

**REGULATIONS OF THE
NEW HAMPSHIRE BAR ASSOCIATION
PUBLIC PROTECTION FUND COMMITTEE**

The following regulations are adopted under the authority of Rule 55(5) of the Rules of the Supreme Court of New Hampshire and were approved by that Court on November 1, 2001. The following regulations are intended to amplify, clarify and complete Rule 55, and should be read in conjunction with Rule 55.

- Part 100 - Definitions
- Part 200 - Fund Organization and Administration
- Part 300 - Application Requirements
- Part 400 - Eligibility Requirements
- Part 500 - Hearing Procedures
- Part 600 - Appeals
- Part 700 - Subrogation Requirements
- Part 800 - Reinstatement Requirements

Part 100 - Definitions

100.01 **Definitions.** As used in Rule 55 and these regulations,

(a) “Accused” means the person who the claimant alleges deprived the claimant of money or other thing of value through theft or misappropriation.

(b) “Assignee” includes, but is not limited to:

(1) a trustee in bankruptcy; and

(2) a collection agency, regardless of the form of the agency’s possession of the claim.

(c) “Claimant” means the person who seeks reimbursement from the Fund pursuant to Rule 55 of the Rules of the Supreme Court of New Hampshire.

(d) “Committee” means the New Hampshire Bar Association Public Protection Fund Committee.

(e) A “fiduciary” is:

(1) an executor, trustee, conservator, guardian or an attorney-in-fact, expressly appointed as such; and

(2) an individual or entity in any other position of trust, but not including business relationships.

(f) The “Fund” is the New Hampshire Bar Association Public Protection Fund, established by Rule 55 of the Rules of the Supreme Court of New Hampshire.

(g) “Lawyer” does not include a person who, at the time the acts or omissions constituting the theft occurred, is either disbarred or suspended from the practice of law.

Part 200 - Fund Organization and Administration

200.01 **Waiver.** Except as limited by section 500.04, the Committee may waive all or any portion of a regulation to pay a claim, if, in its discretion, justice so requires. The Committee may not waive any portion of Rule 55 of the Rules of the Supreme Court of New Hampshire.

200.02 **Term of Members.** The terms of the initial nine members of the Committee shall be staggered, with three members serving for one year, three members serving for two years and three members serving for three years. Thereafter the members of the Committee shall be appointed for terms of three years. Each member shall serve for the term and until that member’s successor is appointed and qualified. Vacancies shall be filled by the appointing authority for the unexpired portion of the term.

200.03 **Chair.** Annually, the President of the New Hampshire Bar Association, with the consent of the Board of Governors, shall designate one member of the Committee to serve as the Chair of the Committee, for a one-year term, and until that Chair’s successor is designated. No Chair shall serve longer than that person’s service as a member of the Committee.

200.04 **Investment Policy.** The Fund’s assets shall be invested only in such instruments and securities as will permit \$1,000,000 of those assets to be converted to cash on May 31 of each fund year in order to pay allowed claims. Subject to that requirement, the first \$2,000,000 of the Fund’s assets shall be invested only in interest-bearing short-term, low risk securities that pay a fixed rate of return. The Fund’s assets shall be deposited only in accounts federally insured in amounts sufficient to protect the full amount of the deposits from theft or dissolution by the depository. The Funds’ assets in excess of \$2,000,000 may be invested as the Committee deems reasonable and prudent in instruments and securities that vary from the above restrictions. In the investment of the amounts in excess of \$2,000,000, the Committee shall: (a) exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence, acting in a like capacity and familiar with such matters, would use in the conduct of a fund of like character and with like aims as the Fund, and (b) diversify investments of the Fund so as to minimize the risk of large losses.

Part 300 - Application Requirements

300.01 **Fees For Representing Claimants.** The Committee encourages attorneys or other persons representing parties to waive their fees.

300.02 **Claim Form.** A claim is commenced only when a written claim, on the form attached to these regulations as Exhibit A, is completed and filed with the Committee within the time prescribed by Rule 55 of the Rules of the Supreme Court of New Hampshire.

300.03 **Other Sources of Reimbursement.** A claimant shall file a claim form within the three-year limitation period, even though the claimant has not then exhausted all other sources of reimbursement for the loss giving rise to the claim.

300.04 **Abandonment of Claim.** After filing, the Committee may request more information from the claimant. If the Committee requests further information from the claimant, and the claimant fails to respond to the Committee in writing within 45 days of the date of Committee's request for further information, the claim shall be deemed to be abandoned by the claimant. Once the claim has been abandoned, if the claimant wishes to pursue the matter further, the claimant must complete and file a new claim form. In that circumstance, the date of commencement of the claim shall be the date the **NEW** claim form is filed with the Committee.

