IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: REQUEST OF THE	§	
TRUSTEES OF THE LAWYERS'	§	
FUND FOR CLIENT	§	No. 327, 2020
PROTECTION FOR AN	§	
ADVISORY OPINION	§	

Submitted: September 4, 2020
Decided: October 12, 2020

Before **SEITZ**, Chief Justice; **VALIHURA, VAUGHN**, **TRAYNOR**, and **MONTGOMERY-REEVES** Justices.

The trustees of the Delaware Lawyers' Fund for Client Protection (the "LFCP") have requested an advisory opinion, in accordance with Supreme Court Rule 66(h)(iii),[1] regarding whether the trustees have discretion to consider paying claims involving misconduct by attorneys who were not members of the Delaware bar, but who were admitted *pro hac vice* or who had in the past received limited permission to practice. The question arises from the language of Supreme Court Rule 66(a)(ii), which states that the purpose of the trust fund is to address "losses caused to the public by defalcations of members of the Bar;" subsections 1 and 2 of Rule 4(1) of the LFCP Rules, which provide that the Trustees will consider for reimbursement from the fund certain claims involving "a member of the Delaware

[1] *See* DEL. SUP. CT. R. 66(h)(iii) ("The trustees may apply to this Court for interpretation of this rule, and for advice as to their powers and as to the proper administration of the trust. Any final order issued by this Court in response to any such application shall finally bind and determine all rights with respect to the matters covered therein."). This matter is subject to confidential treatment as provided in Rule 8 of the Rules of the Trustees of the Lawyers' Fund for Client Protection of the Supreme Court of Delaware (the "LFCP Rules").

Bar;" and subsection 3 of Rule 4(1) of the LFCP Rules, which provides that the trustees will consider for reimbursement certain claims involving a "member of the Bar." For the reasons discussed below, we conclude that the trustees' discretion is not limited to paying claims for reimbursement involving an attorney who was a member of the Delaware bar at the time of the defalcation that gave rise to the claim.

Factual Context

The trustees requested our opinion on the following question:

> Is the discretion of the Trustees limited to paying claims only involving attorneys who are or were at the time of their defalcation full members of the Bar of the Supreme Court of the State of Delaware?

They informed us that they are investigating two claims involving attorneys who were not members of the Delaware bar at the time of the conduct for which a claim for reimbursement has been made.

The first claim involves an attorney who was admitted to practice in Pennsylvania and New Jersey. He was admitted *pro hac vice* in a postconviction proceeding in the Delaware Superior Court. He retained advanced fees without meeting his obligations concerning representation.

The second involves an attorney who was admitted to practice in New York and Pennsylvania. He received limited permission to practice in Delaware under Rule 55, which authorizes limited permission to practice in certain public programs, such as legal-aid and government agencies. That permission was later revoked or

rescinded. Thereafter, the attorney was residing in Delaware and apparently held himself out as available to assist with legal matters. A Delaware resident contacted him in Delaware about a legal matter relating to a real estate development project in New York. The attorney accepted the representation in Delaware. In the course of handling the matter, the attorney allegedly stole a significant amount of client funds. The client has made claims to the New York and Pennsylvania client-protection funds; Pennsylvania paid part of the claim, and the New York claim is pending.

Rules Governing the Trustees' Discretion

Delaware Supreme Court Rule 66 governs the LFCP. Rule 66(a)(ii) states that the purpose of the trust fund is to address "losses caused to the public by defalcations of *members of the Bar*."[2] Rule 66(g) broadly vests the trustees with "the power, which they shall exercise at their sole discretion, to determine whether a claim merits reimbursement from the trust fund, and, if so, the amount of such reimbursement, the time, place and manner of its payment, the conditions upon which payment shall be made, and the order in which payments shall be made."[3]

The LFCP Rules provide for the governance of the LFCP. LFCP Rule 4(1) establishes the types of claims that the trustees will consider for reimbursement from the fund. That rule provides as follows:

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[2] DEL. SUP. CT. R. 66(a)(ii) (emphasis added).
[3] *Id.* R. 66(g)(i).

