of Directors on August 2, 2005. The response was significant and gratifying.

Grateful acknowledgment is due for the many, varied, substantive, and extremely valuable comments to the original draft provided by Fred Miller, Bill Ricker, Curtis Harada, Robin Lawnichak, Marty Cole, Carole Richelieu, Mike Miyahira, and Kris Wenzel. Considerable improvement to the Standards resulted from their suggestions.

In addition to providing excellent ideas of her own, Victoria Rees did superb work for the NCPO Subcommittee that used the commentary to produce a final draft for consideration by the Board of Directors, and subsequently by the membership. As it turned out, that draft became the Standards adopted by NCPO at its Annual Meeting on June 2, 2006.

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Introduction

What follows is born of hundreds of discussions over many years. Whether formal presentations or off-the-cuff remarks, and whether in-person, over the phone or via e-mail, these exchanges have dealt with the obstacles encountered to doing client protection well, or even at all.

Those obstacles are many and they are persistent. That they utterly lack merit does not deter persons who invoke them to prevent assistance to victims of dishonest lawyers. When that is permitted to happen, it matters little to clients whether the harm to them is perpetuated deliberately or inadvertently. This is what those who work for client protection funds discuss when they have the opportunity: What prevents us from doing what ought to be done? What should be done? What works?

What does not work is encountered over and over again:

- Our Fund does not pay that kind of claim because it cannot afford to.
- We reject every claim we can to preserve the Fund.
- A proposal to increase the limitation from \$5,000 to \$10,000 per claimant has been met with adamant opposition.
- We only meet and pay claims once (or twice) a year.
- Our Fund is a remedy of last resort; claimants must prove they have exhausted all other possible sources of recovery.
- We would ask that the annual assessment for the Fund increase from \$5 to \$7.50, but we know the lawyers would complain.
- Our Fund trustees “get it”, but the powers-that-be don’t.
- If the Fund ends the year with a reserve, the assessment is suspended until it’s gone. (Or, the Fund’s money is used for other purposes.)
- The Fund is considered just another state agency - or bar committee.
- All unearned retainer claims are fee disputes, which we don’t pay.
- This year’s Bar President is okay, but the President-Elect doesn’t like the Fund.
- Our Fund could do better with more staff, but we share one part-time person with Bar Counsel, or CLE, or Fee Arbitration, or...
- We won’t even look at any claim involving an investment; lawyers are not investment counselors.

And so on.

Funds exist because lawyers are honest by an overwhelming majority. It is simply unacceptable to honest lawyers that there be no remedy for clients who suffer solely for having given a lawyer their trust, especially since the system of justice depends upon such clients' trust and candor. The same logic that compels Funds to exist commands them to be better than mediocre.

When carefully considered, the obstacles to excellence in client protection reveal themselves to comprise faulty, often circular, reasoning combined with bad public policy. That a Fund rejects certain kinds of claims because it cannot afford to pay them (the first obstacle, above) explains nothing, of course. Why can't the Fund afford them? Because it has no assessment, or an assessment of \$5 or \$7.50 per year. Why does the Fund lack adequate resources? Because it has no control over its fiscal health and the powers-that-be do not support the Fund. Why don't they support the Fund? Because they don't understand it and they fear the lawyers will revolt. Do those in control really fear lawyers will "revolt" over paying the equivalent of one-twentieth to one-third of one billable hour, per year, to save innocent clients from ruin? They do not want lawyer complaints, especially since the Fund receives so few claims. Why no claims? No lawyers ever steal in your State? Nobody knows about the Fund. Why is that? It would be foolish to publicize a Fund that cannot afford to pay claims.

A sense of humor is helpful for those who work in client protection, but so is a steely resolve. There is always an answer from those who don't "get it", or from those who fear those who don't "get it". The fact that the answers to the why-not-do-this-well questions make no sense often seems not to matter. That is frustrating.

The Standards that follow take on the obstacles, and expose them for what they are. The aspirations guiding the Standards are provided by the Profession itself. That is to say, they are principled and they are deliberately and appropriately set high.

