

# Rules Governing the Client Protection Fund

## 17A-001. Purpose and definitions.

A. **Purpose.** The purpose of the New Mexico client protection fund is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this jurisdiction occurring in the course of the client-lawyer or other fiduciary relationship between the lawyer and the claimant.

B. **Definitions.** For purposes of these rules:

(1) "board" means the Board of Bar Commissioners of the State Bar of New Mexico;

(2) "chair" means the chair of the Client Protection Fund Commission;

(3) "commission" means the Client Protection Fund Commission;

(4) "Court" means the New Mexico Supreme Court;

(5) "fund" means the New Mexico client protection fund;

(6) "lawyers" means lawyers admitted and licensed to practice law in New Mexico, including lawyers admitted *pro hac vice* and lawyers recently suspended or disbarred whom clients reasonably believed to be licensed to practice when the dishonest conduct occurred; and

(7) "secretary" means the secretary of the fund.

C. **Lawyer obligation.** Every lawyer has an obligation to the public to participate in the collective effort of the bar to reimburse persons who have lost money or property as a result of the dishonest conduct of another lawyer. Contribution to the fund is an acceptable method of meeting this obligation.

D. **Title.** These rules shall be known as the Rules Governing the Client Protection Fund.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

## 17A-002. Creation of client protection fund and commission.

A. **Fund created.** The "client protection fund" is created to reimburse claimants for losses caused by dishonest conduct committed by lawyers admitted to practice in this state.

**B. Commission created.** There is established, under the supervision of the court, a permanent commission of the Board of Bar Commissioners of the State Bar of New Mexico known as the Client Protection Fund Commission, which shall receive, hold, manage and disburse from the fund such money as may from time to time be allocated to the fund.

**C. Administration.** The State Bar of New Mexico shall administer the commission and shall develop and approve budget, operations and staffing for the commission and provide an annual status and progress report to the court.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-003. Attorney assessment.**

**A. Duty of Court.** The Court shall provide for continuous funding for the fund in amounts adequate for the proper payment of claims and the costs of administering the fund with funds available for transfer under the provisions of Subparagraph (1) of Paragraph C of Rule 18-102 NMRA and pursuant to Paragraph B of this rule.

**B. Assessment of attorneys.** Every lawyer admitted and licensed to practice law in New Mexico shall, prior to January of each year, pay to the commission an annual client protection fund fee in the amount of fifteen dollars (\$15.00). The annual fee assessment shall be mailed to the state bar at the time the registration statement required under Rule 17-202 NMRA is submitted. Annual fee assessments collected by the state bar shall be deposited in an account in a financial institution in the name of the commission.

**C. Suspension.** A lawyer's failure to pay any fee assessed shall be a cause for suspension from practice until payment has been made.

[Approved by Supreme Court Order No.05-8300-025, effective December 13, 2005; as amended by Supreme Court Order No. 09-8300-034, effective September 29, 2009.]

### **ANNOTATIONS**

**The 2009 amendment**, approved by Supreme Court Order No. 09-8300-034, effective September 29, 2009, in Paragraph A, after "Rule 18-102 NMRA", added "and pursuant to Paragraph B of this rule"; and in Paragraph B, deleted "Funding may be provided through an assessment from every" and added "Every"; in the first sentence, after the phrase "practice law in New Mexico", added the remainder of the sentence; and added the second and third sentences.

### **17A-004. Fund as trust; costs.**

**A. Trust.** All money or other assets of the fund shall constitute a trust and shall be held in the name of the fund, subject to the direction of the commission.

B. **Costs of administration.** The cost of administering the fund shall be paid out from the fund.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-005. Composition and officers of the commission.**

A. **Members.** The commission shall consist of nine (9) lawyers appointed as follows:

- (1) five (5) lawyers appointed by the Court;
- (2) three (3) lawyers appointed by the board;
- (3) the secretary-treasurer of the board; and

(4) the state bar staff administrator of the fund and the executive director of the State Bar of New Mexico shall be ex-officio, non-voting members of the commission.

B. **Qualifications.** Each appointed member of the commission shall be a licensed active member of the State Bar of New Mexico who practices in this state and maintains such member's principal office in this state.

C. **Terms.** The appointed members shall be appointed for staggered three (3) year terms. No appointed member shall serve for more than two (2) terms.

