

Rule 241

RULE RELATING TO THE LAWYERS' FUND FOR CLIENT PROTECTION

(a) **Purpose and Scope.**

- (1) The purpose of the Lawyers' Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing the loss to a client caused by the dishonest conduct of a lawyer admitted and licensed to practice law in Kansas when the loss occurs in the course of a lawyer-client relationship between the lawyer and the claimant.
- (2) The Supreme Court, in the exercise of its inherent power to oversee the administration of justice and to regulate the practice of law and Kansas attorneys 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, persons who may be injured by the dishonest conduct of lawyers. Therefore, the Supreme Court adopts this rule to carry out that purpose.
- (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.
- (4) Losses caused by the dishonest conduct of lawyers serving as fiduciaries outside of a lawyer-client relationship are not reimbursable.

(b) **Establishment.**

- (1) The Lawyers' Fund for Client Protection is established.
- (2) Under the supervision of the Supreme Court, the Client Protection Fund Commission is established. The Commission may award payments to qualified claimants and authorize disbursements from the Fund under this rule.
- (3) This rule is effective for claims arising out of conduct occurring on or after July 1, 1993.
- (4) The Chief Justice has authority to contract on behalf of the Commission for the investment of money with the Pooled Money Investment Board established under K.S.A. 75-4221a prior to the organizational meeting of the Commission.

- (c) **Funding.**
- (1) The Supreme Court may provide for funding by Kansas lawyers through annual assessments and from transfers of money from the disciplinary fee fund.
 - (2) The Fund is not a part of the state treasury. Any money recovered by the Commission will be redeposited into the Fund.
 - (3) Any lawyer whose actions have caused payment of funds to a claimant from the Fund must make restitution or be subject to an action for restitution to the Fund for all money paid as a result of 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.
 - (4) The Fund may accept any unidentifiable property transferred under Rule 235(a)(2)(C).
- (d) **Funds and Disbursements.** All money or other assets of the Fund will be held in the name of the Fund. All disbursements and expenditures must be made upon warrants of the director of accounts and reports issued through vouchers prepared by the Commission and approved by the Chief Justice 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.
- (e) **Composition and Officers of the Commission.**
- (1) The Commission is comprised of four lawyers registered as active under Rule 206; 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:
 - (A) two lawyers for one year;
 - (B) one nonlawyer for two years;
 - (C) one judge or justice and one lawyer for two years;
 - (D) one nonlawyer for three years; and
 - (E) one lawyer for three years.
 - (2) Subsequent appointments will be for a three-year term. The Supreme Court will fill any vacancy occurring on the Commission. A person appointed to fill a vacancy on the Commission will serve the unexpired term of the previous member. No member 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.
 - (3) The Supreme Court may appoint a temporary Commission member on the request of the Commission.

- (4) Commission members will serve without compensation but will be reimbursed for their necessary expenses incurred in the discharge of their duties.
 - (5) The Commission must elect a chair and vice-chair to serve for a term of one year and until a successor is elected. The vice-chair will perform all of the duties and exercise the authority of chair in the chair's absence.
 - (6) The disciplinary administrator will act as the custodian of the official files and records of the Commission and perform other ministerial functions as the Commission directs. All papers and pleadings will be filed with the disciplinary administrator.
- (f) **Commission Meetings.**
- (1) The Commission will meet as necessary to conduct the business of the Fund and to timely process claims.
 - (2) A quorum for any meeting of the Commission is four members of the Commission.
 - (3) Minutes of meetings will be taken and maintained by the disciplinary administrator.
- (g) **Duties and Responsibilities of the Commission.** The Commission has the following duties and responsibilities:
- (1) to receive, investigate, evaluate, and pay or deny claims, or portions thereof, as the Commission deems appropriate;
 - (2) to promulgate rules of procedure not inconsistent with this rule;
 - (3) to contract with the Pooled Money Investment Board—the Commission's status to contract and authority for such contract is established by this rule;
 - (4) to advise and consult with the Pooled Money Investment Board on appropriate general investment objectives and cash flow needs of the Fund;
 - (5) to provide an annual financial report to the Supreme Court and to make other reports as necessary;
 - (6) to publicize its activities to the public and the bar;
 - (7) to retain and compensate legal counsel to make or supervise an investigation and the gathering of evidence, to present evidence to the Commission, and to take any other legal action necessary to effectuate the purpose of the Fund;
 - (8) to prosecute claims for restitution to which the Fund is entitled;
 - (9) to participate in studies and programs for client protection and prevention of dishonest conduct by lawyers; and
 - (10) to perform all other acts necessary or proper for the fulfillment of the purposes of the Fund and its effective administration.