There is nowhere to hide in these Standards. Lack of funding, for example, is not an excuse for anything; it is a critical problem that must be solved. Falling short in one of the four major building blocks is as harmful to a Fund as a deficiency in any of the others.

Those four major building blocks (structure, funding, accessibility, and responsiveness) are imperatives. A Fund beholden to forces indifferent or hostile to its mission has no chance to achieve excellence. Independent structure with no funding yields contemptibly unfulfilled promise. If a Fund is securely in place with adequate funding, even these are small victories unless the Fund can be found and used by those who need it most. Finally, all is for naught if a Fund simply fails to respond to the need of deserving claimants who find it. The Standards are built upon these truisms.

The Standards provide detailed explication of what excellence in client protection demands. Setting them high means that readers from virtually every Fund in North America will find at least something disquieting in these Standards. Discomfort with inadequacy is appropriate. When improvement is the result, the Standards are working.

Kenneth J. Bossong
Director-at-Large
National Client Protection Organization
April 2007



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STANDARDS FOR EVALUATING LAWYERS' FUNDS FOR CLIENT PROTECTION

Adopted - June 2, 2006

Lawyers' Funds for Client Protection ["Funds"] can only benefit from articulating standards to measure performance. There are four fundamental building blocks for any Fund that strives for excellence:

- (1) An organizational structure that secures the Fund's independence;**
- (2) Steady, secure and adequate funding;**
- (3) Accessibility; and**
- (4) Responsiveness to the need.**

On this foundation are constructed the 31 specific policy standards that follow. Because all four building blocks are necessary, they are interdependent, and their corresponding standards are interrelated. Cross-references are provided.

Standards in a developing field cannot be permanent. As progress is made and aspirations evolve, however, Funds must consider, in detail, what they can and should accomplish in order to offer a high level of protection to clients. The fundamental question will always be: "Is the need being met?" These standards provide an analytical framework for answering that question, and impetus thereafter to develop a plan of action for reaching the desired level of excellence. In short, these standards for evaluating Funds are presented to assist a Fund in determining whether it is truly protecting the law clients in its jurisdiction.

Over the last several decades, the American Bar Association has developed an evolving Model Rule for structuring and operating a Fund. The philosophical underpinnings of these standards are consistent with those of the Model Rule, the use of which is greatly encouraged. Even a cursory review of the ABA's Triennial Survey of Funds will show that there are many ways to structure Funds, however, and even more variability in the actual delivery of the services by Funds. These standards are intended to compliment the Model Rule by establishing aspirational criteria by which jurisdictions can evaluate the performance of their programs, whether they use the Model Rule or significantly depart from it.

1. Structure/Organization

1.1 The Fund should be an entity of the jurisdiction’s highest court as an exercise of the Court’s power and duty to regulate the practice of law.

1.2 The Fund should be created and maintained by court rule with enabling statute only where necessary under the jurisdiction’s constitution.

Commentary

Regulation of the practice of law, including such things as admissions, rules of practice, rules of professional conduct, and discipline, are generally the responsibility of a jurisdiction’s highest court [“Court”]. In that capacity, the Court should create and maintain the Fund by court rule. Some jurisdictions may prefer to have an enabling statute; in other jurisdictions an attempt to create a Fund by way of statute may be considered a violation of separation of powers.

In any event, the Court should create and maintain a Fund as a critical aspect of its professional responsibility rule making power, recognizing the appropriateness of creating a remedy for those who have had their trust violated by lawyers licensed by the Court.

Where statute vests authority for regulation of lawyers with a body other than the Court, as is the case with Canadian law societies, care must be taken to give the Fund the autonomy and independence it needs to ensure it meets these standards. “Court” as used in these standards shall be meant to include any governing body with the authority to create and maintain the Fund.

1.3 The Fund shall constitute a trust separate and independent from any other fund or entity of the Court, bar association, law society or government agency.