D. **Reimbursement.** Commissioners shall serve without compensation but shall receive mileage and per diem at the same rate as provided for public officers and employees of the state and may be reimbursed with the approval of the commission for expenses incurred in conjunction with travel on commission business.

E. **Vacancies.** Vacancies shall be filled by appointment from the appointing entity.

F. **Officers.** The commission shall select a chair, secretary, treasurer, and such other officers as the commission deems appropriate.

G. **Bond.** Pursuant to the provisions of the Surety Bond Act, the commission shall coordinate with the Court's chief clerk to ensure that the applicable premium is paid to the Risk Management Division for the commission's treasurer.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005; as amended by Supreme Court Order No. 12-8300-002, effective January 1, 2012; by Supreme Court Order No. 13-8300-002, effective January 1, 2013; as amended by Supreme Court Order No. 16-8300-036, effective November 1, 2016.]

### **ANNOTATIONS**

**The 2016 amendment**, approved by Supreme Court Order No. 16-8300-036, effective November 1, 2016, in Subparagraph A(3), deleted “vice-president” and added “secretary-treasurer”.

**The 2013 amendment**, approved by Supreme Court Order No. 13-8300-002, effective January 1, 2013, increased the number of members of the commission to nine lawyers; in Paragraph A, after "shall consist of", deleted "seven" and inserted "nine (9)"; in Subparagraph (1), deleted "four" and added "five (5)"; in Subparagraph (2), deleted "two" and added "three (3)"; and in Paragraph C, after "serve for more than two", added "(2)".

**The 2012 amendment**, approved by Supreme Court Order No. 12-8300-002, effective January 1, 2012, removed the treasurer and added the vice-president as a member of the commission; and in Subparagraph (3) of Paragraph A, deleted "treasurer" and added "vice-president".

**Cross references.** — See Section 10-2-13 NMSA 1978 for the Surety Bond Act.

## **17A-006. Commission meetings.**

A. **Frequency.** The commission shall meet as frequently as necessary to conduct the business of the fund and to timely process claims.

B. **Chair schedules.** The chair shall call a meeting at any reasonable time or upon the request of at least two (2) commissioners.

C. **Quorum.** A quorum for any meeting of the commission shall be five (5) commissioners. A motion shall pass upon the affirmative vote of five (5) commissioners.

D. **Minutes.** Minutes of meetings shall be taken and permanently maintained by the secretary.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005; as amended by Supreme Court Order No. 15-8300-026, effective December 31, 2015.]

## **ANNOTATIONS**

**The 2015 amendment**, approved by Supreme Court Order No. 15-8300-026, effective December 31, 2015, increased the number of commissioners that constitute a quorum to conduct the business of the client protection fund, increased the required number of commissioners voting in the affirmative to pass a motion, and made a technical amendment; in Paragraph B, after “two”, added “(2)”; and in Paragraph C, after “commission shall be”, deleted “four” and added “five (5)”, and after “affirmative vote of”, deleted “four” and added “five (5)”.

## **17A-007. Duties and responsibilities of the commission.**

The commission shall:

- A. receive, evaluate, determine and pay claims;
- B. promulgate rules of procedure not inconsistent with these rules and subject to approval by the Supreme Court;
- C. prudently invest such portions of the fund as may not be needed currently to pay losses, and to maintain sufficient reserves as appropriate;
- D. provide a full report at least annually to the court and to the board and to make other reports as necessary;
- E. publicize its activities to potential claimants, the public and the bar;
- F. work with the staff of the state bar to assure the commission's effective and efficient performance of its functions;
- G. retain and compensate consultants, investigators, actuaries, agents, legal counsel and other persons as necessary;
- H. prosecute claims for restitution to which the fund is entitled;
- I. engage in studies and programs for client protection and prevention of dishonest conduct by lawyers;
- J. promote effective communication between lawyer disciplinary authorities and the fund, and
- K. perform all other acts necessary or proper for the fulfillment of the purposes and effective administration of the fund.

[Approved by Supreme Court Order No. 05-8300-25, effective December 13, 2005.]

### **17A-008. Conflict of interest.**

A. **Client-lawyer relationship.** A commissioner who has or has had a client-lawyer relationship or a financial relationship with a claimant or lawyer who is the subject of a claim shall not participate in the investigation or adjudication of a claim involving that claimant or lawyer.

