

FEATURE ARTICLE

Righting

The Missouri Bar
Client Security Fund

By Gary Toohey

Wrongs!



Integrity is doing the right thing even when no one is watching.¹

For 45 years, The Missouri Bar's Client Security Fund has helped to maintain the professional reputation of Missouri lawyers by compensating clients financially harmed by the actions of their attorneys. As a result of this service, hundreds of clients have had their faith in the legal profession restored. Yet for both the public and the state's lawyers, it remains one of The Missouri Bar's least known services.

By virtue of their oath of admission to the bar, lawyers are expected to adhere to a strict code of ethical conduct. But it is an unfortunate fact that, on rare occasion, some lawyers fail to live up to the high degree of competence and ethics expected among members of the legal profession. It is for just such occasions that the Client Security Fund – along with other client protection programs of The Missouri Bar – was established.

The Preamble of Missouri Supreme Court Rule 4 – the Rules of Professional Conduct – lays the groundwork for the profession's obligation to protect clients from harm. While noting that lawyers must be "guided by personal conscience and approbation of professional peers,"² the preamble states:

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests³

When lawyers fail to meet this standard of conduct and cause financial harm to a client, the profession has a duty to respond, says Poplar Bluff attorney Scott A. Robbins, chair of the Client Security Fund Committee that oversees the service.

"It's certainly not conduct that we would expect from a Missouri licensed attorney," he explained. "That's some-

thing we tell everyone who makes a claim. We apologize for the conduct of the attorney giving rise to the claim, because it is not the standard of conduct we would uphold and certainly not something the vast majority of Missouri attorneys would ever think of doing."⁴

In much the same way that a verdict from a jury of one's peers represents the collective judgment of society, it could be said that the work of the Client Security Fund – funded by an annual allocation from The Missouri Bar's budget – carries with it the professional expectations of the members of the bar. In that role, the CSF carries out the concepts embodied in Missouri Supreme Court Rule 4-12:

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.⁵

In addition, in many situations the CSF serves as the only potential source of financial assistance to clients.

"Oftentimes we find that attorneys who have claims against them before the fund, because they are disbarred or suspended, have no real funds coming in," Robbins said. "The [Client Security] Fund really becomes a source of repayment that would not otherwise exist."⁶

History of Client Protection *The British Empire Leads the Way*

As is the case with so much of American law, the roots of today's client protection services can be traced to the English legal system. It was during the early part of the 20th century that nations of the English Commonwealth pioneered this concept.

In 1901, for example, the British Parliament amended the Larceny Act of 1861 "to make it a criminal offense to convert funds or property held in trust."⁷ This action was taken in response to the collapse of the English stock market following the Boer War, which resulted in many solicitors and well-established law firms going bankrupt. "Until then, solicitors commonly commingled their own funds with client funds, and even used clients' funds, unless earmarked for a particular purpose."⁸

The first effort to establish some sort of mechanism for recompense of clients harmed by their solicitors came shortly thereafter, when a special committee of the English Law Society began examining professional accounting requirements and the possible formation of a guarantee fund to protect defrauded clients. However, in 1907 the full English Law Society declined to recommend the creation of such a fund.

With the English legal system sidestepping the issue, it was another member of the British Empire – New Zealand – that took the lead in the provision of client protection mechanisms. In March 1927, the Council of the Wellington District Law Society – in response to concerns voiced by members of the New Zealand Parliament and the Association of Chambers of Commerce – proposed the “creation of a fund for the purpose of making provision for monetary losses incurred by clients of defaulting solicitors.”⁹ The New Zealand Law Society then drafted a bill that, after lengthy discussion, was passed by the New Zealand Parliament. That action created the Solicitors’ Fidelity Guarantee Fund.