> The Trustees will receive and consider for reimbursement from the Fund: (1) Claims for losses due to the defalcations(s) or dishonesty of a *member of the Delaware Bar* within the practice of the member's profession or acting as a fiduciary who has resigned, died, been adjudged insane, been disbarred, suspended or otherwise disciplined, been convicted of embezzlement or misappropriation of money or other property of the member's clients or whose whereabouts is unknown; (2) claims certified to the Trustees by the Board on Professional Responsibility of the Supreme Court of Delaware as appropriate cases for consideration because the loss was caused by the defalcation(s) or dishonest conduct of a *member of the Delaware Bar*, or (3) or any other claims for losses due to the defalcation(s) or dishonesty of a *member of the Bar* which the Trustees, in the exercise of their discretion pursuant to paragraph (g) of Rule 66 of the Supreme Court, deem appropriate for consideration in that such consideration will advance the purpose of the Fund. Claims duly presented will be considered by the Trustees as fairly, fully and equitably as possible under the circumstances.[4]

Discussion

The text of LFCP Rule 4(1) refers both to claims involving a "member of the Delaware Bar" and to claims involving a "member of the Bar." As a matter of statutory construction,[5] where a drafter "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the drafter] acts intentionally and purposely in the disparate inclusion or exclusion."[6] Applying that principle, in isolation, to the text of LFCP Rule 4(1) leads

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[4] LFCP Rule 4(1) (emphasis added).

[5] *See generally Gentile v. Singlepoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001) (suggesting that similar principles of interpretation apply to construction of statutes, contracts, and "other written instruments"); *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995) (suggesting that similar principles of interpretation apply to construction of a rule and a statute).

[6] *Russello v. United States*, 464 U.S. 16, 23 (1983), *cited in In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 578 n.77 (Del. 2019) (discussing principle in context of interpretation of an insurance policy, and stating that "referring to the common law elsewhere in the policy

to the preliminary conclusion that the drafters of the rule intended subsection 3 to allow consideration of claims involving *any* member of the bar, and not just those involving a member of the *Delaware* bar, to which subsections 1 and 2 are limited. This expansive reading of subsection 3 is supported by that subsection's reference to Supreme Court Rule 66(g), which vests the trustees with broad discretion to determine whether a claim merits reimbursement.[7] The expansive reading of subsection 3 of LFCP Rule 4(1) is further supported by that subsection's reference to the advancement of the purpose of the Fund, which, as set forth in Supreme Court Rule 66(a)(ii), is not limited to addressing wrongdoing by members of the "Delaware" bar but by its terms extends to "members of the Bar."[8]

But another principle of statutory construction is that a court "will read each section of the statute in light of all the others to produce a harmonious whole."[9] Moreover, the Delaware Supreme Court's "duty in interpreting our rules, like that of statutory construction, is to reject a result producing an unreasonable

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demonstrates that the parties knew how to expressly provide for coverage of common law claims when that was intended").

[7] *See* DEL. SUP. CT. R. 66(g) (vesting the trustees with "the power, which they shall exercise at their sole discretion, to determine whether a claim merits reimbursement from the trust fund, and, if so, the amount of such reimbursement, the time, place and manner of its payment, the conditions upon which payment shall be made, and the order in which payments shall be made").

[8] *See id.* R. 66(a)(ii) (stating that the purpose of the trust fund is to address "losses caused to the public by defalcations of members of the Bar").

[9] *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 496 (Del. 2012) (internal quotations and alteration omitted).

consequence, and to adopt an interpretation which gives a sensible and practical meaning to the rule and the purpose for which it was intended."[10]

When one considers the Supreme Court rules as a whole and with a view toward reasonable interpretation, it is clear that the terms "members of the bar" and "members of the Delaware bar" have not been used consistently and intentionally to refer to different groups of people. Put another way, it appears that the phrase "members of the bar" sometimes has been used where the rules are addressing matters pertaining only to members of the *Delaware* bar. For example:

- Supreme Court Rule 51(a) provides that the Board of Bar Examiners shall consist of "such number of members of the Bar as the Court shall determine." Although not specified, the most reasonable understanding of this provision is that it is intended to be limited to members of the Delaware bar. In contrast, Supreme Court Rule 62(a) provides for membership on the Board on Professional Responsibility of a number of "members of the Delaware Bar."

- Supreme Court Rule 52 governs "admission to the Bar" and can only reasonably be understood to mean admission to the Delaware bar.

- Supreme Court Rule 66 itself provides that the trustees of the LFCP "shall consist of 7 persons who shall be members of the Bar and 2 persons who shall be public members who are not members of the Delaware Bar."[11] It would probably surprise many people to interpret this to mean that the seven lawyers could be lawyers who are not members of the Delaware bar (and perhaps that the two public members could be lawyers at all).

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[10] *In re Petition of Nenno*, 472 A.2d 815, 819 (Del. 1983). *See also Jackson*, 654 A.2d at 832 ("Where ambiguity exists, a rule, like a statute, must be interpreted to avoid mischievous or absurd results.").