B. **Disclosure of conflicts.** A commissioner with a past or present relationship, other than as provided in Paragraph A, with a claimant or the lawyer whose alleged conduct is the subject of the claim, or who has other potential conflicts of interest, shall disclose such relationship to the commission and, if the commission deems appropriate, that commissioner shall not participate in any proceeding relating to such claim.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-009. Immunity.**

Members of the commission, commission staff, employees and agents shall be immune from suit as provided by law for all conduct in the course of their official duties. Immunity shall also extend, as provided by law, to claimants and any lawyer who assists a claimant for all communications to the fund.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-010. Eligible claims.**

A. **Conduct required.** The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant.

B. **Notice of claim.** The claim shall have been filed no later than five (5) years after the claimant knew or should have known of the dishonest conduct of the lawyer.

C. **Definition.** As used in this rule, “dishonest conduct” means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value, including but not limited to

(1) failure to refund unearned fees received in advance as required by the New Mexico Rules of Professional Conduct; and

(2) the borrowing of money from a client without intention to repay it or with disregard of the lawyer’s inability or reasonably anticipated inability to repay it.

D. Except as provided by Paragraph E of this rule, the following losses shall not be reimbursable:

(1) losses incurred by spouses, children, parents, grandparents, siblings, partners, associates, and employees of lawyers causing the losses;

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

(3) losses incurred by any financial institution that are recoverable under a “banker’s blanket bond” or similar commonly available insurance or surety contract;

(4) losses incurred by any business entity controlled by the lawyers, any person, or entity described in Subparagraph (D)(1), (2) or (3) of this rule;

- (5) losses incurred by any governmental entity or agency;
- (6) losses arising from business or personal investments not arising in the course of the client-lawyer relationship; and
- (7) consequential or incidental damages, such as lost interest, lawyer's fees, or other costs incurred in seeking recovery of a loss.

**E. Payment considerations.** In determining whether to pay a claim, the commission should consider the following factors:

- (1) the funds into which the lawyer is required to pay an annual assessment or into which an appropriation is made on behalf of the lawyer by the bar association or court;
- (2) the domicile of the lawyer;
- (3) the domicile of the client;
- (4) the residence of the lawyer;
- (5) the jurisdictions in which the lawyer is licensed and the number of years in each;
- (6) the location of the lawyer's principal office;
- (7) whether the lawyer maintains offices in other jurisdictions and, if so, where;
- (8) the location where the attorney-client relationship was formed;
- (9) the primary location where the legal services were provided;
- (10) whether at the time the legal services were rendered the lawyer was engaged in the unauthorized practice of law in the jurisdiction in which services were provided;
- (11) whether the lawyer had the authority to offer or provide the services that led to the claim without being licensed in this jurisdiction;
- (12) whether the claimant has filed a claim with another jurisdiction's fund and whether that fund has or will pay some or all of the claim under its rules; and
- (13) any other significant factors as determined by the commission, including but not limited to contacts by the lawyer or client with this and any other jurisdiction in which the primary services were rendered.

**F. Payment by other jurisdictions.** The commission may, in its discretion enter into an agreement with the fund of another jurisdiction to pay a portion of a claimant's reimbursable loss that is eligible for payment by both funds taking into account the factors set forth in Paragraph E of this rule, and the rules applicable to the fund of the other jurisdiction.

**G. Hardship exception.** In cases of extreme hardship or special and unusual circumstances, the commission may, in its discretion and consistent with the purpose of the fund, recognize a claim which would otherwise be excluded under these rules.

**H. Unjust enrichment.** If it appears that there will be unjust enrichment, or a claimant unreasonably or knowingly contributed to the loss, the commission may, in its discretion, deny the claim.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005; as amended by Supreme Court Order No. 15-8300-026, effective December 31, 2015.]

## **ANNOTATIONS**

**The 2015 amendment**, approved by Supreme Court Order No. 15-8300-026, effective December 31, 2015, provided factors for the client protection fund commission to consider in determining whether to pay a claim from the client protection fund, authorized the commission to enter into an agreement with the fund of another jurisdiction to pay a portion of a claimant's reimbursable loss that is eligible for payment by both funds, and made a technical amendment; in Subparagraph D(4), after "Subparagraph", added "(D)", and after "(3)", deleted "of Paragraph D"; and added new Paragraphs E and F and redesignated former Paragraphs E and F as Paragraphs G and H, respectively.