When originally established, the fund reimbursed those who suffered monetary losses because of theft by a solicitor or a solicitor’s servant or agency of any money or other valuable property entrusted to the solicitor in the course of practice. All solicitors were required to contribute to the fund. After the Act was adopted, the Law Society drafted an advertising circular, for publication by local law societies, informing the public about the fund benefits.¹⁰

Spurred by this action, similar funds were soon thereafter created in other nations of the British Commonwealth:

In 1930, the Legal Practitioners’ Fidelity Guarantee Fund was established in Queensland, Australia. The first fidelity fund in Canada was established in Alberta in 1939, and entitled the Assurance Fund. A compensation fund was created in England in 1941 into which every practicing solicitor was required to contribute annually. Funds were established in Scotland in 1949 and Ireland in 1954.¹¹

Interest Grows in the United States

Ironically, the impetus for creation of similar funds in jurisdictions throughout the United States may have come from an unlikely and unexpected source: World War II. Popular lore claims that a Sacramento lawyer, Kenneth G. McGilvray, learned of the client protection fund concept while stationed in New Zealand during the war. Intrigued by its possibilities, the story continues, he returned home and published an article detailing the New Zealand experience in the California State Bar Journal in 1946.¹²

Seven years later, American Bar Association (ABA) President Robert G. Storey brought the concept of lawyers’ funds for client protection to the fore during a report to that organization’s membership. In 1955, the ABA established a committee to study and promote the creation of such funds – a movement endorsed by such legal heavyweights as New Jersey Supreme Court Chief Justice Arthur G. Vanderbilt and Harvard Law School Dean Erwin Griswold.

However, it wasn’t until 1959 – “a watershed year in the development of client protection measures”¹³ – that the concept became reality:

The first American lawyers’ fund for client protection was established in Vermont in January 1959 through the auspices of the Vermont Bar Association. In February, the ABA House of Delegates adopted a resolution approving such funds in principle and urging all state bar associations to appoint feasibility study committees. In May, the Board of Governors of the Illinois State Bar Association adopted a resolution approving the principle of a fund and appointing a committee to develop ways to establish a fund with the Chicago Bar Association. In June, the Philadelphia Bar Association adopted a resolution putting a clients’ security fund into operation. In August, a meeting of the ABA Clients’ Security Fund Committee reported that 34 state bar associations had appointed committees to study fund creation. In September the State Bar of Washington voted to establish a security fund. The next month, bar associations in Colorado and New Mexico followed suit. In November the Board of Governors of the Virginia State Bar Association approved the establishment of a fund in principle.¹⁴

Missouri Joins the Trend

On September 8, 1965, the Board of Governors of The Missouri Bar adopted a resolution creating the Cli-

ent Security Fund (effective January 1, 1966) “for the purpose of reimbursing losses to clients, subject to the establishment of rules for the operation of said fund”¹⁵ That resolution required 15 percent of monies available at the end of each fiscal year to be retained as “seed” money for the ensuing year.¹⁶ For the 1964-1965 fiscal year, the Board of Governors appropriated \$10,000 to make the fund operational.¹⁷ (Illustrative of its growth since then, the Board’s 2010 appropriation to the CSF was \$200,000.)

“States fund their client security funds in a variety of ways,” said Missouri Bar Director of Programs Christopher C. Janku, whose duties include staff support of the CSF. “Some states have an annual assessment from each lawyer that goes directly to the fund, similar to the annual assessment of a portion of Missouri Bar dues directly to the Advisory Committee to fund the lawyer discipline system in Missouri. Rather than an annual assessment per lawyer, The Missouri Bar’s budget annually appropriates an amount to the Client Security Fund.”¹⁸

Today, all 50 states and the District of Columbia have client security funds in operation.

The ABA Weighs In

The ABA’s Standing Committee on Client Protection (created in 1984 through the merger of the Standing Committee on Unauthorized Practice of Law and the Standing Committee on Clients’ Security Fund) actively promotes the strengthening of client protection mechanisms, including programs to reimburse financial losses caused by lawyer misappropriation of client funds.¹⁹

Through its predecessor entities, the committee published “Suggested Guidelines for the Establishment and

Operation of a Clients’ Security Fund” in the mid-1970s. By the end of that decade, the ABA began to codify into black letter the basic mechanism to achieve reimbursement of losses caused by the dishonest conduct of lawyers.²⁰

