

BY ANGUS G. GOETZ, JR.

Fee forfeiture for Professional Misconduct

HOW MUCH
SHOULD
THE CLIENT
PROTECTION
FUND PAY?

IMAGINE A CLIENT'S ATTITUDE WHEN HIS OR HER LAWYER STEALS. Suppose an attorney represents an accident victim. The matter is settled. The insurance carrier issues a draft payable to the client. The attorney, without client consent, endorses the client's name to the draft and misappropriates the entire sum to the lawyer's personal use.

When the attorney is uncollectible, the client may seek reimbursement from the Client Protection Fund (CPF). Assuming the claim is reimbursable (does not exceed the CPF allowable award amounts), how much should the client receive—all of the stolen funds or only that portion the client would be entitled to receive had there been no attorney wrongdoing?



FAST FACTS:

The purpose of the CPF is to advance the integrity of the legal profession by reimbursing client losses caused by the “dishonest conduct” of active members of the State Bar of Michigan.

An attorney may lose the right to a fee by reason of unprofessional conduct.

Some argue that the client should not receive the attorney’s share of the settlement proceeds. They say the client should not receive a windfall and would award to the client only the client’s share of the recovery up to the CPF award caps. The thinking is that the victim should not be placed in a better financial position than if the money had not been stolen. Opponents of that viewpoint could argue that the client rarely receives any “windfall” since in many cases funds are limited and many victims have unpaid litigation costs exceeding the amount of the reimbursement recovery.

Understanding the Client Protection Fund

Some lawyers and most clients do not know about the existence of the CPF. The purpose of the CPF is to advance the integrity of the legal profession by reimbursing client losses caused by the “dishonest conduct”¹ of active members of the State Bar of Michigan. The dishonest conduct must have occurred within the client-lawyer representation or within a fiduciary relationship between the lawyer and the claimant when the lawyer was admitted or licensed to practice law in Michigan. If the lawyer was suspended or disbarred at the time of the dishonest conduct, and the client reasonably believed the lawyer to be licensed or admitted when the dishonest conduct occurred, there is a six-month extension of the time to file from the date of discovery.²

At this time (for those claims presented to the Fund after December 31, 2003), the reimbursable amount is \$50,000 per claimant due to the dishonesty of a single lawyer, or a group of lawyers acting in collusion with one another, to a maximum of \$200,000 aggregate limit for all claims made against a single lawyer, or group of attorneys acting in concert.³ When claims against a single lawyer, or group of attorneys exceed \$200,000, the maximum reimbursable amount is apportioned on a pro-rate basis so that the total payments do not exceed \$200,000 using the formula as follows:

Individual claim amount loss

Total amount lost = % of maximum limit to be paid on claim.

However, the maximum amount payable to a single claimant may not exceed \$50,000. If so, the percentage awarded to that claimant is set at 25 percent or \$50,000 and the remainder of the funds are prorated amongst the remaining claimants.⁴ The Board of Commissioners may, in its discretion, approve payment of a claim that exceeds the maximum limits where the totality of the circumstances so warrant.⁵

Beware of the requirement that a claim must be filed “no later than one year after a determination by the Attorney Grievance Commission and/or the Attorney Discipline Board.”⁶ The dishonest conduct upon which the claim is based must have been reported to either the Attorney Grievance Commission, a law enforcement agency, or the claimant must have filed a claim in any court or tri-

bunal having jurisdiction within two years of the dishonest act. If the dishonest act could not have been reasonably discovered, the claim must have been filed within six months after the claimant did, or reasonably should have discovered the dishonest conduct upon which the claim is predicated, on a form containing at least the information called for by the CPF Rule 10B.⁷

**Unprofessional Conduct—
Loss of a Fee: Michigan Law**

Compensation of lawyers is left to the express or implied agreement of the parties subject to the regulation of the Michigan Supreme Court.⁸ MCR 9.104 says that conduct “contrary to justice, ethics, honesty or good morals” occurring within the attorney-client relationship is professional misconduct and grounds for discipline punishable by admonishment, reprimand, suspension, or disbarment depending on the gravity of the situation. Standards of conduct for attorneys include the rules of professional responsibility adopted by the Michigan Supreme Court effective October 1, 1998.⁹ The Michigan Rules of Professional Conduct (MRPC) explain that it is professional misconduct for a lawyer to engage in activity involving “dishonesty” when such conduct reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.¹⁰ Moreover, the comment to MRPC 1.7 says that loyalty is an essential element in the lawyer’s relationship with a client and MRPC 1.5(a) seems implicated since it makes it unethical to charge or collect an illegal or clearly excessive (unreasonable) fee.¹¹ Thus, it is safe to conclude that honesty is a character trait and dishonesty is indicative of a character deficiency relevant to the practice of law, which can result in the loss of a fee.