### **17A-011. Procedures and responsibilities for claimants.**

**A. Reimbursement form.** The commission shall prepare and approve a form for claiming reimbursement.

**B. Contents of form.** The form shall include at least the following information provided by the claimant under penalty of perjury:

(1) the name, address, home and business telephone numbers, occupation, employer and social security number of the claimant;

(2) the name, address and telephone number of the lawyer alleged to have dishonestly taken the claimant's money or property and any family or business relationship of the claimant to the lawyer;

(3) the legal or other fiduciary services the lawyer was to perform for the claimant;

- (4) the amount paid to the lawyer;
- (5) the form of the claimant's loss (e.g. money, securities or other property);
- (6) the amount of loss and the date when the loss occurred;
- (7) the date the claimant discovered the loss and how the claimant discovered the loss;
- (8) the lawyer's dishonest conduct and the names and addresses of any persons who have knowledge of the loss;
- (9) the name of the person, if any, 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;
- (10) the source, if any, from which the loss can be reimbursed including any insurance, fidelity or surety agreement;
- (11) the description of any steps taken to recover the loss directly from the lawyer or any other source;
- (12) 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;
- (13) the existence of facts believed to be important to the fund's consideration of the claim;
- (14) the manner in which the claimant learned about the fund;
- (15) the name, address and telephone number of the claimant's present lawyer;
- (16) the claimant's agreement to cooperate with the commission in reference to the claim or as required by Rule 17A-015 NMRA, in reference to civil actions which may be brought in the name of the commission pursuant to a subrogation and assignment clause which shall also be contained within the claim;
- (17) the claimant's agreement to repay the fund if the claimant is subsequently reimbursed from another source;

(18) the name and address of any other state fund to which the claimant has applied or intends to apply for reimbursement, together with a copy of the application; and

(19) 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. Attachments to form.** The following documents shall be attached to the form for claiming reimbursement:

- (1) a copy of any written agreement pertaining to the claim;
- (2) copies of any checks, money orders, receipts or other proofs of payment.

**D. Claimant responsibilities.** The claimant shall have the responsibility to complete the claim form and provide satisfactory evidence of a reimbursable loss.

**E. Filing of claim.** The claim shall be filed with the commission in the manner and place designated in the commission's rules.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

## **17A-012. Processing claims.**

**A. Denial of claim.** If a claim is not eligible for reimbursement pursuant to Rule 17A-010 NMRA of these rules, the claimant shall be advised of the reasons why the claim may not be eligible for reimbursement and that, unless additional facts to support eligibility are submitted to the fund, the claim file shall be closed.

**B. Supreme Court order.** An order disciplining a lawyer for the same dishonest act or conduct alleged in a claim, or a final judgment imposing civil or criminal liability therefor, shall be evidence that the lawyer committed such dishonest act or conduct.

**C. Notice to disciplinary board.** The Disciplinary Board shall be promptly notified of the claim and required to furnish a report of its investigation of the matter to the commission. The Disciplinary Board shall allow the fund's representative access to its records during an investigation of a claim. The commission shall 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. Any access to Disciplinary Board records provided for under this rule is subject to the disciplinary board's rules of confidentiality.

**D. Independent investigation.** The commission may conduct its own investigation when it deems it appropriate.

E. **Response.** The lawyer shall be notified of the claim and given an opportunity to respond to the claim. A copy of the claim shall be provided to the lawyer or the lawyer's representative. The lawyer or representative shall have twenty (20) days in which to respond.

F. **Record.** The commission may request that testimony be presented to complete the record. Upon request, the claimant or lawyer, or their representatives, will be given an opportunity to be heard.

G. **Findings.** The commission may make a finding of dishonest conduct for purposes of adjudicating a claim. Such a determination is not a finding of dishonest conduct for purposes of professional discipline and shall not have preclusive effect in any related civil or criminal proceeding.

H. **Conclusions.** When the record is complete, the claim shall be determined on the basis of all available evidence, and notice shall be given to the claimant and the lawyer of the commission's determination and the reasons therefor. The approval or denial of a claim shall require the affirmative votes of at least four commissioners.

I. **Evidence.** Any proceeding upon a claim need not be conducted according to technical rules relating to evidence, procedure and witnesses. Any relevant evidence shall be admitted if it is the type of evidence upon 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 which might make improper the admission of such evidence over objection in court proceedings. The claimant shall have the duty to supply relevant evidence to support the claim.