- (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.**
 - (1) A Commission 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 must not participate in the investigation or determination of a claim involving that claimant or lawyer.
 - (2) A Commission member with a past or present relationship, other than as provided in subsection (i)(1), with a claimant or the lawyer who is the subject of the claim must disclose such relationship to the Commission and, if the Commission deems appropriate, that Commission member will not participate in any proceeding relating to such claim.
- (j) **Immunity.** Commission members, 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 are entitled to judicial immunity from civil liability for all acts in the course of their official duties.
- (k) **Reimbursement from Fund Is a Matter of Grace.** No person has the legal right to reimbursement from the Fund.
- (l) **Eligible Claims.**
 - (1) The claimant's loss must be caused by the dishonest conduct of a member or former member of the Kansas bar and 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.
 - (2) The claim must have been filed no later than one year after the claimant knew or should have known of the dishonest conduct of the lawyer.
 - (3) As used in this rule, "dishonest conduct" means any of the following:

- (A) acts committed by a lawyer in the wrongful taking or conversion of money, property, or other things of value;
 - (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;
 - (C) the borrowing of money from a client without an intention to repay it or with disregard of the lawyer's inability or reasonably anticipated inability to repay it; or
 - (D) a lawyer's act of intentional dishonesty that proximately leads to the loss of money or property.
- (4) Except as provided by subsection (1)(5), the following losses and damages are not reimbursable:
- (A) a loss incurred by a spouse, child, parent, grandparent, sibling, partner, associate, or employee of the lawyer causing the loss;
 - (B) a loss 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;
 - (C) a loss incurred by any business entity controlled by the lawyer or any person or entity described in subsection (1)(4)(A);
 - (D) a loss incurred by any governmental entity or agency; and
 - (E) interest and other incidental and out-of-pocket expenses.
- (5) In its discretion, the Commission may consider a claim that would otherwise be excluded under this rule:
- (A) when a claimant presents a case of extreme hardship or special and unusual circumstances; or
 - (B) in the event the Fund receives property under Rule 235(a)(2)(C) and the owner is later identified.
- (m) **Procedures and Responsibilities for Submitting a Claim.**
- (1) The Commission must prepare and approve a form for submitting a claim for reimbursement.
 - (2) The form will require at least the following information provided by the claimant under penalty of perjury:
 - (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;
 - (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;

- (C) the legal or other fiduciary services the lawyer was to perform for the claimant;
- (D) the amount paid to the lawyer;
- (E) a copy of any written agreement pertaining to the claim;
- (F) the form of the claimant's loss, e.g., money, securities, or other property;
- (G) the amount of the loss and the date when the loss occurred;
- (H) the date when the claimant discovered the loss and how the claimant discovered the loss;
- (I) a description of the lawyer's dishonest conduct and the name and address of any person who has knowledge of the loss;
- (J) the name of 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;
- (K) any source from which the loss can be reimbursed, including any insurance, fidelity, or surety agreement;
- (L) a description of any steps taken to recover the loss directly from the lawyer or any other source;
- (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;
- (N) any other facts believed to be important to the Commission's consideration of the claim;
- (O) the manner in which the claimant learned about the Fund;
- (P) the name, address, and telephone number of the claimant's present lawyer, if any;
- (Q) a statement that the claimant agrees to cooperate with the Commission in reference to the claim or as required by subsection (q) in reference to civil actions that may be brought in the name of the Commission under a subrogation and assignment clause contained within the claim;
- (R) the name and address of any other state's fund to which the claimant has applied or intends to apply for reimbursement, together with a copy of the application; and
- (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.

