

2015-2016

AMERICAN BAR ASSOCIATION

**Standing Committee on  
Client Protection**

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December 4, 2015

Mr. Jim Tompkins  
Senior Policy Analyst  
Washington State Office of the Insurance Commissioner  
P.O. Box 40258  
Olympia, WA 98504-0258

**Re: CR-10, Matter 2015-06: Notice of Payments of Settlements by Insurers**

Dear Mr. Tompkins:

On behalf of the American Bar Association Standing Committee on Client Protection, I urge the Washington State Office of the Insurance Commission (“Insurance Commission”) to adopt proposed R-2015-06 (“payee notification” rule).

Each state and the District of Columbia have established a lawyers’ fund for client protection to compensate clients for financial losses resulting from their lawyer’s dishonest conduct. These compensation programs, generally funded by assessing members of a jurisdiction’s practicing bar, have as their primary goal to make whole a client who has been the victim of lawyer theft.

The unfortunate truth, however, is that a lawyer who misappropriates funds from a client will rarely limit the theft to one client and it is not uncommon for a dishonest lawyer to successfully conceal the theft for several years. Once the theft is discovered, the cumulative amount of the theft is often too large to be fully reimbursed by the jurisdiction’s lawyers’ fund for client protection.

This is well-illustrated by the events surrounding the discipline and criminal prosecution of former Washington lawyer Brian Boddy. Boddy represented a number of clients in personal injury matters and failed to forward settlement proceeds. He was charged with 16 counts of theft resulting in losses to clients of nearly \$500,000. The Washington State Bar Association Lawyers’ Fund for Client Protection (“Washington Fund”) reimbursed six claimants for a total of approximately \$157,743. One of those claimants experienced losses of \$175,000, but the Washington Fund was only able to award the claimant \$75,000. See, [\*Washington Lawyers’ Fund for Client Protection 2014 Annual Report\*](#).

Preventative mechanisms such as payee notification provide greater protection to law clients by reducing the risk of lawyer theft. Arguably, a payee notification rule would have minimized or eliminated the risk of loss to Mr. Boddy's clients.

There are a number of misconceptions surrounding the adoption of a payee notification rule. Chief among them is the assertion that a payee notification rule places an unfair economic burden on insurance companies. This is not true. The cost to implement a payee notification procedure is nominal. First, the duty to notify is not triggered unless the settlement is \$5,000 or greater. Companies will have no additional obligation with small rewards. Second, the primary "cost" to insurers would occur during the initial administrative implementation. Payee notification only requires the company to send to the client the same letter, with no alterations, that is sent to the lawyer.

Another misconception is that compliance with a payee notification rule results in impermissible contact with a represented party in violation of the jurisdiction's lawyers' rules of professional conduct. The process of payee notification is administrative and does not require contact between a lawyer for the insurance company and the represented party. The "notification" that is required is not a negotiation of terms and does not include matters in controversy. It is simply notification that payment regarding a settled matter has occurred. Even in the unlikely case of direct contact between the insurance company lawyer and the represented client, Rule 4.2 of the Washington Rules of Professional Conduct permits such contact if "authorized to do so by law..."

Some insurance companies and lawyers contend that by adopting a payee notification rule the Insurance Commission will be regulating the practice of law and creating an inter-agency conflict. Payee notification does not grant the insurance commissioner any authority to regulate lawyers. Any lawyer discipline would result from a lawyers' violation of the Washington Rules of Professional Conduct. Furthermore, a payee notification rule does not affect the lawyer-client relationship or violate client confidentiality. It is a preventative measure, but adoption of a payee notification regulation does not limit the client's ability to recover losses from the jurisdiction's lawyers' fund for client protection or affect lawyer discipline.

Likewise, the Insurance Commission's adoption of a payee notification rule does not have any effect on the regulatory authority of the Washington Supreme Court to regulate the practice of law. There is no prohibition against two regulatory bodies adopting rules that serve a common goal. The adoption of a payee notification rule is simply the Insurance Commission's attempt to ensure that insurance proceeds reach the intended recipient. The practice of payee notification does not affect the rules of professional conduct, it only encourages compliance.

To date, fifteen U.S. jurisdictions have adopted some form of the ABA Model Rule for Payee Notification. See:

[http://www.americanbar.org/groups/professional\\_responsibility/resources/client\\_protection/client.html#Payee](http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/client.html#Payee).

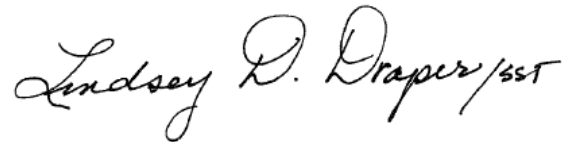
Payee notification rules in other jurisdictions have been an effective deterrent to lawyer misconduct and an effective protection device for clients. The benefits of payee notification far outweigh the minor administrative burden to insurance companies. The proposed payee

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notification rule in Washington will undoubtedly have a similarly beneficial effect. The Standing Committee on Client Protection strongly encourages its adoption.

If you have any question regarding the ABA Model Rule of Payee Notification, please feel free to contact Selina Thomas, ABA Client Protection Counsel, at (312) 988-6721 or [selina.thomas@americanbar.org](mailto:selina.thomas@americanbar.org).

Regards,

A handwritten signature in cursive script that reads "Lindsey D. Draper /sst". The signature is written in black ink and is positioned above the typed name.

Lindsey D. Draper, Chair  
ABA Standing Committee on Client Protection