This was followed in 1981 by the ABA House of Delegates’ approval of the Model Rules for Clients’ Security Funds. “Nearly a decade later [1989], based on experience in reimbursement programs nationally, the rules were updated and renamed Model Rules for Lawyers’ Funds for Client Protection.”²¹ Additional revisions to these model rules have taken place during the intervening years.²²

According to the ABA, “[s]tates generally follow the model rules but are free to make their own modifications.”²³

How It Functions

In Missouri, a six-member Client Security Fund Committee appointed by the Board of Governors holds hearings on claims submitted by clients who have been financially harmed by the wrongful conduct of their lawyers. However, there are restrictions on the types of claims eligible for consideration.

For example, the Client Security Fund Committee cannot authorize compensation for fee disputes (although a separate Missouri Bar program does try to resolve those types of issues) or cases of malpractice. Rather, the attorney in question must be disbarred, suspended, deceased or mentally incapacitated before a claim may be considered. A prohibition on paying claims resulting from malpractice is a common feature of such programs nationwide.²⁴

Robbins said there is a logical reason for these restrictions. “The [Client

Look for the Regulations and Rules of Procedure that govern the Client Security Fund, along with the form submitted to initiate a claim, on The Missouri Bar website (www.mobar.org) under the “Public” tab, or write to The Missouri Bar Client Security Fund, P.O. Box 119, Jefferson City, MO 65102.

Security] Fund should be there to take care of someone when the attorney has done something more than simple negligence,” he explained. “For example, if I miss a statute of limitations in filing a lawsuit for my client, I fully expect the client to be upset and I fully expect the client to pursue it, including filing a claim against my malpractice insurance. But malpractice insurance doesn’t cover intentional acts involving stealing from a client.”

“The Client Security Fund compensates clients for wrongful or dishonest conduct by attorney for which no other practical remedy is available,” Janku confirmed. “Other remedies are available for a loss caused by an attorney’s malpractice.”

In addition, Robbins said, the committee and Missouri Bar staff doesn’t have sufficient resources to undertake such a chore. “If we had to look at every alleged case of negligence, you’d

have to have a standing committee with someone whose job entails only that,” he explained.

The Client Security Fund Committee may recommend reimbursement of a claim in full or in part, or may recommend denial or dismissal of a claim. The committee’s recommendations are then forwarded to the Board of Governors of The Missouri Bar for review. The Board retains full discretion regarding payment of any claim.

During 2010, the Board of Governors approved the committee’s recommendations for payment of 74 claims for a total of \$185,074. The Board also approved the committee’s recommendations for denial of 22 claims and dismissal of five claims. Those numbers include 84 claims received during 2010 as well as claims held over from previous years.

“To help ensure the solvency of their funds, many states have caps on the amounts that can be recovered from their funds, similar to the caps in insurance policies that limit recovery on losses,” Janku said. “In Missouri there is a cap of \$50,000 per single claim so that a single large claim does not bankrupt the Fund or reduce the Fund’s ability to pay claims from other clients.

“Also, to reduce the cumulative impact on the Fund from multiple claims, Missouri only pays 80 percent of the loss above \$2,500.”²⁵ However, he added, “unlike some states, Missouri does not cap the total amount paid on claims involving a single lawyer.”²⁶

Indeed, as client security funds nationwide have discovered, “lawyers who steal money often steal it from a number of clients, leading to multiple claims.”²⁷

“We might see 15 or 20 claims against a lawyer over one or two years after they’ve been disciplined,”

explained Robbins.²⁸

“It is common for multiple claims to be filed against a lawyer,” Janku added. “Of the 74 claims paid by the Fund in 2010, ... 26 were caused by one lawyer” and “three lawyers were responsible for 53 of the 74 claims paid.”

Needless to say, these sorts of situations can involve almost incomprehensible behavior on the part of lawyers – not to mention the resulting emotional and financial toll on clients.