300.05 **Response by Accused.** Unless the Committee rejects the claim for lack of jurisdiction, the Committee shall send the Accused a copy of the claimant's claim form with all attachments, at the Accused's last known address in the membership records of the New Hampshire Bar Association. The Accused shall be notified that the Accused has 30 days from the date of the Committee's notice to file with the Committee a written objection to the claim, under oath. At the discretion of the Committee, and for good cause shown, this provision may be waived. If the Accused fails timely to file such an objection, the Accused shall be deemed to have waived any objection to the claim, shall have no right to participate in any further proceeding concerning the claim and will not be given any further notice.

Part 400 - Eligibility Requirements

400.01 **Persons Ineligible.** Without causing any other person to be deemed eligible by negative implication, all of the following persons shall be ineligible for any award from the Fund:

(a) Any present or former spouse, descendant, ancestor, sibling, uncle, aunt, niece or nephew of the Accused, or the spouse of any of them.

(b) Any present or former partner, associate (but not employee), co-shareholder, co-member or employer of the Accused, or the spouse of any of them.

(c) Any entity presently or formerly controlled by the Accused or any person listed in paragraphs (a) or (b) of this section 400.01.

(d) Any present or former affiliate of the employer of the Accused or of an entity listed in paragraph (c) of this section 400.01.

(e) Any governmental entity, federal, state, county or municipal.

(f) Any insurer, surety, bondsman, or any company or other entity serving that function.

400.02 Exhaustion of Recovery. A claimant must exhaust all other sources of reimbursement for the loss giving rise to the claim before the claimant is eligible for reimbursement from the Fund.

(a) A claimant has not exhausted other sources unless the claimant demonstrates to the satisfaction of the Committee that the claimant has made reasonable efforts to collect from the assets, insurance and sureties of the Accused and the Accused's firm and from third parties who may be liable to the claimant (including, but not limited to, banks). Among other ways, a reasonable effort can be demonstrated if the claimant, after attempting to so, is unable to retain an attorney on a contingent fee basis to represent the claimant on claims against such Accused, firm, insurance company, surety company and third parties.

(b) If, at the time prescribed for the payment by the Fund of claims against a given Accused, a claimant against that Accused has not exhausted other sources of recovery, the following actions will be taken:

(1) All of the claims of claimants against that Accused who are otherwise eligible will be totaled.

(2) All caps and other limitations will be applied to those claims.

(3) The resulting total will be fixed, and monies allocated in the Fund in that total amount.

(4) From that allocation all claimants who have exhausted other sources of recovery will be paid their *pro-rata* share of the allocation.

(5) The balance of the allocation will be held in reserve for the claimants who have not yet exhausted other sources of recovery.

(6) As each claimant exhausts other sources of recovery, such claimant will be paid such claimant's *pro-rata* share of the allocation.

(7) When all claimants against that Accused have exhausted other sources of recovery, or the time within which that may be accomplished has expired, whichever occurs first, the undistributed balance of the allocation will be distributed *pro-rata* to

all claimants who have exhausted other sources of recovery, taking into account the earlier distribution(s) to those claimants.

As used in this paragraph (b), the time within which the exhaustion of other sources of recovery may be accomplished expires at the later of:

(i) the latest of the limitation periods within which a suit may be commenced against all other sources of recovery has expired without the commencement of such a suit; or

(ii) all suits against other sources of recovery commenced within that limitation period have been terminated by settlement or final judgment.

400.03 Other Funds. When determining a claimant's loss, recoveries awarded to, or received by, the claimant from the public protection fund(s) of other states or provinces (by whatever name it is known and in whatever form it may take and from whatever source it may arise) shall reduce the claimant's claim against the Fund, dollar for dollar.

400.04 Investment Losses. The loss of monies or other things of value placed with an Accused for investment will not be reimbursed, even if all other requirements of the Fund are met, unless, in addition to all other requirements for reimbursement:

(a) the Accused had possession of the money or thing of value while an attorney for the claimant; and

(b) at the suggestion of the Accused, the Accused retained the money or thing of value to invest it; and

(c) there is a subsequent loss by theft.

To qualify as being “an attorney for the claimant” within the meaning of paragraph (a) of this section 400.04, the claimant’s retention of the Accused must have been for purposes other than investment.

400.05 Unearned Fee. The mere failure of a lawyer to return to a client money lawfully paid to the lawyer as a fee shall not constitute a theft within the meaning of Rule 55 unless the lawyer has:

(a) performed no work on behalf of the client, and

(b) taken no action on behalf of the client, and

(c) obtained no result for the client.

The mere existence of all three of the foregoing factors shall not cause such failure to constitute a

theft within the meaning of Rule 55.

400.06 **Contributory Conduct.** Reimbursement for the loss of monies or other things of value shall be reduced or eliminated entirely, even if all other requirements of the Fund are met, to the extent the conduct of the claimant contributed to such loss.

