

SCR CHAPTER 12

CLIENT PROTECTION

SCR 12.01 Attorney's death or disappearance without compliance with license suspension or revocation order.

If an attorney whose license is suspended or revoked disappears or dies and has failed to comply with SCR 22.26 and no partner, personal representative or other responsible party capable of conducting the attorney's affairs is known to exist, a judge of a court of record in a county in which the attorney maintained an office shall appoint an attorney to enter the former offices of the attorney or other location as may be necessary for the sole purpose of protecting clients' rights, files and property and delivering the files and property to the clients or to their successor counsel. The appointed attorney may be compensated in an amount approved by the judge out of the assets of the attorney who has disappeared or died.

SCR 12.02 Sole practitioners; medical incapacity.

(1)(a) In addition to any proceedings that are instituted by the office of lawyer regulation, in the case of an attorney who is a sole practitioner, any interested person or person licensed to practice law in this state may file a petition in the circuit court for the county in which the attorney resides or maintains his or her office alleging that the attorney has a medical incapacity. The petition and a notice of hearing shall be served personally upon the attorney alleged to have a medical incapacity. If personal service upon the attorney cannot be accomplished, notice by publication of a class 1 notice, as provided in ch. 985 of the statutes, and mailing shall be sufficient service, except that the court may determine that additional notice is required. Upon a showing by clear, satisfactory and convincing evidence at a hearing that the attorney has a medical incapacity, if no other satisfactory arrangements have been made to assist the attorney, the court shall appoint a trustee attorney and notify the office of lawyer regulation of the appointment.

(b) An attorney appointed under par. (a) shall enter the offices of the attorney and assist the attorney to do all of the following:

1. Protect the clients' rights, files and property.
2. Notify all clients being represented in pending matters of the appointment of the attorney under par. (a) as promptly as possible, personally or by mail, and advise them to seek counsel of their choice. At the request of a client, an attorney appointed under par. (a) may act as interim counsel, subject to par. (f) 4.

3. Deliver client files and property to the clients upon their request.

4. Collect outstanding attorney fees, costs and expenses and make arrangements for the prompt resolution of any disputes concerning outstanding attorney fees, costs and expenses.

5. Assist and cooperate with the attorney in the suspension, termination or windup of his or her practice.

(c) The court may order an examination of the attorney by qualified medical and psychological experts and order the examined attorney to pay the expense of the examination.

(d) The court may make other orders pending a hearing regarding any of the following:

1. Restrictions on the disbursement of funds.
2. Restrictions on the transfer, removal or concealment of files.
3. Preparation of lists of all clients in pending matters.
4. Preparation of lists of all matters pending before any court or administrative agency.

5. Disclosure of what arrangements the attorney may have made or might suggest to protect the interest of his or her clients.

(e) All papers, files, transcripts, communications and proceedings pertaining to any petition under this subsection shall be closed and remain confidential until the court has made a finding of medical incapacity. This paragraph does not prohibit any publication the court finds necessary and does not prohibit the court from notifying another court before which a similar petition may be filed.

(f) An attorney appointed under par. (a) and his or her law firm shall:

1. Not serve in any other capacity as counsel for the assisted attorney or his or her family.

2. Be compensated from any assets generated in connection with his or her efforts for his or her professional services and reasonable and necessary expenses.

3. Be eligible to be a purchaser of the law practice under SCR 20:1.17.

4. Not be permitted to act as successor attorney except and until the trustee attorney becomes a purchaser of the law practice under SCR 20:1.17.

(g) The assisted attorney may nominate a trustee attorney and may consent to the appointment of a trustee attorney.

(h) The court shall appoint a guardian ad litem pursuant to s. 803.01(3) of the statutes if the court has reason to believe that the attorney is mentally incompetent.

(2) The court shall review the amounts requested by the trustee attorney for compensation and reimbursement under sub. (1)(f)2. and shall make a finding as to the reasonableness and necessity of the proposed compensation and expenses before entering the order authorizing their payment. The assisted attorney shall be personally liable for any compensation and expenses ordered by the court.

(3) Upon a showing that the assisted attorney is no longer incapacitated, or upon a showing that the trustee attorney has completed his or her responsibilities, the court may terminate the proceeding and discharge the trustee attorney.

(4) A trustee attorney appointed under sub. (1)(a) shall be deemed to be a member of a committee described under SCR 20:8.3(c).

