Isaac Hecht Remembered

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A Newsletter for Law Client Protection Funds

The Client Protection Webb

Volume 6 Number 2

Published by The National Client Protection Organization, Inc. Fall 2003

A Message From the President

Janet Green Marbley

A Letter to the Editor published recently in the *American Bar Association Journal* was highly critical of client protection funds and the lack of protection they provide. The letter, entitled *"Security Funds Not Up To Snuff"*, was authored by "HALT – An Organization of Americans for Legal Reform". I was unfamiliar with HALT, and my first reaction was a defensive one – why is this organization attacking client protection funds?

To move beyond my initial reaction, I had to make a determined effort not to focus upon HALT, but its message, which was based primarily upon the data published in the ABA's latest *Law Client Protection Survey*. Halt's letter argued that arbitrary fund limits and inadequate financing is only "lip service" to client protection. The letter offers inaccurate data to support HALT's message.

With the help of several NCPO members, I prepared a response. In addition to correcting the inaccurate information, we acknowledged that no fund is perfect, and that there are some in need of real improvement. But that response has not put the issue at rest for me.

Those of us who are committed to providing support to funds and other programs aimed at protecting legal consumers from dishonest conduct in the practice of law must always be willing to address legitimate concerns raised about client protection. We must also continually look for ways to do what we do better. We must gather and review, no less than annually, the statistics on what we are doing. This form of self-evaluation is one way to ensure that our funds are not simply paying "lip service" to client protection.

In addition to self-evaluation, we must continue to exchange information among ourselves, other members of the legal profession, and others who share our commitment to client protection. NCPO's workshops, newsletter, and training materials are aimed at helping us to better achieve this goal.We must also look for new ways of supporting funds and improving their protections. That is why it's critically important that we react to letters like HALT's, but not simply with another letter. We must react by finding ways to improve law client protection.

Inside

Planning for the Isaac Hecht Award

Isaac Hecht, Director Emeritus and Co-founder of the National Client Protection Organization, died in Baltimore, Maryland on January 23, 2003, at age 89. Isaac was a long-time Treasurer of the Maryland Lawyers' Fund for Client Protection and, over an 18-year period, a member of the American Bar Association's Standing Committee on Client Protection and its predecessor standing committees. Isaac was an expert and frequent lecturer at national professional conferences in matters involving professional responsibility, ethics and client protection funds. At his death, Isaac was an active partner in the Baltimore law firm of Hecht & Chapper.

Shortly after Isaac's death, NCPO's Board of Directors announced its intent to create the Isaac Hecht Law Client Protection Award to honor Isaacs's extraordinary contributions to the legal profession in the United States and Canada, and its programs to protect law clients from dishonest conduct in the practice of law. The Board of Directors also authorized NCPO's Treasurer to establish a special bank account to fund the award with contributions from Isaac's family, his friends and professional colleagues.Contributions thus far exceed $5,400. More are welcome, and can be sent to A. Root Edmonson, c/o North Carolina Client Security Fund, P.O. Box 25908, Raleigh, NC 27611.

The Isaac Hecht Law Client Protection Award will be presented annually to an individual, client protection fund, or other professional association that has demonstrated excellence in the field of law client protection. "Excellence" includes significant achievements in promoting public confidence in the administration of justice and the integrity of the legal profession; the substantial reimbursement of law clients for eligible losses; the development of programs to pre-

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Isaac Hecht Remembered

Doing The Best We Can

Kenneth J. Bossong

Eulogizing his father, Henry Hecht said that two words come to mind when thinking of Isaac: love and passion. Henry then mentioned examples of those for whom Isaac had both – his wife; his children, their spouses, and his grandchildren; his clients and the practice of law with his partner; and Maryland's law client protection fund. That is honored company, indeed, for the protection fund. Henry also described the pleasure of a call from his father. On that, I can also speak from experience.

"Kehhhhnnnnn?" [In that gravelly, *basso-profundo* rumble]
"Yes?"
"Iiiiiiisaac." [As if it could be anyone else]

How many wonderful phone calls began this way!

The first such call was an invitation, 20 years ago, to meet with the ABA Standing Committee on Client Security Funds. The Committee had divided itself up regionally, with members seeking to foster relationships with their area's funds. The Committee's next meeting was in Washington, D.C., and Isaac was inviting his states' participation. Thus was Isaac the bridge for me to active participation in the ABA, and to the national client protection community. I soon realized that the idea of enhancing protection funds through personal relationships was his. It was, and is, a great idea. And it typified a great man.