[11] DEL. SUP. CT. R. 66(b)(i).

- Rule 69(a) establishes the categories of "members of the Bar of this Court," while Rule 69(c) provides that "[a]ll members of the Bar who are not inactive, judicial, retired or emeritus members are active members." Rule 69(c) can only reasonably be understood to refer to members of the Delaware bar.

Thus, an interpretation of Supreme Court Rule 66(a)(ii) and LFCP Rule 4(1) that turned solely on a distinction between the use of "members of the Bar" and "member of the Delaware Bar" in those provisions would be inconsistent with a reasonable reading of the use of that language throughout the rules.

In an effort to reconcile the competing conclusions that result from applying general principles of construction to the language of the rules, we have also considered whether public policy and the purposes for which the LFCP was created support a broader or narrower understanding of the trustees' discretion. As noted above, the purpose of the LFCP is "to establish, as far as practicable, the collective responsibility of the profession in respect to losses caused to the public by defalcations of members of the Bar, acting either as attorneys or as fiduciaries."[12] That purpose is focused on protecting the public from attorney wrongdoing. In our view, carrying out that purpose can extend to considering claims involving attorneys who are not members of the Delaware bar where there is some nexus between the

[12] *Id.* R. 66(a)(ii).

matter and Delaware and where the client reasonably believed that the attorney's conduct was subject to some oversight in Delaware.[13]

In comparison to the Delaware LFCP Rules, the ABA's Model Rules for Lawyers' Funds for Client Protection (the "Model Rules") more clearly establish a scope of coverage that includes misconduct by attorneys who are not members of the bar of the state at issue, but are "otherwise authorized to practice" in the state. Model Rule 1(A) provides that the purpose of a client-protection fund "is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers licensed *or otherwise authorized to practice* law in the courts of this jurisdiction occurring in the course of the client-lawyer or other fiduciary relationship between the lawyer and the claimant."[14] That language alone arguably could allow consideration of claims involving counsel who are admitted *pro hac vice* and those who are authorized to engage in limited practice under Rule 55. The Model Rules go further, however, to expressly apply to certain individuals who are not members of the bar of the applicable state. Model Rule 1(B) defines "lawyer" for purposes of

[13] *See generally In re Lassen*, 672 A.2d 988, 1002 (Del. 1996) (stating that "public confidence in the profession . . . traditionally has been built on trust and self-regulation").

[14] ABA Model Rules for Lawyers' Funds for Client Protection R. 1(A) (emphasis added). For the historical background of the Model Rules, see https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/history/. For information regarding the first twenty-five years of Delaware's LFCP, see https://courts.delaware.gov/lfcp/anniv.aspx.

the client-protection fund rules to include a person "(1) licensed to practice law in this jurisdiction, regardless of where the lawyer's conduct occurs"; "(2) admitted as in-house counsel"; "(3) *admitted pro hac vice*"; "(4) admitted as a foreign legal consultant"; "(5) admitted only in a non-United States jurisdiction who is authorized to practice law in this jurisdiction"; or "(6) *recently suspended or disbarred whom clients reasonably believed to be licensed to practice law* when the dishonest conduct occurred."[15]

Thus, the Model Rules expressly include counsel admitted *pro hac vice*—as well as those permitted to engage in certain types of limited practice, though not the specific public-interest limited practice at issue in the facts presented by the trustees—in the definition of "lawyer" for the purpose of the client-protection rules. Moreover, subsection 6 of Model Rule 1(B) makes clear that the scope of covered claims is not limited to those involving *current* members of the bar, but extends to the misconduct of lawyers who were recently suspended or disbarred but were reasonably believed to be licensed to practice law.

As a matter of interpretation of the Delaware rules, the fact that the Model Rules expressly address these issues and the Delaware rules do not suggests that the Delaware rules are narrower than the Model Rules and apply only to lawyers admitted to the Delaware bar. Indeed, the current language of Model Rule 1 appears

[15] Model Rules R. 1(B) (emphasis added).

to have been in place since at least 2006, and Delaware could have adopted that language but has not. But as a matter of policy, the fact that the Model Rules are not limited to lawyers who are admitted to the bar of the applicable state supports a finding that the trustees have broad discretion to consider claims involving attorneys admitted *pro hac vice* or authorized to engage in limited practice.

