

## DUE PROCESS

YVONNE GIBNEY, JANE FLETCHER, KENNETH BOSSONG

### Why is due process important in Client Protection?

- **Rule 1 of the ABA Model Rules for Lawyers' Funds for Client Protection ("Model Rules") states:**

"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 losses caused by the dishonest conduct of lawyers . . . occurring in the course of the client-lawyer or other fiduciary relationship between the lawyer and the claimant." If promoting confidence in the administration of justice and integrity of the profession is a central purpose of the Fund, we should be intent on providing due process for all claims the Fund receives.

- **Integrity of Decisions**

Unless your fund is of the philosophy that every claim should be paid—or of the opposite extreme, that virtually no claims should be paid-- you want to ensure that your decision-makers have all the information that will lead them to evaluate the merits of each claim fully and fairly. This goal is best met by effectively inviting the attorney who is the subject of the claim to take a position on the claim and provide proof supporting his position.

- **Finality of Decisions**

Funds don't want to pay claims and then have them challenged later, such as when (a) funds try to get reimbursement from the attorney (or collateral sources of recovery) for claims paid or (b) the attorney disputes for the first time the merits of claims already paid when seeking reinstatement of his license because of a lack of due process. In jurisdictions with court review of reimbursement decisions, lengthy appeals deprive all parties of a final decision and can be expensive.

- **Public Confidence in the System**

In Virginia, the Clients' Protection Fund is funded by fees that Virginia lawyers pay. We want our VSB members to believe that their monetary contributions are valued and well spent. We also want the public at large to know that the Virginia State Bar believes it is important to protect clients from monetary losses by unscrupulous or dishonest lawyers.

## What Process is "Due?"

### Due Process for the Respondent/Attorney:

#### **Due Process at the beginning of the claim:**

1. Rule 12.5 of the Model Rules states that "The lawyer shall be notified of the claim and given an opportunity to respond to the claim."
2. In Virginia, we send the Petition to Respondent at the address of record on file with the Virginia State Bar, including email.
3. Respondent has 30 days to respond, in writing, to the petition. There is not necessarily an inference of "no contest" if Respondent does not respond. We still investigate the claim fully.

#### **Due Process during the investigation:**

1. The Investigator (in Virginia, a CPF Board member) typically tries to contact the Respondent. Sometimes, this is impossible because the Respondent has not kept his contact information with the Bar current.
  - Who investigates for your fund?
  - What other steps, if any, are taken to locate the Respondent if he does not respond to standard mail/email/phone attempts to contact?
2. The investigator requires good documentation from Petitioner for fees paid to Respondent, communications with Respondent, and evidence of work performed by Respondent. In Virginia, there is no prescribed rule for sharing this information with the Respondent unless it is included with the Petition form, but the Investigating Board member can share the information to ascertain the Respondent's position on the information. This may include sharing newly-developed information with the Respondent.
3. Standard 4.5 of NCPO's Standards for Evaluating Lawyers' Funds for Client Protection states that "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 . . ."

4. The Virginia CPF Board does *not* have subpoena power, so it must rely entirely on information that participants voluntarily divulge or that can be obtained from the courts, opposing counsel, insurance companies, and other third parties.

#### **Due Process during the Decision-Making Process:**

1. In Virginia, the meetings at which claims are discussed and decisions made are public meetings, and the Respondent may attend and request to address the Board. Such requests are usually honored by the Board Chair, with limited time (approximately five to ten minutes) accorded for statements and/or questions from the Board members. This may be an approach to consider if your jurisdiction is reluctant to hold hearings.
2. Board meetings are administrative in nature, not evidentiary hearings, so the Virginia Board acts on a written report from the investigating Board member. The Board makes decisions according to parliamentary procedure for meetings.

#### **Due Process after a claim is approved:**

1. Respondent is informed of the amount and basis of the award.
2. Respondent has 30 days to object to the award.
3. If Respondent does not object to the award and ask for a reconsideration of the decision, the claim is paid.
4. If Respondent objects to the award, the case goes back on the docket for the next meeting of the CPF Board, and the case is re-assigned to the investigating board member to examine any new evidence that the Respondent presents arguing against payment of the claim. The investigating board member then presents a supplemental report to the Board, which either affirms or reverses its prior decision. If the Board affirms the decision, the decision to pay is final, and a check is sent to the Petitioner.
5. Virginia CPF rules give the Respondent one opportunity for reconsideration. Respondent cannot repeatedly contest the award. There is no further opportunity for additional information to be considered after the Board considers the petition pursuant to the request for reconsideration.
6. If the Board affirms the award decision and amount, there is no further right of appeal to any other agency or court. See [Virginia CPF Rules, VSB Website](#).
7. Rule 13 of the Model Rules likewise provides that “[t]he claimant or respondent may request reconsideration in writing within 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 Board is final and there is no further right or appeal.”

## Does the Petitioner get Due Process?

We assume that all jurisdictions want to treat Petitioners fairly. In Virginia, we acknowledge that Petitioners have certain duties, for example to provide documentation for their claims and to cooperate in the investigation. However, we also understand that Petitioners may not be sophisticated, business-savvy or have as many resources as do attorneys. The petitioner's lack of wherewithal may have made them particularly susceptible. So the investigating board members' investigation includes ascertaining facts or evidence that the Petitioner may not be able to access or fully understand, such as information from a court, bank, insurance company or other attorneys who may have been involved in the underlying case.