Part 500 - Hearing Procedures

500.01 **Computation of Time; Filing.**

(a) Unless otherwise specified, all time periods referenced in these regulations shall be calendar days.

(b) Computation of any period of time referred to in these regulations shall begin with the day after the action which sets the time period in motion and shall include the last day of the period so computed.

(c) If the last day of the period so computed falls on a Saturday, Sunday or legal holiday, then the time period shall be extended to include the first business day following the Saturday, Sunday or legal holiday.

(d) As used in these regulations, a document is “filed” only when it is received by the New Hampshire Bar Association.

500.02 **Presiding Officer; Appointment; Authority.** All hearings shall be conducted by the Committee with at least a quorum of the Committee present. The Chair shall act as the presiding officer subject to the control of the Committee. If the Chair is unavailable, the quorum shall appoint one of them as the presiding officer. A presiding officer shall as necessary:

(a) regulate and control the course of a hearing;

(b) administer oaths and affirmations;

(c) receive relevant evidence at hearings and exclude irrelevant, immaterial or unduly repetitious evidence; and

(d) rule on procedural requests, including adjournments or postponements, at the request of a party or on the presiding officer’s own initiative.

Any member of the Committee may ask questions of any person who testifies.

500.03 **Withdrawal of Committee Members.** Upon his or her own initiative or upon the motion of any party, any Committee member shall, for good cause, withdraw from any hearing.

Good cause shall exist if a Committee member has:

- (a) a direct interest in the outcome of the proceeding, including, but not limited to, a financial or familial relationship (within the third degree of relationship) with any party; or
- (b) made statements or engaged in behavior which objectively indicates that he or she had prejudged the facts of the case; or
- (c) personally believes he or she cannot fairly judge the facts of the case.

The obligation of the attorney members of the Committee to contribute to the Fund shall not be deemed good cause. Previous acquaintance with the issues, the parties or a witness shall not constitute good cause for withdrawal.

500.04 Waiver or Suspension of Regulations. The Committee, upon its own initiative or upon the motion of any party, may suspend or waive any requirement or limitation imposed by this Part 500, in its discretion, when the proposed waiver or suspension appears to be lawful, and would be more likely to promote the fair, accurate and efficient resolution of issues pending before the Committee than would adherence to these regulations. The provisions of Rule 55 of the Rules of the Supreme Court of New Hampshire may not be waived by the Committee.

500.05 Availability of Hearing. A contested hearing on the merits shall be held on the Committee's own initiative or upon the request of the claimant or of the Accused (if the Accused is a party). However, hearings in uncontested cases will be held only at the Committee's discretion. Hearings on matters that do not involve the merits of the claim will be held only at the Committee's discretion.

500.06 Commencement of Hearing. A hearing on the merits shall be commenced by a notice from the Committee to the parties of the date of any scheduled hearing.

500.07 Notice of Hearing. The notice of a hearing on the merits shall be issued by the Committee no less than fourteen (14) days prior to the scheduled hearing. The notice shall contain the information stated below:

- (a) a statement of the time, place and nature of any hearing;
- (b) a statement of the legal authority under which a hearing is to be held;
- (c) a statement of the claimant's name and the name of the Accused;
- (d) a statement that each party has the right to have an attorney or person of good character present to represent the party at the party's expense.

A copy of the notice shall be sent by certified mail and regular first-class mail to the claimant at the

address indicated in the claimant's claim form and to the Accused, if a party, at the last address on file with the Committee.

500.08 Postponements. Postponements are disfavored. If a postponement is requested by a party to the hearing, it shall not be granted unless the Committee determines that good cause has been demonstrated. Good cause may include the unavailability of the claimant or witnesses or attorneys necessary to conduct the hearing. The Chair shall issue a new hearing notice stating the date, time and place of the postponed hearing as soon as practicable. In such a case, fourteen days advance notice of the new hearing date is not required.

500.09 Failure to Attend Hearing. If any party to whom notice has been given in accordance with section 500.07 fails to attend a hearing, the Committee may decide the claim on the basis of the information before it; or reschedule the hearing; or deny the claim; or take any other action the Committee deems appropriate.

500.10 Disclosure of Witnesses and Exhibits. At least 5 days before the hearing on the merits in contested cases the parties shall exchange a list of all witnesses to be called at the hearing, with a brief summary of their testimony, a list of all documents or exhibits to be offered as evidence at the hearing and a copy of each such document or exhibit. At the same time, the parties shall file such lists, summaries and exhibits with the Committee.

500.11 Confidentiality. Upon request of the claimant only, the Committee shall close the hearing on the merits to the public, and the Accused's objection to the claim and all evidence submitted at the hearing shall be confidential. However, the claimant's claim form shall always be available to the public, as well as the Committee's decision on the merits. This regulation shall not be interpreted to deny access to relevant information by professional discipline agencies or law enforcement authorities as the Committee shall authorize, or the release of statistical information which does not disclose the identity of the Accused or the parties.