The commentary to the Model Rules draws a parallel between the scope of the claims that are covered and the scope of those lawyers who are required to pay into the fund. Comment 2 to Model Rule 1 notes that "[l]awyers admitted as in-house counsel, *pro hac vice*, or as foreign legal consultants should both pay into the Fund as provided under Rule 3 and have their conduct covered by the Fund."[16] And Comment 4 states:

> It is particularly equitable to require that this Fund, into which lawyers have paid annual assessments, have the primary responsibility to compensate clients who have suffered losses. Such lawyers would include those admitted as in-house counsel, by *pro hac vice* admission and foreign legal consultants. Lawyers admitted only in a non-United States jurisdiction may have their conduct covered by the Fund because the highest court in this jurisdiction has authorized them to provide legal services on a temporary basis in this jurisdiction.[17]

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[16] Model Rules R. 1, cmt. 2.

[17] *Id.* R. 1, cmt. 4. Professor Stephen Gillers has noted similar considerations when discussing the regulation of multijurisdictional practice:

> Many states now have client protection funds, which will reimburse clients whose lawyers cheat them for some or all of their loss. Contributors to those funds are the state's lawyers. What if a host state client is cheated by an out-of-state lawyer engaged in cross-border practice?
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> We have to make some choices when an out-of-state lawyer cheats a host state resident. We can say that the host state client has no recourse to the host

The Delaware LFCP is funded by assessments against "active members of the Bar of this Court."[18] Lawyers who are admitted *pro hac vice* pay an assessment that does not include an earmark for the LFCP; rather, the assessments for *pro hac vice* admission are "to be deposited in the registration fund of the Delaware Supreme Court for the purpose of the governance of the Bar and the administration of justice and to be distributed pursuant to approval of a majority of the members of the Supreme Court."[19] The rules also do not impose any assessment on a person who is

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> state's client protection fund. We can authorize any fund in the lawyer's home state to compensate the client. We can authorize the host state fund to compensate the client even though only in-state lawyers contribute to it. If so, we can also require out-of-state lawyers to contribute to the fund as a condition of cross-border practice. If we are going to create a contribution scheme to cover the added potential cost of disciplining lawyers who utilize more generous cross-border practice rules, then we can build into that tariff an appropriate additional amount to safeguard the jurisdiction's client protection fund. After all, if a lawyer is going to represent a client in a host state, it is equitable to ask him or her to contribute to a fund that protects the lawyer's clients in the host state.

Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 701 (2002) (footnotes omitted).

[18] DEL. SUP. CT. R. 66(e). *See also* LFCP Rule 3 ("The Trust Fund shall be funded from assessments, pursuant to Supreme Court Rule 66(e), made annually against active members of the Bar of the Supreme Court. As a condition of continuing active membership in the Bar of the Supreme Court, every active member, except judges disqualified from practicing law, shall pay to the Supreme Court an annual assessment as determined by the Supreme Court in the Annual Registration Statement pursuant to Supreme Court Rule 69.").

[19] DEL. SUP. CT. R. 71(b)(vi). *See generally* Tom Lininger, *Deregulating Public Interest Law*, 88 TULANE L. REV. 727, 759 n.133 (2014) ("The requirement of pro hac vice admission apparently has little to do with client protection. The host state simply checks the existing public records to see if the attorney applying for temporary admission has any black marks on their bar record. No state requires an out-of-state attorney to pass an exam that assesses familiarity with the host state's laws. There is no evidence that any state earmarks the fees from pro hac vice admission to subsidize particular programs that protect in-state clients from the threat posed by out-of-state attorneys admitted on a short-term basis. Indeed, Rule 5.5's restrictions on practice by out-of-state attorneys seem to place a higher priority on benefiting local lawyers than on benefiting local clients.").

authorized to engage in limited practice under Rule 55. Therefore, if the coverage of the Delaware LFCP were intended to parallel the source of contributions to the fund, then the fund would not cover claims relating to misconduct by attorneys who are admitted *pro hac vice* or authorized to engage in limited practice. Moreover, determining that the trustees have discretion to pay claims involving such attorneys could have significant effects on the number of claims made and the viability of the fund, especially where those categories of individuals do not contribute to the LFCP.[20] This is especially so given the significant level of *pro hac vice* participation in corporate and commercial litigation in Delaware.