(5) A trustee attorney is governed by the same rules of professional conduct applicable to the assisted attorney with respect to client matters and files.

(6) The trustee attorney appointed under sub.(1)(a) shall have his or her own professional liability coverage with a carrier admitted to do insurance business in this state and whose coverage language clearly covers the work of the trustee attorney acting under this section.

SCR 12.03 Sole practitioners; death or disappearance.

(1) Death. (a) Upon the death of an attorney who is a sole practitioner, any interested person or person licensed to practice law in this state may file a petition in the circuit court for the county in which the attorney resided or maintained his or her office alleging that the attorney is deceased and that no satisfactory arrangements have been made for the winding up of his or her practice. The petition and a notice of hearing shall be served upon the personal representative for the estate of the deceased attorney. If there is no personal representative appointed, service shall be made upon an adult heir or

such person as the court considers appropriate and the court may appoint a special administrator in those cases. Upon a showing at a hearing that no satisfactory arrangements have been made to wind up the practice of the deceased attorney, the court shall appoint a trustee attorney and notify the office of lawyer regulation of the appointment.

(b) An attorney appointed under par. (a) shall enter the offices of the deceased attorney and do all the following:

1. Protect the clients' rights, files and property.
2. Notify all clients being represented in pending matters of the appointment of the attorney under par. (a) as promptly as possible, personally or by mail, and advise them to seek counsel of their choice. At the request of a client, an attorney appointed under par. (a) may act as interim counsel, subject to the par. (c) 4.
3. Deliver client files and property to the clients upon their request.
4. Collect outstanding attorney fees, costs and expenses and make arrangements for the prompt resolution of any disputes concerning outstanding attorney fees, costs and expenses.
5. Assist and cooperate with the deceased attorney's personal representative, special administrator or other representative of the deceased attorney's estate in the termination or sale of the law practice under SCR 20:1.17.

(c) An attorney appointed under par. (a) and his or her law firm shall:

1. Not serve in any other capacity in the administration of the deceased attorney's estate.
2. Be compensated from the assets of the estate for his or her professional services and reasonable and necessary expenses.
3. Be eligible to be a purchaser of the law practice under SCR 20:1.17.
4. Not be permitted to act as successor attorney except and until the trustee attorney becomes a purchaser of the law practice under SCR 20:1.17.

(d) The personal administrator and heirs of the deceased attorney may nominate a trustee attorney.

(e) The estate of the deceased attorney shall be liable for the compensation and expenses of the trustee attorney ordered under sub. (3).

(2) Disappearance. (a) Upon the abandonment or

disappearance of an attorney who is a sole practitioner that continues for not less than 21 days, any interested person or person licensed to practice law in this state may file a petition in the circuit court for the county in which the attorney resided or maintained his or her office alleging the abandonment or disappearance and that no satisfactory arrangements have been made to continue the practice. The petition and a notice of hearing shall be served personally upon the attorney. If personal service upon the attorney cannot be accomplished, notice by publication of a class 1 notice, as provided in ch. 985 of the statutes, and mailing shall be sufficient service, except that the court may determine that additional notice is required. Upon a finding that the attorney has disappeared or abandoned his or her practice, if no other satisfactory arrangements have been made to continue the practice, the court shall appoint a trustee attorney and notify the office of lawyer regulation of the appointment.

(b) An attorney appointed under par. (a) shall enter the offices of the absent attorney and do all of the following:

1. Protect the clients' rights, files and property.
2. Notify all clients being represented in pending matters of the appointment of the attorney under par. (a) as promptly as possible, personally or by mail, and advise them to seek counsel of their choice. At the request of a client, an attorney appointed under par. (a) may act as interim counsel, subject to par. (c) 3.
3. Deliver client files and property to the clients upon their request.
4. Collect outstanding attorney fees, costs and expenses and make arrangements for the prompt resolution of any disputes concerning outstanding attorney fees, costs and expenses.
5. Collect any moneys and safeguard any assets in the office of the absent attorney and hold the moneys and assets in trust pending their disposition upon order of the court.

(c) An attorney appointed under par.(a) and his or her law firm shall:

1. Not serve in any representative capacity for the absent attorney or his or her family.
2. Be compensated from the assets collected for his or her professional services and reasonable and necessary expenses.
3. Not be permitted to act as successor attorney.
- (d) The absent attorney shall be personally liable for the

compensation and expenses of the trustee attorney ordered under sub. (3).