An attorney may lose the right to a fee by reason of unprofessional conduct.¹² In *Hightower v Detroit Edison Co.*,¹³ the court, in denying an attorney fee to a lawyer involved in ambulance chasing in violation of a statute prohibiting solicitation of personal injury claims, said . . . “we lay denial upon the broader ground that the judgment of the court will not be given in aid of or to encourage unprofessional conduct—infringing the integrity of judicial proceedings.” (Case authorities omitted.) *Evans & Luptak, PLC v Lizza*,¹⁴ involved the plaintiff’s attempt to enforce an unethical referral fee contract. After discovering a conflict of interest that prevents a lawyer from accepting a case, the attorney cannot refer the client to another lawyer and collect a referral fee since the advice regarding choice of counsel would be like selecting one’s adversary and the referring lawyer may be tempted to ill-advise the client as to the selection of counsel.¹⁵

A recent Michigan judicial decision states that a lawyer guilty of professional misconduct may lose the right to any fee. In *Reynolds v Polin*,¹⁶ it is said:

“These cases indicate that quantum meruit recovery of attorney fees is barred when an attorney engages in misconduct that results in

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representation that falls below the standard required of an attorney (e.g.), disciplinable misconduct or when such recovery would otherwise be contrary to public policy." (Emphasis supplied.)

For another example of a case against Michigan public policy see *Krause v Hartford Accident & Indemnity Co.*¹⁷

A very recent 6th Circuit federal decision rejected an attorney's entitlement to a referral fee for misconduct directed toward the client whose case generated the fee. In rejecting the lawyer's claim for a referral fee, both on the written contract and on a quantum meruit basis, the court said that the lawyer stole money from clients who sought legal help and denied any referral fee to the lawyer for services provided after the misconduct.¹⁸

Other Relevant Legal Principles

Since a lawyer is the agent of the client occupying a fiduciary duty of trust, courts often draw upon the law of agency and the law of trusts in deciding claims of fee forfeiture.

"an agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." Section 469. Restatement (Second) Agency.

Comment (a) to Section 469 clearly states that an agent who acts out of self interest or on behalf of another person adverse to the principal is not entitled to any compensation.

The Restatement (Second) Trusts says at Section 243:

"If the Trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation."

The modern trend appears to be set forth in the Restatement (Third) The Law of Governing Lawyers, Section 37 as follows:

Section 37 Partial or Complete Forfeiture of a Lawyer's Compensation.

*"A lawyer engaging in clear and serious violation of duty to a client may be required to **forfeit some or all of the lawyer's compensation** for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies."* (Emphasis supplied.)

A Sensible Rule

When a lawyer engages in a clear and serious act of professional misconduct, forfeiture should extend to all fees for that particular matter. However, where the lawyer performs valued client services

before the misbehavior and the harm to the client is not as severe, forfeiture of all fees seems inappropriate. Moreover, minor ethics violations should not justify total forfeiture for valued services rendered although lesser violations may reduce the size of a fee. In other words, fee forfeiture should be proportionate to the seriousness of the offense. Some important factors to consider could include:

- violation of a clear duty
- seriousness of the violation—is it willful or inadvertent
- extent of misconduct—simple incident or repeated activity
- value of services to client
- adequacy of other remedies

As for the reimbursement policy of the CPF, I believe it best to compensate the client for the amount the client would have received (up to the CPF limits) had there been no attorney misconduct in the representation. ♦

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Footnotes

1. "Dishonest Conduct" is a defined term meaning "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." CPF Rule 9C.
2. "If the lawyer was under an order of interim suspension, suspension or revocation issued at least six months prior to the dishonest conduct, it may be presumed that the person was unreasonable in believing that the lawyer was licensed or admitted to practice law at the time of the dishonest conduct." CPF Rule 9A.
3. CPF Rules 12B and 12C.
4. CPF Rule 12C.
5. CPF Rules 12A and 12E.
6. CPF Rule 9B
7. See CPF Rule *7B with respect to the two-year requirement.
8. MCL 600.919.
9. MCR 9.103.
10. MRPC 8.3.
11. See *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002).
12. *Ripsey v Wilson*, 280 Mich 233, 245, 273 NW 552 (1937).
13. 262 Mich 1, 13, 247 NW 97 (1933).
14. *Supra*.
15. Michigan Informal Opinion RI-116 (Feb 1992). Although State Bar Ethics Opinions are not precedential and therefore binding on the courts, they are instructive and are given considerable deference by the judiciary. See *Barkley v Detroit*, 204, Mich App 194,202: 514 NW2d 242 (1994).
16. 222 Mich App 20, 26, 564 NW2d 467 (1997).
17. 331 Mich 19, 49 NW2d 41 (1951).
18. See *Idalski et al v Crouse Cartage Company et al.*, 229 F Supp 730 (ED Mich, 2002).