- (3) The claimant has the responsibility to complete the claim form and provide satisfactory evidence of a reimbursable loss.
 - (4) The claim will be submitted to the Commission by filing the statement of claim form with the Office of the Disciplinary Administrator, 701 Southwest Jackson Street, First Floor, Topeka, Kansas 66603.
 - (5) As a condition precedent to the filing of a claim, the claimant must report the dishonest conduct to the disciplinary administrator.
- (n) **Processing Claims.**
- (1) When a claim is filed, the accused lawyer will be notified and given an opportunity to respond to the claim. A copy of the claim will be mailed by certified mail return receipt requested to the lawyer's last registered address under Rule 206. The lawyer will have 20 days from the date of mailing 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).
 - (3) Whenever it appears that a claim is not eligible for reimbursement, the Commission will advise the claimant and lawyer 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.
 - (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 evidence that the lawyer committed such act or conduct.
 - (5) The disciplinary administrator will furnish a report of the investigation of the matter to the Commission.
 - (6) Upon receipt of the disciplinary administrator's report of the investigation, the Commission 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.
 - (7) The Commission may conduct additional investigation or may request the disciplinary administrator to conduct additional investigation and to verify any claim not previously investigated by the disciplinary administrator.
 - (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 be given an

opportunity to be heard. The chairman, vice-chairman, or any member of the Commission acting under this rule 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 be issued by and returned to the disciplinary administrator. A judge of the district court of any judicial district in which the attendance or production is required must, 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 the same as in the district court.

- (9) The Commission may make a finding of dishonest conduct for purposes of determining a claim. 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.
 - (10) When the record is complete, the claim will be determined on the basis of all available evidence, and the Commission will notify the claimant and the lawyer of its determination and reasoning. The approval or denial of the claim requires the affirmative votes of at least four Commission members.
 - (11) Any proceeding on a claim need not be conducted according to technical rules relating to evidence, procedure, and witnesses. Any relevant evidence will be admitted if it is the sort of evidence that 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 might make improper the admission of such evidence in court proceedings. The claimant has the duty to supply relevant evidence to support the claim.
 - (12) The Commission will determine the order and manner of payment and pay all approved claims.
- (o) **Payment of Reimbursement.**
- (1) The Commission is vested with the power, which it will 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 be made; and the order in which payment will be made. In making such determinations, the Commission may consider, together with such other factors as it deems appropriate, the following:

- (A) the amounts available and likely to become available to the Fund for payment of claims;
 - (B) the size and number of claims that are likely to be presented in the future;
 - (C) the total amount of losses caused by the dishonest conduct of any one lawyer or associated group of lawyers;
 - (D) the unreimbursed amount 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;
 - (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;
 - (F) the degree of hardship the claimant has suffered by the loss; and
 - (G) any conduct of the claimant that may have contributed to the loss.
- (2) If a claimant is a minor or an incompetent person, the reimbursement may be paid to another person or an entity for the benefit of the claimant.
- (p) **Reconsideration.** The claimant may request reconsideration within 30 days of the denial or the determination of the amount of reimbursement of the claim. If the claimant fails to make a request or the request is denied, the decision of the Commission is final.
- (q) **Restitution and Subrogation.**
- (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.
 - (2) As a condition of reimbursement, a claimant is 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 arising and accruing by reason of the lawyer's dishonest conduct.
 - (3) Upon commencement of an action by the Commission as subrogee or assignee of a claimant, the Commission will advise the

claimant, who may then join in such action to recover the claimant's unreimbursed losses.

