

FAQ: Client Security Fund Proposal

The Oregon State Bar Client Security Fund was created in 1967 to help reimburse clients who lose money or property as a result of dishonest conduct by their lawyer. Oregon lawyers developed the CSF and fund it with a mandatory assessment paid by all active members of the Bar. The fund is one way the Bar and its members compensate for the misdeeds of a few lawyers. Awards from the CSF are discretionary and are not a matter of right. Currently, the maximum reimbursement available per claim is \$50,000.

What is the BOG considering on February 12?

The Board will consider raising the current maximum payout of \$50,000 to \$100,000 per claim, beginning with claims for attorney misconduct occurring on or after January 1, 2022. The cap was last raised in 1993 from \$25,000 to \$50,000.

Why is this under consideration?

The CSF has received increased focus recently, partly in response to the misconduct of one lawyer which resulted in claims for losses totaling approximately \$2 million in 2018/19. The harm to clients was considerable and several claims exceeded the CSF reimbursement cap, limiting the ability of the fund to provide meaningful relief. Several bar members asked the BOG to review the fund's limit, and the BOG asked the CSF Committee to examine the current cap, and the feasibility of an increase. The Committee submitted the results of its investigation in November 2019, and the BOG directed the Committee to draft a proposed rule change, to be effective January 1, 2022. In January 2021, the committee advanced this proposal to the BOG for possible adoption.

How did the committee arrive at \$100,000?

The CSF Committee and the BOG Budget and Finance Committee examined regional and national practices, as well as what is fiscally feasible for the OSB. The increase to \$100,000 would bring the OSB into parity with Washington and California, as well as most bars of a similar size to Oregon across the country.

Will the OSB have to increase the per-member CSF assessment to pay for this change?

While this will have a fiscal impact, the OSB does not anticipate a need to raise the assessment in 2022, barring an excessive or highly unusual claims year.

What else has can OSB do to enhance public protection in this arena?

The bar has increased the money held in its CSF reserve to prepare for any unusually high claims years.

It has also proposed a “payee notification” bill in the 2021 session of the Oregon legislature. [Senate Bill 180](#) would require that notice of an insurance settlement goes to the claimant in addition to the lawyer, upon payment of the settlement. The proposal is modeled on legislation already enacted in other states. This would alert the client early to the existence of settlement money, providing both a deterrent to malfeasance, and a means of prompt action for the payee in the event of misconduct.

The Board of Governors welcomes your input at: feedback@osbar.org.

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Oregon State Bar Board of Governors
16037 S.W. Upper Boones Ferry Rd.
Tigard, OR 97224

Re: Client Security Fund Committee Recommendations

Dear Board of Governors:

I am the outgoing chair of the Client Security Fund Committee. As you know, this has been a challenging year for the Client Security Fund due to the large increase in claims associated with Lori Deveny. With these challenges in mind, at its November 9, 2019 meeting the CSF Committee voted to recommend that you take two actions. In making these recommendations, the CSF Committee was aware of the fact that you recently voted to raise the CSF assessment from \$15 to \$50 for 2020 to pay existing claims and replenish the CSF reserve.

First, the CSF Committee voted to recommend that you amend CSF Rule 4.7 to increase the claim cap from \$50,000 to \$100,000, as well as increase the CSF reserve from \$1 million to \$1.5 million. In addition, the CSF Committee voted to recommend that the claim cap increase apply only to misconduct occurring on or after January 1, 2022. Second, the CSF Committee voted to recommend that you include the enactment of a so-called "Third-Party Payee Notification" law as part of the OSB's priorities for the 2021 session of the Oregon Legislature.

In considering whether to follow these two recommendations, I believe it is important that you have some brief background as to how the CSF Committee came to approve them. Earlier this year, several OSB members suggested the claim cap be increased in light of the nature of the Lori Deveny claims. It was also apparent to the CSF Committee that there were several claims involving a loss far greater than \$50,000 in which Lori Deveny was accused of stealing settlement funds in cases where claimants suffered from significant permanent disabilities such as paralysis. In response, I convened a rules subcommittee to study the merits of increasing the claim cap and present findings to the full CSF Committee.

At its November 9, 2019 meeting, the CSF Committee discussed and largely approved the subcommittee's conclusions. In adopting the recommendation to increase the claim cap to \$100,000, the CSF Committee noted that \$100,000 is the most frequently appearing cap in states with a similar number of licensed attorneys. In addition, the CSF Committee acknowledged that such an increase will largely benefit claimants who have suffered significant physical injuries. The CSF Committee also concluded that an increase in the reserve is necessary to fund an increase in the claim cap. The CSF Committee voted to recommend a delayed effective date for an increase in the claim cap for three reasons. First, a delay eliminates the possibility that some claimants would perhaps receive an arbitrary windfall solely because their claim was not approved until after the rule change. Second, a delay allows time for the CSF reserve to be replenished and grow. Third, a delay allows time for the Oregon Legislature to possibly enact a Third-Party Payee Notification law, which I will explain more fully below.

During the time the rules subcommittee was studying increasing the claim cap, I was fortunate to attend the American Bar Association's National Forum on Client Protection and represent the Oregon State Bar Client Security Fund. During this event, I heard from attorneys from all over the country who are directly involved in client protection. I learned that approximately 15 states (including California and New York) have enacted what is known as a Third-Party Payee Notification law, and that these laws have had a direct and immediate effect on deterring attorney theft of settlement funds and reducing such claims to client protection funds. I also learned that the American Bar Association has developed model rule for third-party payee notification, a copy of which is enclosed with this letter.