Nevertheless, we conclude that the central purpose underlying the creation of the LFCP—protection of the public—supports a finding that it is within the trustees' discretion to consider claims for reimbursement for losses caused by the wrongdoing of attorneys who are admitted *pro hac vice* or authorized to engaged in limited practice under Supreme Court Rule 55. To the extent that public policy is reflected on the face of the Delaware rules, Rule 66(a)(ii), addressing the purpose of the fund,

[20] *See generally* Laurie Diefenbach, *Clients' Security Fund*, 13-Jun. NEV. LAW. 30, 31 (2005) ("Finally, the task force has been charged with developing possible sources of funding for the Clients' Security Fund, other than raising dues for active members of the Bar. One untapped source, that grows every year and actually is at risk for generating more claims, is the *pro hac vice* applications. Each year, several hundred lawyers who are licensed to practice law in states other than Nevada apply for permission to appear as counsel of record in Nevada. Thus far, none of these *pro hac vice* lawyers have generated a claim. However, as more and more come in, the exposure for such a claim increases. A portion of the fee they pay for the privilege of practicing in Nevada is suggested to augment the Clients' Security Fund balance, and perhaps even create a reserve to use for catastrophic losses.").

focuses on protection of the public and does not limit the scope of protection to claims involving only full members of the Delaware bar. Because the trustees are vested with the duty to carry out that purpose, and because Supreme Court Rule 66(a)(ii) and LFCP Rule 4(1) on their face do not limit the trustees' discretion to considering only claims that involve defalcation by members of the *Delaware* bar, the trustees have discretion to consider claims involving attorneys who were admitted *pro hac vice* or who were authorized to engage in limited practice. In order to ensure the continuing viability of the Fund, especially where the sources of contributions to the Fund do not fully correspond to the sources of potentially covered claims, other components of the trustees' discretion serve as a back stop. Specifically, when determining whether to pay a claim, the trustees have the discretion to take into account a wide variety of considerations, including the effect of paying the claim on the availability of funds for other claims, the degree of hardship imposed on the claimant, and the reasonableness of the claimant's belief that the attorney was authorized to engage in the representation.

With respect to the facts presented by the trustees, we note that the situation involving an attorney whose Rule 55 authorization was revoked or rescinded presents a rather attenuated connection to Delaware and raises questions regarding whether a reasonable member of the public would have believed that the attorney was authorized to practice in Delaware or was subject to oversight in Delaware. As

a general policy consideration, the purpose of Rule 55 is to increase the availability of counsel to represent Delaware's most vulnerable clients. To the extent that someone authorized to engage in Rule 55 limited practice misappropriated client funds within the scope of that representation, it would promote the client-protection goals of the LFCP to allow the trustees to consider a claim for reimbursement. In the facts presented by the trustees, however, the attorney's limited practice authorization had been revoked or rescinded but the person was holding himself out in Delaware as available to assist with legal matters and accepted a representation concerning a New York real estate project—the misappropriation did not occur within the scope of the limited-practice representation.

Thus, although we conclude that the trustees' discretion extends to considering claims involving attorneys who are admitted *pro hac vice* or have authorization to engage in limited practice, we trust that the trustees will take into consideration the specific facts of the particular case—such as the revocation of the limited-practice authorization, the nexus to Delaware, and the reasonableness of the client's belief that the attorney was authorized to practice in Delaware—when exercising their broad discretion to determine whether the claim merits reimbursement from the fund.[21] Moreover, given that a claim has also been

[21] *See* DEL. SUPR. CT. R. 66(g)(i) (providing that the trustees "are invested with the power, which they shall exercise at their sole discretion, to determine whether a claim merits reimbursement from the trust fund, and, if so, the amount of such reimbursement, the time, place and manner of

submitted to the New York client-protection fund, and that the matter appears to involve a significantly greater nexus to New York, the trustees might also consider deferring a final determination of whether to pay any portion of the claim until after the New York fund makes its determination.[22]

/s/ Collins J. Seitz, Jr.
Chief Justice

/s/ Karen L. Valihura
Justice

/s/ James T. Vaughn, Jr.
Justice

/s/ Gary F. Traynor
Justice

/s/ Tamika R. Montgomery-Reeves
Justice

its payment, the conditions upon which payment shall be made, and the order in which payments shall be made"); *id.* R. 66(g)(iii) (providing a nonexclusive list of factors that the trustees may consider when exercising their discretion to determine whether a claim merits reimbursement, including the "amounts available and likely to become available to the trust fund for payment of claims," the "size and number of claims which are likely to be presented in the future," the "amount of the claimant's loss as compared with the amount of the losses sustained by others who may merit reimbursement from the trust fund," the "degree of hardship the claimant has suffered by the loss," and "[a]ny negligence of the claimant which may have contributed to the loss").

[22] *See* LFCP Rules R. 4(3) (allowing the trustees to defer decision on a claim if further investigation is required, and allowing unpaid portions of allowed claims to carry forward to succeeding years).