J. **Pending disciplinary proceedings.** The commission shall determine the order and manner of payment and pay all approved claims, but unless the commission directs otherwise, no claim should be approved during the pendency of a disciplinary proceeding involving the same act or conduct that is alleged in the claim.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-013. Request for reconsideration.**

The claimant or respondent may request reconsideration in writing within thirty (30) days of the denial or determination of the amount of a claim. If the claimant or respondent fails to make a request or the request is denied, the decision of the commission is final and there is no further right of appeal.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-014. Payment of claims for reimbursement.**

A. **Maximum.** The commission may from time to time fix a maximum amount on reimbursement per attorney or per claim that is payable by the fund subject to Supreme Court approval.

B. **Method of payment.** Payment of reimbursement shall be made in such amounts and at such times as the commission deems appropriate and may be paid in lump sum or installment amounts.

C. **Minors and incompetents.** If a claimant is a minor or an incompetent, the reimbursement may be paid to any person or entity authorized to receive the reimbursement for the benefit of the claimant.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-015. Reimbursement from the fund is discretionary.**

No person shall have the legal right to reimbursement from the fund. There shall be no appeal from a decision of the commission.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-016. Restitution and subrogation.**

A. **Restitution.** A lawyer whose dishonest conduct results in reimbursement to a claimant shall be liable to the fund for restitution; and the commission may bring such action as it deems advisable to enforce such obligation.

B. **Disciplinary action.** A lawyer whose dishonest conduct has resulted in reimbursement from the fund to a claimant shall make restitution to the fund including interest and the expense incurred by the fund in processing the claim. A lawyer's failure to make satisfactory arrangement for restitution shall be cause for suspension, disbarment or denial of an application for reinstatement.

C. **Rights assigned.** As a condition of reimbursement, and to the extent of the reimbursement provided by the fund, a claimant shall be required to provide the fund with a transfer of the claimant's rights against the lawyer, the lawyer's legal representative, estate or assigns; and of the claimant's rights against any third party or entity who may be liable for the claimant's loss.

D. **Judicial action.** Upon commencement of an action by the commission as subrogee or assignee of a claim, it shall advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses.

E. **Notice of other proceedings.** In the event that the claimant commences an action to recover unreimbursed losses against the lawyer or another entity that may be

liable for the claimant's loss, the claimant shall be required to notify the commission of such action.

F. **Cooperation.** The claimant shall be required to agree to cooperate in all efforts that the commission undertakes to achieve restitution for the fund and to repay the fund if claimant is subsequently reimbursed from another source in an amount that exceeds the difference between the principal misappropriated and the fund award. Such repayment shall not exceed the amount of the fund award.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-017. Judicial relief.**

A. **Application by commission.** The commission may make application to the appropriate court for relief to protect the interests of claimants or the fund where:

- (1) the assets of clients appear to be in danger of misappropriation or loss or to secure the claimant's or fund's rights to restitution or subrogation; or
- (2) the disciplinary board has failed to exercise jurisdiction.

B. **Court-appointed receivers.** A Court's jurisdiction in such proceedings shall include the authority to appoint and compensate custodial receivers to conserve the assets and practices of disciplined, missing, incapacitated or deceased lawyers.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

### **17A-018. Confidentiality.**

A. **Publicizing awarded claims.** Claims, proceedings and reports involving claims for reimbursement are confidential until the commission authorizes reimbursement to the claimant, except as provided below, unless provided otherwise by law. After payment of the reimbursement, the commission shall publicize the nature of the claim, the amount of reimbursement, and the name of the lawyer. The name and the address of the claimant shall not be publicized by the commission unless specific permission has been granted by the claimant. The commission may provide a waiver to the claimant which authorizes disclosure.

B. **Exceptions.** This rule shall not be construed to deny access to relevant information by the disciplinary board, other professional discipline agencies or other law enforcement authorities as the commission shall authorize, or the release of statistical information that does not disclose the identity of the lawyer or the parties, or the use of such information as is necessary to pursue the fund's subrogation rights under Rule 17A-015 NMRA.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]

**17A-019. Compensation for representing claimants.**

No lawyer shall accept any payment for assisting a claimant with prosecuting a claim, unless such payment has been approved by the commission.

[Approved by Supreme Court Order No. 05-8300-025, effective December 13, 2005.]