The "three amigos" who founded NCPO, Isaac, Fred Miller and I, were brought together by the Standing Committee in the early to mid '80s. It was a collegial and interesting group to begin with, but we three found ourselves doing things together, even beyond the Committee functions. Stories of our families intermingled with those of our funds. As the friendship bonds grew stronger, the ideas got better. While we did not always agree, a passion for doing client protection right brought us together, and personal regard sustained us.

To the extent we took on roles, Fred was often the firebrand, I the philosopher, and Isaac the advocate for effective action. When I'd be off on some abstract, doctrinal point, I could rely on Isaac to say, "Pardon me. That's all well and good, but what are we going to *do*? I think we should..." Apart from the sheer pleasure we derived from each other's company, there was this benefit: we each knew that if we could get an idea past the other two, it had real merit and was worth pursuing.

Isaac meant what he said, and said what he meant. He was a man of tremendous accomplishment, but utterly without pretense. He did what he said he would do, and woe to those who didn't! Though he could be impatient, even his gibes were usually laced with affection. As one of the best storytellers I've ever known, Isaac would delight us, even with ones we'd all heard before. His favorite, which therefore came to be mine, recounted a conversation he had with Maryland's Chief Judge upon one of his many re-appointments as Trustee of the Maryland fund.

Reminding Chief Judge Murphy of his age, Isaac expressed some concern over his ability to complete the term. Chief Judge Murphy replied with a parable. When a man sentenced to 50 years in prison protested that he was 60 years old and could not hope to serve a 50-year sentence, the judge told the defendant to do the best he could. "Isaac," he said, "do the best you can."

Calls with Isaac ended in a special way, too. Each time, without fail, Isaac told me to give his love to my Nancy, and I asked the same for his Kitty. We both meant it.

Isaac and Kitty: what a magnificent couple! That two such bright, funny, opinionated, strong-willed people could be so devoted and in love for so long is something else to cherish. Nancy told me Kitty was special right after meeting her, and thus began a series of adventures over the years while husbands were cooped up in meeting rooms. It wasn't long before each would try harder to make trips after learning the other was going. One time I told Isaac I regretted not being able to attend an event, and he responded, "That's okay. What about Nancy?"

My last contact with Isaac was not a call, but a brief visit for which I will always be thankful. It was on Saturday, January 18. Isaac was out of ICU, but still weak. It was the only time I can remember Isaac looking anywhere near his age. After greeting him, I mentioned that they said he was improving (which was true). Isaac gathered himself, smiled, and retorted, "What about you? Are you improving?" I laughingly denied all improvement.

Isaac told me he was concerned that he might not make the NCPO Workshop in Las Vegas; he was to do the loss-prevention session, and did not want to let anyone down. He seemed relieved when I told him Fred and I had discussed my taking the presentation if he could not. I urged him to consider the ABA Forum in May to be the goal. As I left, I told him two things: that the entire client protection community of North America was pulling for him; and that he meant so much to all of us, his job was to get stronger.

Isaac Hecht spent a lifetime doing the best he could. Now, it's up to us. We could fill this edition of the *Webb* with fond remembrances of Isaac, but we honor him best with effective action. Prevent any loss we can, and pay every loss we can't prevent.

▶ *Kenneth J. Bossong is the Executive Director and Counsel of the New Jersey Lawyers' Fund for Client Protection, and NCPO's first President.*

Planning for the Isaac Hecht Award

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vent or detect professional misconduct in the practice of law; and meaningful public information programs for client protection funds, attorneys and legal consumers.

NCPO intends that the Isaac Hecht Law Client Protection Award will encourage individuals and professional associations in the United States and Canada to become effective advocates and administrators of law client protection programs.

NCPO's Board of Directors will annually appoint a standing committee to administer the Isaac Hecht Law Client Protection Award. The standing committee will solicit recommendations for the award from all appropriate sources, including state client protection funds; the American Bar Association and its entities; the Conference of Chief Justices; the National Organization of Bar Counsel (NOBC); and the Association of Professional Responsibility Lawyers (APRL). The standing committee will report its selection efforts and candidate recommendations to NCPO's Board of Directors, which shall comprise the selection committee for the award. Recipients of the award will be invited to serve on the standing committee.