- (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 be required to notify the Commission of such action.
- (5) The claimant will be required to agree to cooperate in all efforts that the Commission undertakes to achieve restitution for the Fund.

(r) **Judicial Relief.**

- (1) When a claim has been filed, 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.
- (2) A court's jurisdiction in a proceeding includes the authority to appoint and compensate a custodial receiver to conserve the assets and to close the practice of a missing, incapacitated, or deceased lawyer.

(s) **Confidentiality.**

- (1) A claim form, proceedings, and reports involving a claim for reimbursement are confidential until the Commission authorizes reimbursement to the claimant, except as provided in this rule. Any person violating this subsection may be subject to punishment for contempt of the Supreme Court.
- (2) The rule of confidentiality does not apply to the claimant or the lawyer or to any information that the Commission considers to be relevant to any current or future criminal prosecution against the lawyer.
- (3) The disciplinary administrator and anyone appointed to conduct an investigation may receive and disclose information reasonably necessary to complete the investigation.
- (4) The Commission 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 any part of its files involving any candidate for election to or retention in public office.
- (5) Both the claimant and the lawyer will be advised of the status of the Commission's consideration of the claim and will 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 address of the claimant unless the claimant has granted specific written permission.

- (t) **Compensation for Representing Claimant.** It is not intended that the claimant’s application for reimbursement will be an adversarial process, and for that reason, counsel for the claimant generally will not be needed. If a claimant 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 bar will cooperate in providing any services that claimants may need.

Comments

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 the Supreme Court. The comments are intended solely to explain the intent of the rules to the Commission, the bar, and the public.
- [2] Subsection (a)(2) 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).
- [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 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 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 on 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 to claimants does not meet the profession’s responsibility to itself and the public.

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. The Supreme Court bears the responsibility for establishing qualifications for practice and for ensuring that lawyers subject to its jurisdiction adhere to the standards of conduct the Supreme Court mandates.

- [9] Subsection (b)(2) links the establishment of a Fund to the Supreme Court's power to regulate the practice of law.
- [10] Under subsection (b)(3), the Commission will not pay claims for losses incurred as a result of dishonest conduct committed prior to July 1, 1993.

Subsection (c)—Funding.

- [11] Subsection (c)(1) 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 to contribute to it. For legislative acknowledgment, see Senate Concurrent Resolution No. 1644 (1992).
- [13] Subsection (c)(3) assigns potential liability for payment of restitution to the lawyer who caused the loss that the Fund reimbursed. See subsection (q) for restitution and subrogation enforcement standards.

Subsection (d)—Funds and Disbursements.

- [14] Matters and expenses for which the Fund may be used should be considered and stated by the Commission in written policies.
- [15] Administrative expenses will be incurred in operating the Fund even though lawyers volunteer their services to 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 be paid out of either the disciplinary fee fund or the Fund as determined by the Supreme Court.

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 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] Commission members will serve without compensation, *pro bono publico*, but will be reimbursed for expenses incurred in the discharge of their office.

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

- [20] Investing money that is 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) 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 public information officer 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) regarding the cooperative effort anticipated between the Commission and the disciplinary 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), which focuses on subrogation and other methods of restitution.
- [24] Commission 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.

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.

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

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

Subsection (l)—Eligible Claims.

- [27] Subsection (l)(1) sets forth the basic criteria for compensability of a loss. 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 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, such loss could not have occurred. 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, the extent to which the lawyer received information about the financial affairs of the client, and whether the principal part of the transaction was an activity that required a license to practice law.
- [28] Subsection (l)(2) contains a one-year limitation on the filing of claims from the date the claimant knew or should have known of the dishonest conduct.
- [29] Subsection (l)(3) adds to the rule a definition of "dishonest conduct." Subsection (l)(3)(A) sets forth the basic concept as one of conversion or embezzlement. Subsections (l)(3)(B), (C), and (D) 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 (l)(3)(B) sets forth a standard for the handling of problematic unearned fee claims. It is not intended to encompass legitimate 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 (l)(3)(C) 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 (l)(3)(D), 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.