“The most egregious situation in recent years involved a criminal defense law firm that, through its website, successfully recruited a high volume of clients seeking post-conviction relief – many of whom were incarcerated,” Janku recalled. “The firm did little or no work for the clients. Although the Client Security Fund was able to provide at least partial monetary compensation to many of the injured clients, the fund could not assist the clients in restoring any right to post-conviction relief they may have lost as a result of the lawyers’ misconduct.”²⁹

“There’s one story that I use to explain to other attorneys here in the Poplar Bluff area when they ask me why I’m involved with the fund,” Robbins added. “In this particular case, the attorney had agreed to represent the client in a workers’ compensation claim. The attorney negotiated a settlement, forged the client’s name to the compromise stipulations, filed those documents with the Division of Workers’ Compensation, accepted the client’s check, forged the client’s name on the check, and pocketed those funds – all while telling the client that the case was ongoing. And the attorney had done so with more than one client.

“I guess his or her conscience got the best of them, because they eventu-

ally turned themselves in at the local police department. The client got an early morning knock on the door from the police department, and that is how the client found out what had happened.”

Reaction From Clients – and Attorneys

As is the case with litigation, client reaction to decisions of the Client Security Fund Committee and the Board of Governors often boils down to who won and who lost.

“As you might expect, some claimants are extremely disappointed” when their claim is denied by the committee and the Board of Governors, Janku said. “Unfortunately, it may strengthen the negative impression of the legal profession engendered by the misconduct of the attorney that was the basis of the claims. Although there is no appeal from the decision of the Board of Governors, some clients attempt to appeal the decision or request a rehearing with the Client Security Fund Committee.”³⁰

On the other hand ...

“In the majority of cases, the clients are very grateful when they receive compensation from the Fund,” Janku said. “Frequently they voluntarily acknowledge that the attorney misconduct they experienced is not typical of the behavior of the vast majority of Missouri lawyers. Occasionally, clients send thank you cards or e-mails to the committee to express their appreciation.”³¹

The committee also occasionally hears from attorneys who are seeking reinstatement following suspension or disbarment.³² Most of this contact takes place as a result of the Client Security Fund’s close cooperation with the Office of Chief Disciplinary Counsel and Advisory Committee. The Cli-

The Missouri Bar Client Security Fund Activity Since 1995

Year	Number of Claims Received ¹	Payments Authorized ²	Appropriated ³
1995	19	\$ 48,981	\$ 40,000
1996	20	\$ 92,429	\$ 42,000
1997	60	\$ 60,889	\$ 50,000
1998	49	\$101,078.76	\$ 60,000
1999	27	\$ 15,100	\$ 70,000
2000	36	\$102,372	\$ 70,000
2001	54	\$121,447	\$ 70,000
2002	82	\$118,232.68 ⁴	\$ 70,000
2003	122	\$174,213.20 ⁵	\$ 75,000
2004	46	\$110,502.68 ⁶	\$ 90,000
2005	60	\$105,471.13	\$125,000
2006	91	\$101,593.30 ⁷	\$175,000
2007	75	\$313,695.85 ⁸	\$175,000
2008	50	\$107,458.47 ⁹	\$185,000
2009	34	\$ 87,920.17	\$195,000
2010	84	\$185,074.44 ¹⁰	\$200,000
Totals	881	\$1,846,458.68	\$1,692,000

Endnotes

1 Indicates claims received during year, not number of claims paid. Claims received during one year may be held over to a later year, particularly if a claim is received prior to a lawyer's disbarment or suspension.

2 Payments for some years may have actually occurred in immediately following fiscal year after authorization at January Board of Governors meeting.

3 Fund also accumulates interest and restitution payments.

4 Includes \$35,195.68 authorized for payment at January 2003 Board of Governors meeting.

5 \$223,381.43 initially recommended for payment but reduced to \$174,213.20 due to limited funds. Includes \$169,986 authorized for payment at January 2004 Board of Governors meeting.

6 \$115,227 was initially recommended by the Client Security Fund Committee for payment in 2004. The committee's recommendation was reduced to \$110,502.68 due to the limited funds and to retain "seed money" for 2005.