Commentary

It is essential to the success of a Fund that it constitute a trust, inviolate from other uses and unavailable to all other entities. Lawyers contribute to the Fund each year on the basis that the money will be used to pay

victims of lawyer dishonesty, to administer the Fund, and to take steps to prevent such losses. To permit other agencies or organizations to utilize the money so collected for any other purpose, however meritorious, would be to countenance the sort of breach of trust for which lawyers are suspended or disbarred.

It is therefore appropriate to refer to those appointed by the Court to manage the Fund as “Trustees”, which term is not used lightly. Funds that are nothing more than line items in bar associations’ budgets, subject to political whim and competition for scarce resources, cannot be relied upon to fill the need or fulfill the purpose of the Fund.

1.4 The Court should appoint to the Fund’s Board of Trustees only those individuals who have demonstrated a combination of achievement, professionalism and concern for the public. Diversity of background should also be a factor in Trustee selection, including members who are not lawyers.

1.5 The Fund’s Trustees should have sole discretion to decide claims, make awards and determine the Fund’s procedures and policies within the court rule.

Commentary

Apart from creating a truly independent Fund (see Standards 1.1 - 1.3, above), and providing it with appropriate funding (see Standards 2.1 - 2.5), the next most important thing that the Court can do to ensure a successful Fund is to appoint only outstanding individuals to serve as Trustees. Only those who have already distinguished themselves professionally and in service to the public should be considered for these appointments, whether they are positions for lawyers or non-lawyers.

Once outstanding persons have been selected to immerse themselves in the purpose and policies of the Fund, they should be permitted and expected to make all significant decisions on claims and policy in their sole discretion. Expertise borne of handling the Fund’s matters combined with commitment to the Fund’s purpose engender just and timely decisions.

Trustees should recuse themselves from consideration of matters in which they have a conflict of interest, or the potential for such conflict.

1.6 To manage the Fund’s daily affairs, the Trustees should employ a staff sufficient to permit them to (a) render the most just and timely decisions attainable in all matters, and (b) efficiently implement their decisions. The staff should serve at the pleasure of the Board.

Commentary

However committed they may be to the Fund, the Trustees cannot be expected to manage every aspect of the Fund’s business on a daily basis. The Trustees should not hesitate to employ such staff as is necessary to assist them in attaining just and timely results, and in protecting the Fund’s rights. Full time staff devoted to the Fund’s affairs is preferable. Where, as a practical reality, staff must be shared with other entities or functions within an organization, the independence of the staff in handling the Fund’s affairs must be guaranteed.

1.7 Staff salaries and all other obligations of the Fund should be paid or reimbursed by the Fund out of its income and assets to maintain the Fund’s independence.

Commentary

Once established on firm financial ground, the Fund should be financially beholden to no other entity. Rather, it should pay its own way, thus securing the Fund’s independence.



2. Funding

2.1 The Fund must have a source of income that is steady, secure and adequate to meet its standards of accessibility and responsiveness.

Commentary

Client protection is a field in which good intentions are not enough. A Fund in hiding or unable to meet the need (see Standards 3.1 - 3.6, and 4.1 - 4.10, below) cannot be considered a Fund at all. In many ways, funding is the ultimate Fund issue. Not only must funding be adequate, but it must be steady - every year or every other year - and secure. Given the Fund's importance to maintaining trust and respect within the legal profession, it cannot be permitted to go begging each year with clients' financial viability hanging in the balance.

2.2 Primary funding should be by regular, periodic assessment of lawyers. The assessment should be conducted by authority of the Court, with appropriate sanctions for non-compliance.

2.3 All, or nearly all, licensed members of the profession should pay into the Fund.

Commentary

Voluntary contributions should be gladly and thankfully accepted, but cannot be relied upon to maintain a fully accessible and responsive Fund. Funds are based on the principle of professionalism and are not insurance companies. Lawyers are not asked to pay the assessment on the basis that they contribute to the risk covered by the Fund. To the contrary, it is a source of pride to note how few lawyers conduct themselves in a way that threatens Funds.