After discussing the merits of Third-Party Payee Notification laws, the subcommittee concluded that it would be irresponsible to recommend an increase the CSF claim cap without also attempting to fix the problem that led to the current challenges for the CSF. The subcommittee also determined that, under Oregon law, a Third-Party Payee Notification law would have to be enacted through legislation rather than administrative rulemaking. After being presented with this information, the CSF Committee unanimously voted to recommend that you include a Third-Party Payee Notification law as part of the OSB's legislative priorities.

I believe it would be irresponsible to not mention that two CSF Committee members voted against the recommendation to increase the claim cap. These members felt it was not the right time to raise the claim cap because they did not believe it was fiscally responsible, particularly without any cap on total payouts for claims related to any individual lawyer. During its work, the rules subcommittee studied such "aggregate" or "per lawyer" caps and learned they are put into practice in very different ways. For example, some states cut off payment of claims related to a particular lawyer when the cap is met. Other states set a time limit for all claims related to a particular lawyer to be submitted, then (if necessary) pro rate all claims at the expiration of the time limit. Either option presents challenges for claimants. A "race to the CSF" aggregate cap is seemingly arbitrary and unfair. Alternatively, setting a fixed time limit for all claims related to a particular lawyer to be submitted would both shorten the current time limits for bringing claims and delay payment of claims for those who submit claims early. Despite these difficulties, the CSF Committee felt an aggregate cap is something that should receive further study. As a result, incoming CSF Committee chair Dan Steinberg agreed to solicit volunteers for a subcommittee to

determine whether an aggregate cap is appropriate. I leave it to next year's CSF Committee to make such a recommendation to you.

With the above information in mind, I encourage you to act on both of the CSF Committee's recommendations. If fully implemented, these actions would secure the CSF's future and further advance the CSF's mission of reimbursing claimants who have lost money or property as a result of dishonest conduct by their lawyer. The CSF promotes public confidence in our profession and we as a profession should do everything we can to strengthen the CSF.

Please feel free to contact me if you have any questions.

Sincerely,



Douglas J. Stamm

Encl.

MODEL RULE FOR PAYEE NOTIFICATION - PREFACE

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PREFACE

The Model Rule for Payee Notification is based upon Regulation 64 of the Department of Insurance of the State of New York, promulgated in 1988 (11 NYCRR 216.9 (A) & (B)), which requires notice to the payee in all insurance settlements in excess of \$5,000. The regulation does not apply to no-fault payments from a claimant's own insurer. As implemented in various jurisdictions the provision for payee notification has been triggered by a dollar amount which ranges from \$1,000 to \$5,000.

In payment of liability claims, it is the customary practice of insurance carriers to deliver the settlement proceeds to the lawyer of record for the claimant, usually by check made payable jointly to the claimant and the claimant's lawyer. As the Supreme Court of New Jersey observed in *Matter of Conroy*, 56 N.J. 279, 266 A.2d 279 (1970), the underlying purpose for the practice is to "protect and preserve the interests of all three parties to the transaction" the insured, the successful claimant and the claimant's lawyer. In the payment process, the insurance carrier does not typically notify the claimant when it makes payment to the claimant's lawyer or other representative. This gap in the process permits dishonest practices to interfere with the settlement and payment of insurance claims.

If the dishonest conduct involves the claimant's lawyer instances of lawyer misconduct can include the unauthorized settlement of the client's claim with the defendant's insurer, forgery of the claimant's signature on a stipulation of settlement or other legal document that may be required to complete the settlement, forgery of the claimant's endorsement on the settlement draft itself, or misappropriation of the claimant's share of the proceeds.

It is not uncommon for a dishonest lawyer to successfully conceal the unauthorized settlement and misappropriation for several years and to be unable to restore the claimant's funds when the loss is finally discovered. As few client protection funds are able to provide full reimbursement for all eligible losses it is important that the legal profession devise and support methods of reducing losses resulting from dishonest conduct in the practice of law, including the misappropriation of personal injury settlements.

Experience in New York and other states demonstrates that the payee notification rule has had a salutary effect on lawyer misconduct, has demonstrated an effective protection device for clients and has benefitted the state lawyers' fund for client protection. A similar statute or regulation should have the same beneficial effect in other jurisdictions.

Written Notice to Claimants of Payment of Claims in Third Party Settlements.

- 1 Upon the payment of [insert desired dollar amount] or more in settlement of any third-party liability claim, the insurer shall provide written notice to the claimant where: (1) the claimant is a natural person, and (2) the payment is delivered to the claimant's lawyer or other representative by draft, check or otherwise. Such notice shall be required when payment is made to a claimant by the insurer or its representative, including the insurer's lawyer.

- 2 This rule shall not create any cause of action for any person against the insurer, other than a government agency, based upon the insurer's failure to provide notice to a claimant as required by this rule; nor shall this rule create a defense for any party to any cause of action based upon the insurer's failure to provide such notice.

Comment

This rule is intended to serve as a deterrent to the dishonest conduct of a claimant's lawyer with respect to the receipt of third-party liability claims. The intended salutary effects of including the payee in the claim payment process should obtain whether the rule is enacted as a statute or a regulation.

The written notice requirement of Paragraph A of this rule is reasonable and appropriate to advise the claimant of settlement of its liability claim by payment to its lawyer or other representative. Written notice provides the claimant with an independent and verifiable source of information concerning the facts of the settlement. It also provides the adverse party and insurer with certainty that the settlement has been concluded in a lawful manner.

The provisions of Paragraph B are intended to make clear that an insurance carrier's failure to comply with this rule does not create a new cause of action or defense for a party. The insurer, however, may be subject to appropriate action by a state regulatory or licensing agency.