(e) The trustee attorney shall hold in trust any remaining assets of the attorney subject to order of the court.

(3) The court shall review the amounts requested by the trustee attorney for compensation and reimbursement under subs. (1)(c)2. and (2)(c)2. and shall make a finding as to the reasonableness and necessity of the compensation and expenses before entering the order authorizing their payment.

(4) Upon a showing that the trustee attorney has completed his or her responsibilities under sub. (1) or (2), the court may discharge the trustee attorney.

(5) A trustee attorney appointed under sub. (1)(a) or (2)(a) shall be deemed to be a member of a committee described under SCR 20:8.3(c).

(6) A trustee attorney is governed by the same rules of professional conduct applicable to the absent attorney with respect to client matters and files.

(7) The trustee attorney appointed under sub. (1)(a) or (2)(a) shall have his or her own professional liability coverage with a carrier admitted to do insurance business in this state and whose coverage language clearly covers the work of the trustee attorney acting under this section.

(8) In the event that more than one petition is filed under SCR 22.27(9)(a) or sub. (1) or (2) of this section, the proceedings shall be consolidated and only one trustee attorney shall be appointed.

COMMENT

1. An agreed-to voluntary suspension is subject to the provisions of SCR 22.26 activities following suspension or revocation.

2. Source, s. 256.286, 1975 stats.

SCR 12.04 Wisconsin lawyers' fund for client protection: creation and purpose.

A Wisconsin Lawyers' Fund for Client Protection of the state bar of Wisconsin is created to reimburse, to the extent and in the manner provided by this chapter, losses caused by the dishonest conduct of members of the state bar of Wisconsin.

COMMENT

The Wisconsin Lawyers' Fund for Client Protection was established in 1981 and was originally entitled The Clients' Security Fund. The name change reflects amendments to the ABA Model Rules for Lawyer's Funds for Client Protection, and is more descriptive of the funds' purpose.

SCR 12.045 Definitions. In ss. 12.04 to 12.11:

(1) "Attorney" means a person who, at the time of the act complained of, was a member of the state bar of Wisconsin, except a person who was an inactive member at that time.

(2) "Claimant" means a person who has applied to the fund for reimbursement.

(3) "Client" means a person engaging the professional legal services of an attorney or for whose benefit the attorney is acting in a fiduciary capacity.

(4) "Committee" means the Wisconsin lawyers' fund for client protection committee.

(5) "Dishonest Conduct" means any of the following:

(a) A willful act committed by an attorney that causes a reimbursable loss to a client in the manner of defalcation or embezzlement of money.

(b) The intentional taking or conversion of money, property or other things of value.

(c) The failure to refund an unearned advanced fee.

(6) "Fund" means the Wisconsin lawyers' fund for client protection of the state bar of Wisconsin.

(7)(a) "Reimbursable Loss" means a loss of money or other property of a client that meets all of the following conditions:

1. The loss was caused by the dishonest conduct of an attorney while performing services under his or her license to practice law in Wisconsin.

2. The attorney was acting either as attorney in the matter out of which the loss arose or in a fiduciary capacity customary to the practice of law.

3. The attorney has:

a. Died;

b. Been adjudicated a bankrupt;

c. Been adjudicated incompetent;

d. Been disbarred or suspended from the practice of law;

e. Consented to the revocation of his or her license to practice

law;

- f. Failed to refund an unearned advanced fee;
 - g. Become a judgment debtor of the person claiming the loss;
 - h. Been adjudged guilty of a crime based upon the dishonest conduct of the attorney; or
 - i. Left the jurisdiction or cannot be found.
4. The act that occasioned the loss occurred on or after March 1, 1981.

(b) "Reimbursable Loss" does not include any of the following:

1. Losses of a spouse, child, parent, grandparent, sibling, partner, associate, or employee of the attorney or attorneys causing the losses.

2. Losses covered by any bond, surety agreement or insurance contract to the extent covered thereby, including any loss to which any bondsman or surety or insurer is subrogated to the extent of that subrogated interest.

3. Losses of any financial institution that could be recoverable under a "banker's blanket bond" or similar insurance or surety contract, whether or not the institution had such bond or contract in force.