With the overwhelming majority of honest lawyers paying for the misdeeds of a few, the Fund is a testament to the bar's honesty and integrity. Just as instances of dishonesty by lawyers besmirch all lawyers, so too do payments by the Fund to rectify these situations result in benefits to all lawyers. Virtually all licensed members of the bar should participate in taking care of these debts of honor. Exemptions, if any, should be narrowly drawn.

2.4 The assessment should not be halted, suspended, or reduced because the Fund has a positive balance. To the contrary, a substantial reserve should be sought, as interest income will help the Fund meet the need in times of large or numerous claims.

2.5 There should be no cap on the Fund's reserve short of self-endowment with full reimbursement of victims.

Commentary

Because of the vagaries of lawyer misconduct, it is not possible to determine the exact amount a Fund will need to reimburse each year. Funds should neither be expected to spend everything it assessed for a given year, nor limited to reimbursing losses only up to the annual assessment. Comparisons with the operating budgets of state agencies are inappropriate. Sound financial health for Funds needs no apology; indeed, it is required for fiscal responsibility in the public interest. With the attainment of an adequate balance, the resulting interest income helps ensure the Fund's continued viability and the ability to meet unforeseen future needs.

Some Funds have a cap on the Fund's reserves whereby the periodic lawyer assessment is halted, suspended or reduced when a certain level is attained. This is to be avoided for a number of reasons. The first is that halting an assessment short of providing full reimbursement of all victims misses the point of the Fund. Second, it is extremely difficult to know how much is "enough". Over the years, some Funds have halted their assessment with a reserve less than the per claim maximum of other Funds. No jurisdiction's Fund is self-endowed (that is, fully able to meet all obligations without infusion of fresh capital), and Funds that employ this mechanism are likely to regret it.

2.6 The Fund should take an assignment of each successful claimant's rights and, within sound business judgment, pursue those rights in vigorous attempts to replenish the Fund with subrogation receipts.

Commentary

The Fund should take an assignment of claimants' rights. Subrogation is a legal doctrine operating under common law. Inherent in the Fund having claimants' rights is that claimants should not "double-dip". The

Fund as assignee and subrogee of its successful claimants is entitled to seek recovery for money paid on claims. Pursuit may be of both the wrongdoer and collateral sources of recovery. Funds have found it a sound business practice to pursue such rights with vigor. As to the potentially competing subrogation rights of Funds and their successful claimants, see Standard 4.3. Funds and their claimants should share information with prosecutors and discipline authorities, as permitted by law.

2.7 The Fund should seek implementation of appropriate loss prevention mechanisms. Among those that should be sought are trust account overdraft notification, minimum financial recordkeeping, random audits of trust accounts, insurance payee notification, and education of the bar and the public. Lawyer assistance and practice assistance programs should be encouraged and assisted in making their services known.

Commentary

While seeking to raise sufficient revenues to meet the need, the Fund must also strive to limit or prevent losses. In addition to participating in efforts to educate the bar and the public about sound practice and risk avoidance, the Fund should encourage the implementation of loss prevention mechanisms such as those listed above. Each is successfully operating in a number of jurisdictions, and each has a Model Rule of the American Bar Association available to support it.



3. Accessibility

3.1 The Fund should make every reasonable effort to make its existence, nature and purpose known to the bar and the public. In particular, the Fund should ensure that those most likely to be approached by victims of dishonest lawyers - such as prosecutors, ethics committee counsel and members, ombudsmen, receivers/custodians, bar associations and judges - understand the Fund and the importance of appropriate and timely referrals. Similarly, copies of claims should be provided to respondents whose whereabouts are known, with invitations to respond.

3.2 The Fund should issue and publish an annual report. Quarterly or semi-annual news releases should be done as well, even in the absence of high volume activity.

Commentary

The Fund should not be the profession's secret. To the contrary, the profession should be proud to make its existence known to the public in the interests of transparency and accountability. A Fund fearful of receiving valid, compensable claims has a funding problem. (See Standards 2.1 - 2.7, above.) All reasonable measures should be taken to ensure that clients with compensable losses find their way to the Fund. Regular reports on the Fund's activity should come to be expected. A lack of activity may well be noteworthy in itself.