500.12 Record of the Hearing. Upon request of a party, a record of the hearing shall be kept by tape recording or other method that will provide a verbatim record. The Committee shall determine the method of recording. If any party requests a copy of the record, the Committee shall cause a copy of the record to be prepared upon payment of the fully distributed cost of the recording.

500.13 Standard and Burden of Proof. The claimant shall bear the burden of proving each element of the claim, including the amount of the claimant's loss, by a preponderance of the evidence.

500.14 Testimony; Order of Proceeding. Any person offering testimony, shall first swear or affirm that the testimony shall be true and shall state for the record his or her name, and role in the proceeding. If the person is representing another person, the person being represented shall also be identified. Testimony shall be offered in the following order:

- (a) the claimant and such witnesses as the claimant may call;

(b) the Accused, if a party, and such witnesses as the Accused may call.

500.15 **Evidence.** The New Hampshire Rules of Evidence shall not apply. All testimony, documents, materials and objects offered as evidence shall be admitted into evidence unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged. All objections to the admissibility of evidence shall be stated no later than the time when the evidence is offered, or the objection will be deemed waived .

500.16 **Closing the Record.** After conclusion of the hearing, the record shall be closed and no other evidence shall be received into the record, except as allowed by this section and section 500.17. Before the conclusion of the hearing, a party may request that the record be left open to allow the filing of specified evidence not available at the hearing. If the Committee determines that such evidence is presently unavailable and is necessary for a full consideration of the issues raised at the hearing, the Committee may keep the record open for the period of time necessary for the party to file the evidence. Unless the Committee specifies a different time limit, such additional evidence shall be filed no later than 15 days after the conclusion of the hearing.

500.17 **Reopening the Record.** At any time prior to the issuance of the decision on the merits, the Committee, on the Committee's own initiative or on the motion of any party, may reopen the record to receive relevant, material and non-duplicative testimony or other evidence not previously received and unavailable at the time of the hearing, if the Committee determines that such testimony or other evidence are necessary to a full and fair consideration of the issues to be decided.

500.18 **Decision on the Merits.** A Committee member shall not participate in making a decision on the merits of a contested claim without having personally heard the testimony in the case, unless the matter's disposition does not depend on the credibility of any witness and the record provides a reasonable basis for evaluating the testimony. The Committee's decision on the merits shall be in writing and shall contain a statement of the reason(s) for the claim's approval or denial.

Part 600 - Appeals

600.01 **Appeals.** Appeals of the Committee's decision on the merits must be filed with the Supreme Court of New Hampshire not later than thirty (30) days from the date of the Committee's notice of decision. Such appeals shall be governed by Rule 10 of the Rules of the Supreme Court of New Hampshire, except that: (a) no motion for rehearing or reconsideration shall be required or permitted, and (b) such appeals shall be heard finally by the panel prescribed by Rule 55(5). If an appeal is filed, no payment shall be made to the Claimant until the final order on appeal.

Part 700 - Subrogation Requirements

700.01 **Action by the Fund.** After the payment of a claim, the Fund may bring such actions

against the Accused and other persons who may be liable for the claimant's loss as the Fund deems advisable for any theory of recovery, plus the costs of such action, including attorney fees. All actions shall be under the control of the Fund which may prosecute, fail to prosecute, compromise, settle or abandon any such action as it may deem appropriate in its sole discretion and without the necessity of the consent or approval of the claimant. All sums recovered shall be paid first to the Fund up to the amount of the reimbursement plus the entirety of any expenses and costs, including attorney fees, incurred by the Fund in such action.

700.02 Transfer of Claimant's Rights. As a condition precedent to reimbursement, a claimant shall be required to execute and deliver to the Fund a subrogation agreement in the form prescribed by the Fund in its reasonable discretion. At a minimum, the agreement shall transfer to the Fund, to the extent of the reimbursement, all of the claimant's claims and demands against, and rights to sue, the Accused or third parties or entities who may be liable on account of the dishonest acts, and losses with respect thereto, described in the claim application.

700.03 Joinder of Claimant. Upon commencement of an action by the Fund as subrogee, the Fund shall advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses. Even so, all sums recovered shall be paid first to the Fund up to the amount of the reimbursement plus the entirety of any expenses and costs, including legal fees, incurred by the Fund in such action.

700.04 Cooperation by Claimant. The claimant shall cooperate in all efforts undertaken by the Fund as subrogee.

Part 800 - Reinstatement Requirements

800.01 Reimbursement by Accused. If an Accused seeks reinstatement to the New Hampshire Bar, the Accused must reimburse the Fund in full as a condition of reinstatement.