7 Includes \$32,334.90 authorized for payment at January 2007 Board of Governors meeting.

8 Amount authorized for payment at July 20, 2007, November 16, 2007 and January 25, 2008 Board of Governors meetings.

9 Amount authorized for payment at July 18, 2008 (\$4,465.00), November 21, 2008 (\$39,084.47) and January 16, 2009 (\$63,909.00) Board of Governors meetings.

10 Includes amounts authorized for payment at the May 14, 2010 (\$29,250), September 29, 2010 (\$18,570) and November 9, 2010 (\$137,254.44) Board of Governors meetings.

ent Security Fund Committee advises those entities of all payments made to clients and requests that reinstatement of any disbarred or suspended lawyer be conditioned upon reimbursement of the Fund. As a result, the Office of Chief Disciplinary Counsel routinely contacts the committee to determine if there have been any payments from the Fund related to a lawyer applying for reinstatement.

Conclusion

While proud of the role the Client Security Fund plays in at least partially compensating clients for the harm done to them by their lawyers, Robbins recognizes the constraints placed on its operations.

“Many of the different bar organizations [around the nation] have full-time staff that deals with nothing but client security issues,” Robbins noted. “In fact, some of the states that are a little larger in terms of lawyers, such as Ohio and Pennsylvania, have full-time investigatory staff and they have funds that are in the millions of dollars. Some of them actually have websites devoted to client protection and client security.”³³

Indeed, The Missouri Bar’s Client Security Fund often walks a fine line between the profession’s desire to “make right” the harm done to clients and the limited resources available to it.

“Historically, there seems to have been this conflict between ‘we want to do this really good and worthwhile service attempting to make clients whole when their attorney has stolen money from them’ versus ‘we don’t want this to be a free-for-all with the committee having to wade through mountains of claims that may or may not be meritorious,’” said Robbins.³⁴

Regardless, it is clear that the Client Security Fund – representing the

collective professional expectations of Missouri Bar members – more than meets the profession’s call for responsible self-governance.

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.³⁵

“As Missouri-licensed attorneys, we like to complain at times about the overall perception of the legal profession,” Robbins notes. “We hear the lawyer jokes and the overall general negative perception, and we all try to combat that in our individual practices.

“The Client Security Fund allows us to have a really good, positive example of something that lawyers do – something that I’m not aware that a lot of other professions do – which is to try to correct a wrong when one member has done something that most others would consider improper.”³⁶

Endnotes

- 1 Quotation by Dennis Janson.
- 2 Missouri Supreme Court Rule 4-7.
- 3 Missouri Supreme Court Rule 4-9.
- 4 Telephone interview with Scott A. Robbins (January 18, 2011).
- 5 Missouri Supreme Court Rule 4-12.
- 6 Telephone interview with Scott A. Robbins

(January 18, 2011).

7 “A History of the Client Protection Rules,” American Bar Association Center for Professional Responsibility, *available at* <http://www.abanet.org/cpr/clientpro/history.html>.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 Resolution Pertaining to Client Security Funds, The Missouri Bar Board of Governors (September 8, 1965).

16 *Id.*

17 *Id.*

18 Interview with Christopher C. Janku (January 26, 2011).

19 Standing Committee on Client Protection, American Bar Association Center for Professional Responsibility, *available at* <http://www.abanet.org/cpr/clientpro/scrcp.html>.

20 “A History of the Client Protection Rules,” American Bar Association Center for Professional Responsibility, *available at* <http://www.abanet.org/cpr/clientpro/history.html>.

21 *Id.*

22 *Id.*

23 http://lawbrain.com/wiki/Client_Security_Funds.

24 *Id.*

25 Interview with Christopher C. Janku (January 26, 2011).

26 *Id.*

27 http://lawbrain.com/wiki/Client_Security_Funds.

28 Telephone interview with Scott A. Robbins (January 18, 2011).

29 Interview with Christopher C. Janku (January 26, 2011).

30 *Id.*

31 *Id.*

32 Telephone interview with Scott A. Robbins (January 18, 2011).

33 *Id.*

34 *Id.*

35 Missouri Supreme Court Rule 4-12.

36 Telephone interview with Scott A. Robbins (January 18, 2011).



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