3.3 Ineligibility for classes of persons to qualify as claimants, like any limitation on the Trustee's discretion, is not to be favored.

3.4 Strict scrutiny in light of the Fund's purpose and mission should be applied to any suggested barriers to the Trustees' consideration of claims on their merits.

3.5 Claim forms and accompanying instructions should be in plain language and, where appropriate, available in other languages.

3.6 Time limitations on the filing of claims should be reasonable. Trustees should have the authority, in their discretion, to relax the time limitations for good cause.

Commentary

There are a number of ways to make a Fund inaccessible to those who need it, and none serve the Fund's purpose. Defining away claimants, imposing unrealistic time limitations, using incomprehensible forms and instructions, and setting up other impenetrable barriers have the same effect on otherwise deserving claimants as hiding from them.

While a Fund must be able to bring closure to matters within a reasonable time frame, doing justice to the claimants in the Trustees' discretion should remain paramount. Strict or automatic prohibitions from consideration for an award should therefore be avoided. Trustees may consider the following factors presented by claimants: relationship to the respondent, legal status, extent of need, education and sophistication, negligence, or unclean hands. Such factors should not be used harshly to deny meritorious claims, however. (See Standard 4.10.) Trustees should also recognize the particular vulnerability of claimants with limited, or no, ability with the English language, or the inability to read or write, and should provide reasonable accommodation as the circumstances warrant.

3.7 The Fund's rules should be supplemented with regulations and written procedures as needed.

Commentary

The Fund, its Trustees, staff, claimants and the public all benefit from having supplemental policies and procedures reduced to writing and made available on request. This also serves to enhance the Fund's transparency and accountability, as well as creating greater consistency in decision-making. Claimants and potential claimants should know what is expected of them and what limitations the Fund has established to address their needs.



4. Responsiveness To The Need

4.1 The ultimate goal of the Fund is to fully reimburse all clients victimized by the dishonest conduct of their lawyers in as timely a manner as possible.

Commentary

If a Fund is to be anything other than window dressing or a public relations ploy, no other ultimate goal makes sense. If full reimbursement is not possible at any given time, efforts should be redoubled to meet the Standards on Funding (2.1 -2.7, above).

4.2 Limitations on the payment of awards - whether per claim, per claimant, per year or in the aggregate against any one lawyer - are not to be favored. Every opportunity should be sought to eliminate such limitations on the Trustees' discretion to pay awards.

Commentary

Artificial limits on the payment of otherwise compensable claims are, at best, necessary evils. Their necessity should be questioned, and their impact lessened at every opportunity. Raising such limits is well worth doing when their elimination cannot be attained. High caps limit only the most catastrophic of claims and do the least damage to the Fund's mission, because they affect so few claimants. An acceptable dollar figure for an appropriate intermediate goal, short of doing away with all payment limitations, may vary considerably with jurisdictions' cost of living.

While it may not yet be attainable for many Funds to restore wealth to the wealthy, families of modest or average means should not face losing their homes for having trusted a lawyer. Therefore, an acceptable intermediate goal is to maintain the Fund's ability to save a middle-class family's home in the jurisdiction's economy.

Aggregate maximums are especially to be disfavored, there being little, if any, justification for disparate treatment of persons victimized by unusually prolific dishonest lawyers.

4.3 In the event awards must be made short of amounts otherwise compensable, the assignments taken by the Fund, under Standard 2.6 shall be limited to the amounts paid by the Fund. Further, the Fund shall work with the claimants to pursue subrogation receipts, which shall be recovered for the benefit of claimants until all are made whole as to misappropriated principal, and then to the Fund to replenish awards made.

Commentary

Until the Fund reaches the goal of making all victims whole, the invoking of payment limitations raises an issue: Who collects first from subrogation receipts? Simply put, the claimants should, until made whole as to stolen principal, even if the Fund's efforts generate the recovery.

Where the source of the recovery is specific to one claimed transaction, that claimant should be made whole first out of the money recovered. Otherwise, claimants should share recoveries pro rata until all are made whole.