- [30] Subsection (l)(3) must be read in light of subsection (l)(1). 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 (l)(4) presents various exclusions from reimbursable claims. Subsections (l)(4)(A), (C), and (D) declare classes of potential claimants to be ineligible for policy reasons. Subsection (l)(4)(E) 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 (l)(4)(B); to the extent possible, recourse from a third party should be sought prior to seeking it from the Fund. Third parties lack the lawyer-client relationship necessary to prosecute a claim in their own right.
- [32] Subsection (l)(5) reiterates the critical importance of vesting in the Commission the discretion to do justice in each claim considered, without strictly following technical rules. Subsection (l)(5) recognizes that it is impossible to predict every factual circumstance that will be presented to the Commission.

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 but not so detailed as to discourage eligible claimants from applying for reimbursement.
- [34] Subsection (m)(3) assigns the ultimate burden of establishing eligibility for reimbursement on the claimant. Consistent with the evidentiary standards in subsection (n), no formal or technical quantum of proof is imposed on the claimant or the Commission. In a case where the lawyer’s dishonest conduct was already established in a disciplinary action based on the clear and convincing evidence standard under Rule 226 or the beyond a reasonable doubt standard in a criminal proceeding involving the same facts that constitute the claim for reimbursement, the Commission may grant a reimbursement to the claimant without further investigation or delay.

Subsection (n)—Processing Claims.

- [35] This subsection seeks to set forth a framework that 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. See subsections (n)(1), (3), (8), and (10).
- [36] The overriding policy implicit in subsection (n) 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 not be employed to hinder the Commission from accomplishing its mission. Under subsection (n)(7), the Commission may conduct any investigation it deems appropriate, including the taking of testimony as provided in subsection (n)(8). The order and manner of payment of claims is likewise within the Commission’s discretion under subsection (n)(12). Under subsection (n)(10), the Commission is to articulate to each side the reason for its determination on a given claim.
- [37] Note that under subsection (n)(10) the affirmative vote of at least four Commission members is required to dispose of a claim. For example, if the minimum four Commission members necessary for a quorum under subsection (f)(2) are present, any motion that cannot garner unanimous support will fail. Thus, a majority of the quorum present will not suffice. Subsection (n)(10) does not prevent determinations of claims by mail ballot.
- [38] Ideally, the initial investigation should be done by the disciplinary 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.

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. 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) 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) 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 loss involves a minor or an incompetent person, subsection (o)(2) permits the Commission to pay the reimbursement directly to a parent or legal representative for the benefit of the claimant.

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 claimant 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.

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.

[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) 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) requires the Commission to establish a subrogation policy that 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 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) 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) 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) 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 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.

Subsection (r)—Judicial Relief.

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

Subsection (s)—Confidentiality.

- [56] The need to protect wrongly accused lawyers and to preserve the independence of the Commission’s deliberations should be balanced with the 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 disciplinary administrator 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. Subsection (s)(2) adopts Rule 237(c)’s 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. Both the public and the news media should be kept informed of the Commission’s activities and the Fund’s status. After payment of reimbursement, the Commission may publicize the reimbursement through the Supreme Court’s public information officer or in any other manner directed by the Commission.

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 Commission members volunteer their services, lawyers should also contribute their legal services pro bono publico. However, it is not the intent of this subsection to require assisting lawyers to spend their own money. They may request the Fund to reimburse out-of-pocket expenses.

[History: New rule effective March 30, 1993; Am. effective December 1, 1999; Am. effective December 2, 2002; Am. effective February 13, 2008; Am. effective June 25, 2010; Am. effective April 30, 2012; [Rule 227 renumbered to Rule 241 and Am. effective January 1, 2021](#); [Am. \(c\) and \(l\) effective November 29, 2021.](#)]