- Is your fund's burden of proof clearly articulated ?
- Whether or not the burden of proof is clearly articulated, does any fund operate with a burden other than preponderance on the petitioner?

### **Due Process during the investigation:**

1. The Petitioner is allowed to provide whatever information she believes is helpful to the investigator in analyzing the claim.
2. To lessen the burden on the Petitioner in cases in which there is a relevant discipline complaint, the Investigator also can access relevant documents from the discipline file with the caveat that confidential information should not be disseminated at a public meeting of the CPF Board. The discipline file, for example, may include information related to another discipline investigation that has not yet concluded, or may include medical, mental health, or substance abuse records if the Respondent is the subject of an impairment suspension. Such information would be protected from disclosure in a CPF Board meeting. But if Petitioner has previously cooperated in a discipline investigation, much of the discipline information can be used in the Clients' Protection Fund matter.
3. Bar Counsel staff attorneys are often helpful in filling in facts that might be relevant to the claim.

### **Query:**

- Is any fund stymied by a wall of confidentiality between discipline and the fund?
- If so, upon what policy basis?

### **Due Process during the Decision-Making Process:**

1. The Petitioner may attend the Board's public meeting and request to address the Board. Such requests are usually honored by the Board Chair, with limited time (approximately five to ten minutes) accorded for statements and/or questions from the Board members.

2. Since the meetings are administrative in nature, not evidentiary, the Petitioner does not necessarily need an attorney to represent them at the meeting, although some Petitioners do have attorneys that accompany them to the meetings and assist the Petitioner with addressing the Board and answering questions about the claim.

**Due Process after a claim is denied:**

1. Petitioner is informed of the reason the claim was denied.
2. Petitioner has 30 days from the decision date to request a reconsideration of the denial decision.
3. Petitioner must continue to cooperate with the Board investigator in the supplemental investigation so the Board can assess whether there is a basis to reverse the denial decision and approve the claim.
4. If the Board affirms the denial decision, the decision is *final*. There is no further appeal right to the Board or any other agency or court. Virginia CPF Rules, VSB Website. This is in accord with ABA Model Rule 13 and seems to be the practice in a majority of jurisdictions.

However, in some jurisdictions, courts have authority to review board or trustee decisions. For example, in Maryland, claimants may “seek judicial review in the circuit court for the county where the claimant resides or has a principle place of business.” See Website, Client Protection Fund of the Bar of Maryland. Further review in Maryland’s appellate courts is also available. See, for example, *Grebow v. Client Protection Fund of the Bar of Maryland*, 278 A.3d 167, 255 Md.App. 7 (2022).

Arkansas also allows an appeal to the Supreme Court of Arkansas of decisions by the Arkansas Client Security Fund Committee, in line with the appeal rights in disciplinary proceedings. The Client Security Committee’s decision will be affirmed unless “clearly erroneous” upon the supreme court’s review of the matter. See *Curran v. Arkansas Client Security Fund Committee*, 2022 Ark. 217 (2022).

In *Saleeby v. State Bar*, 702 P.2d 525, 39 Cal.3d 547 (1985), the Supreme Court of California held that (a) claim determinations by the Fund may be reviewed by writ of mandamus in the Superior Court and (b) due process required amendment of Fund rules providing claimants an opportunity to reply to a proposed disposition of their claims. The mandamus review is not to require a specific exercise of discretion, but to determine whether there has been an abuse of discretion. The Court pointed out that “if some review is indeed appropriate, then at the minimum there must be a reasonable record upon which review may be based.” 702 P.2d at 533; 39 Cal. at 562. The Fund need not provide formal findings, but mere conclusory language announcing a result would not suffice.

In *GE Capital Mortgage v. NJ Title Ins.*, 333 N.J. Super. 1 (App. Div. 2000), the Appellate Division of New Jersey Superior Court held that the Fund could not be sued in Superior Court by a disappointed claimant. Because the Supreme Court of NJ, which had sole

constitutional authority to regulate lawyers and the practice of law, had vested exclusive jurisdiction over Fund claims with the Fund's Trustees, plaintiff's suit against the Fund lacked subject-matter jurisdiction.

The opinion, which makes for good reading, affirms dismissal of the suit by the trial court as a matter of law in summary proceeding.

**Query:**

- Is due process furthered more by allowing court review or by giving deference to the discretionary decisions of a client protection fund entity?
- Most jurisdictions do not seem to allow court review, but is there a trend toward court review?

## Closing thoughts and aspirations for the future:

If one of the central purposes of a client protection fund is to promote confidence in the administration of justice and the integrity of the profession, why go to the time, effort and expense of establishing such a fund other than to do justice in every claim? Who should be more intent on providing the process due than a client protection fund?

The fairness that engenders confidence in the system depends largely on the exercise of discretion by the Fund's trustees. At its annual meeting of September 19, 2023, NCPO adopted its first amendment to the Standards for Evaluating Lawyers' Funds for Client Protection by adding this second paragraph to Standard 1.5:

1.5, ¶2 The Trustees shall exercise their discretion in managing the Fund's affairs in accordance with their fiduciary duty to the Fund as a trust. Specifically, this should not be misperceived as spending as little as possible, regardless of circumstances, to preserve the corpus. Rather, the duty is better understood as (a) spending the Fund's resources effectively, prudently and appropriately, consistent with the Fund's purpose of making law clients whole; and (b) preserving and growing the Fund to meet the future need. Thus, the Trustees' fiduciary duty includes advocating for adequate resources, paying meritorious claims (even large ones) in full, and spending money on loss prevention and subrogation efforts.