Then, the Fund should recover for the awards paid before claimants seek interest, consequential damages, lost opportunity, or other damages.

4.4 Claims should be decided, and compensable claims paid, as quickly as possible consistent with sound and just decision making, and in no event more than three months after claims are perfected. Claims are perfected when jurisdictional thresholds have been met and all reasonably obtainable proofs are received.

4.5 While a claimant has the burden of proving a claim's compensability, the Fund should not hesitate to use its subpoena power to expedite the perfection of a claim, without regard to whether the information obtained ultimately assists a claimant's position or that of the lawyer against whom the claim is filed.

4.6 The Board of Trustees should meet at least quarterly unless there is no claim or policy business requiring attention. If there is little or no claims activity, the Fund should examine whether it is adequately accessible. (See Standards 3.1 - 3.6, above.) While in-person meetings are to be favored, meetings may consist of teleconferences and mail ballots where appropriate.

4.7 Informal hearings should be held by the Fund where credibility is an issue, the claim presents novel issues, the facts remain unclear, or the claim is too close to decide on the papers.

4.8 Reimbursement checks should be issued as soon after approval of claims as is practicable, and in no event more than thirty days after receipt of papers assigning the successful claimants' rights to the Fund (Standard 2.6).

Commentary

A second aspect of a Fund's responsiveness to the need, beyond the amount paid, is the timeliness of payment. The ameliorative effects of a Fund award can be greatly and tragically diminished with the passage of time. Claimants typically have had a problem or a transaction of great significance before they ever approached the defalcating attorney; where an award is to be paid, the respondent has, by definition, greatly added to the claimant's problems.

While the most important goal is to make the best and most just decision possible for each claim, doing so as quickly as possible is a close second. As suggested in Standard 3.3, jurisdictional barriers should only be those that are necessary. Once those barriers have been hurdled, resolution of the claim should follow as quickly as facts will permit.

Clearly compensable claims should not languish for want of a meeting, even if "meetings" must sometimes be by teleconference or mail ballot. Check-writing procedures should be streamlined to get relief into the hands of victimized clients. The Fund should have and use subpoena power where the claimants or respondents face difficulty in producing documentation. When needed, hearings should be conducted by the Board of Trustees after all reasonably available documentation has been produced. Hearings provide the Trustees an opportunity to consider the concerns of claimants and respondents in context and can help personalize the process to an appropriate extent.

4.9 A Fund is not a remedy of last resort, but claimants should be required to take reasonable steps to recover from wrongdoers or third parties to mitigate losses. The Fund should not hesitate to pay a claim and pursue a claimant's rights where such pursuit would place an undue burden or hardship on a claimant, or where it is in the Fund's own best interest to do so.

Commentary

Requirements such as the attaining of judgment against the respondent lawyer or full-fledged litigation against collateral sources in complex commercial matters are not to be favored. In some instances, such as where the respondent is known to be judgment proof, such a requirement is an empty formality for the claimant. Where claimants are incapable of such pursuit, requirements of this nature operate as the denial of remedy to the most vulnerable of such victims. Fund are best seen as remedies of last resort vis-a-vis collateral sources, not victimized clients. Furthermore, there are instances in which the Fund would be best served by controlling the litigation against a collateral source.

4.10 The Trustees should not utilize over-technical distinctions or harshly restrictive interpretations of the Fund's rules in an endeavor to deny or limit claims. The favored exercise of discretion is to seek opportunities to reimburse victims within the scope of the Fund's rules.

Commentary

It does not serve the public or the profession if Trustees utilize their discretion so as to deny claims in order to conserve Fund assets. Trustees' fiduciary duties to maintain the fiscal integrity of the Fund are not properly carried out by avoiding the Fund's principal goal and reason for existence, that is, taking care of clients victimized by dishonest lawyers. If a Fund is running out of money, it needs to increase revenues (Standard 2.1) and limit losses (Standard 2.7) rather than reject claims for reasons incomprehensible to the average claimant and contrary to the philosophy of the Fund.



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