4. Losses that are recoverable from some other source.

5. Losses barred under any applicable statute of limitations.

(8) "State bar" means the state bar of Wisconsin.

SCR 12.05 Administration.

(1) The fund shall be operated and administered by the committee of the state bar to be known as the Wisconsin lawyers' fund for client protection committee. The committee shall consist of 5 lawyers and 2 nonlawyer members who are appointed by the president of the state bar. The initial terms of the members are: one lawyer to serve until July 1, 1982; one lawyer to serve until July 1, 1983; one lawyer and one nonlawyer member to serve until July 1, 1984; one lawyer to serve until July 1, 1985; one lawyer and one nonlawyer member to serve until July 1, 1986. Upon the expiration of the initial appointments, each subsequent appointment shall be for a term of 5 years. No person who has served a full term of 5 years shall be eligible for reappointment until one year after the termination of his or her last term. A vacancy on the committee shall be filled by appointment by the president of the state bar for the unexpired term.

(2) Each year the chairperson of the committee shall be appointed by the president of the state bar from among the members of

the committee. The committee shall meet from time to time upon the call of the chairperson.

(3) The committee members shall serve without compensation but shall be entitled to reimbursement from the fund for their expenses reasonably incurred in the performance of their duties.

SCR 12.06 Powers and duties of the committee.

(1) Consideration of claims. The committee shall consider applications for reimbursement from the fund for losses caused by the dishonest conduct of an attorney. The committee shall investigate claims of losses coming to its attention and may reject or allow claims in whole or in part.

(2) Committee discretion. The committee may, in its discretion, determine the order and manner of payment of claims. In cases of extreme hardship or if other interests of justice so warrant, the committee may, in its discretion, recognize a claim which would otherwise be excluded under this chapter.

(3) Rules of procedure. The committee shall adopt rules of procedure not inconsistent with this chapter for the management of the fund and its affairs, for the presentation of claims, for the processing and payment thereof and for the subrogation or assignment to the state bar for the benefit of the fund of the rights of the claimant to the extent paid from the fund.

(4) Investment. All sums received by the state bar for the fund shall be maintained in a separate account and shall be managed by the state bar pursuant to the provisions of SCR chapter 10 and the state bar bylaws pertaining to the investment and management of state bar assets, subject to the written direction of the committee under rules adopted by the committee.

(5) Use of funds. The committee may use the fund for any of the following purposes within the scope of the fund's objectives:

(a) To make payments on claims as provided in this chapter.

(b) To purchase insurance to cover such payments in whole or in part as is deemed appropriate.

(c) To pay the reasonable and necessary expenses of the committee and administration of the fund.

(6) Access to office of lawyer regulation files. Notwithstanding other supreme court rules to the contrary, during the investigation of a claim the committee or its designee shall have access to the files of the office of lawyer regulation which pertain to the alleged loss.

(7) Audit and report of activities. The fund shall be audited by auditors annually and at such other times as the supreme court shall direct, such audits to be at the expense of the fund. The annual audit shall be included in a report to be submitted annually by the committee to the supreme court reviewing in detail the administration of the fund and the committee's activities during the preceding year.

(8) Enforcement of claims. The committee may press claims which the state bar may have on behalf of the fund and may pay all reasonable and necessary expenses connected therewith.

SCR 12.07 Assessment of attorneys; enforcement.

(1) Initial assessment. Every attorney shall pay to the fund an initial assessment of \$5.

(2) Annual assessments. Commencing with the state bar's July 1, 1982 fiscal year, every attorney shall pay to the fund such annual assessment as is necessary to maintain a balance in the fund of \$250,000, but in no event shall any annual assessment exceed \$25. An attorney whose annual state bar membership dues are waived for hardship shall be excused from the payment of the annual assessment for that year. An attorney shall be excused from the payment of the annual assessment for the fiscal year during which he or she is admitted to practice in Wisconsin.

(3) Certificate of sufficiency. The committee shall determine the net value of the fund as of May 1 of each year. Whenever the value of the fund shall equal or exceed \$250,000, after deducting all claims which the committee has determined to pay and which are not disposed of at the date of valuation and all expenses properly chargeable against the fund, the committee shall file with the supreme court prior to May 31 of that year a certificate of sufficiency to that effect. When a certificate of sufficiency is filed with the supreme court, there shall be no annual assessment for the next fiscal year.

(4) Collection; failure to pay. The initial assessment and annual assessments shall be collected at the same time and in the same manner as the annual membership dues for the state bar are collected. An attorney who fails to timely pay the initial assessment or any annual assessment shall have his or her right to practice law suspended pursuant to SCR 10.03(6).

SCR 12.08 Payment of claims.

(1) Considerations. No claim shall be paid unless there is an affirmative vote for payment of at least 4 members of the committee.

In determining payment the committee shall consider, among other appropriate factors, the following:

(a) The amounts available and likely to become available to the fund for the payment of claims and the size and number of claims which are likely to be presented;

(b) The amount of the claimant's loss as compared with the amount of losses sustained by other eligible claimants;

(c) The degree of hardship suffered by the claimant as a result of the loss;

(d) The degree of negligence, if any, of the claimant which may have contributed to the loss;

(e) The existence of any collateral source for the reimbursement of the loss.

(2) Limitations on payment.

(a) The committee shall, by rule, fix the maximum amount which any one claimant may recover from the fund and may, by rule, fix the aggregate amount which may be recovered because of the dishonest conduct of any one attorney.

(b) If the fund is not sufficient to pay all claims which the committee determines should be paid, the committee may, in its discretion, defer payment of all or any portion of one or more claims. If the full amount of the claim has not been paid within 5 years from the date the claim is made, any balance remaining unpaid shall remain unpaid and the claim shall be closed.

(3) Rights to fund. No claimant or any other person or organization shall have any right in the fund as beneficiary or otherwise. All payments from the fund shall be a matter of discretion and not of right.

(4) Attorney's fee. No attorney representing a claimant shall be compensated from any source for his or her services.

SCR 12.09 Claims for reimbursement.

(1) The claimant shall prepare or cause to be prepared an application for reimbursement containing the following information:

(a) The name and address of the attorney alleged to have caused the loss;

(b) The amount of the loss claimed;

(c) The date or period of time during which the alleged loss was incurred;

(d) The name and address of the claimant;

- (e) A general statement of facts relative to the claim;
- (f) Verification by the claimant;
- (g) Other information which the committee may require.

(2) The committee shall conduct or cause to be conducted an investigation to determine whether the claim is for a reimbursable loss and to guide the committee in determining the extent, if any, to which reimbursement shall be made. When the claim is for a non-reimbursable loss or is otherwise barred, no further investigation need be conducted.

(3) A copy of the application shall be personally served upon the attorney or sent by certified mail to his or her address shown on the state bar's membership roll. The attorney or, in the event the attorney is deceased, his or her personal representative shall be given an opportunity to be heard by the committee.

(4) The committee shall advise the claimant of its final determination of the claim.

SCR 12.10 Subrogation.

(1) If payment is made from the fund, the fund shall be subrogated in the amount of that payment and may bring such action as is deemed advisable against the attorney, his or her assets or estate. The action may be brought either in the name of the claimant or in the name of the state bar on behalf of the fund. The claimant shall be required to execute a subrogation agreement which shall include a provision that in the event the claimant or his or her estate should ever receive any restitution from the attorney or his or her estate, the claimant shall repay to the fund the amount received up to the amount of the payment made from the fund. Upon commencement of any action by the fund pursuant to its subrogation rights, the committee shall advise the claimant, who may then join in the action to press a claim for his or her loss in excess of the amount of the reimbursement from the fund.

(2) Any amounts recovered from the attorney, either by the fund or by the claimant, in excess of the amount to which the fund is subrogated, less the actual costs of such recovery, shall be paid to or retained by the claimant.

SCR 12.11 Confidentiality.

(1) Claims, proceedings and reports involving claims for reimbursement are confidential until the fund authorizes payment to the claimant, except as otherwise provided by these rules or by law. After

payment of a claim, the fund may publicize the nature of the claim, the amount of the payment, and the name of the lawyer. The fund may not publicize the name and address of the claimant unless authorized by the claimant.

(2) The fund at any time may do any of the following:

(a) Authorize access to relevant information by professional discipline agencies or law enforcement authorities.

(b) Release statistical information that does not disclose the identity of the attorney or the claimant.

(c) Use any information in its possession to pursue its subrogation rights.

SCR 12.12 Reimbursement from the fund is discretionary.

The fund's decision regarding payment of claims under ss. 12.08 and 12.09 is discretionary. Any such decision of the fund is not appealable.

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