The Isaac Hecht Client Protection Award will likely consist of an engraved medallion which will be presented annually. NCPO hopes to make the first presentation of the award at the ABA's National Client Protection Forum on June 4, 2004 in Naples, Florida.

NCPO's Board of Directors on November 19, 2003 appointed a standing committee to administer the first grant of the Hecht award. The standing committee consists of A. Root Edmonson, Janet Green Marbley, Frederick Miller, and William T. Ricker, Jr., with Miller as Chair (**millerfg@aol.com**). Plans for the award are still preliminary, and comments and suggestions from the client protection community are welcome, as are contributions to enable this fund to become a permanent feature of law client protection in the United States and Canada. Contact any member of the standing committee, and, of course, feel free to recommend deserving colleagues to be the award's first recipient.

Report of the Secretary

Georgia Taylor

On May 30, 2003 NCPO held its Sixth Annual Meeting in Chicago with 18 attendees. A new slate of officers was approved, as well as a proposed budget for 2003-2004. Among the topics discussed, the Membership Committee reported on its recruiting and retention efforts, the Publications Committee spoke of enlarging, and there was a report on the Nova Scotia trustee training project. Webmaster Mike Knight (NY) discussed communication issues and was the recipient of an award honoring him for his many efforts on behalf of NCPO.

Benette Johnson, a Justice with the Louisiana Supreme Court, invited NCPO to conduct their next Workshop in Louisiana, perhaps in New Orleans in spring 2004.

On July 16, 2003 the Board of Directors held a teleconference. Among the items discussed were the Isaac Hecht Award and what form the award might take (plaque, scholarship, medallion, etc.), the issues surrounding a uniform MJP rule as it pertains to client protection funds, and a resolution of the problems associated with the duplicative list serves sponsored by the ABA and NCPO. It was determined we will conduct the Difficult Claims Workshop at next June's ABA Forum in Naples, Florida.

▶ *Georgia Taylor is NCPO Secretary and the administrator of Nevada's client protection fund.*

ABA's Standing Committee Roster 2003-2004

The ABA's Standing Committee on Client Protection has new members for the 2003-2004 year. Serving with Chair Robert D. Welden of Seattle are Melissa DeLacerda of Stillwater, OK; A. Root Edmonson of Raleigh, NC; Gwendolyn D. Hodge of Little Rock, AR; Lori S. Holcomb of Tallahassee, FL; Henry A. Kelly of Albuquerque, NM, and Lynda C. Shely of Scottsdale, AZ. Liaisons include Alice E. Richmond of Boston, MA (Board of Governors); G. Fred Ours of Baton Rouge, LA (NOBC); and Janet Green Marbley of Columbus, OH (NCPO).

NCPO Plans New Orleans Workshop

NCPO's Board of Directors is planning its next Training Workshop; this one in New Orleans, Louisiana, on Friday, March 19, 2004, at The Iberville Suites Hotel in New Orleans' historic French Quarter. Hosts for the Workshop are the Louisiana Supreme Court and the Louisiana State Bar Association. Preliminary agenda plans include numerous and snappy presentations covering all important aspects of administering a client protection fund. Contact Fred Miller with suggestions for specific topics, and to volunteer as a presenter: **millerfg@aol.com**. Stay in touch with NCPO's website for further information: **www.ncpo.org**

NCPO's Annual Meeting

NCPO held its Sixth Annual Meeting in Chicago on May 30, 2003. A new slate of officers was approved, as well as a proposed budget for 2003-2004. Topics discussed were membership recruiting efforts, trustee training in Nova Scotia, and a NCPO workshop in New Orleans. NCPO Web Master Michael J. Knight, Deputy Counsel of the New York Lawyers Fund, discussed communication issues, and was presented with a special award honoring him for his contributions in developing NCPO's web site: **www.ncpo.org**

Mike Knight and NCPO President Janet Green Marbley

Media Tips for Client Protection Funds

Marla Hockfeld

What Does the Media Want?

There are ten basic principles essential for developing a good relationship with the media:

Your honesty
Your integrity
Your accuracy
The newsworthiness of your story
Use of the correct format
Knowing the deadlines
Knowing whom to contact
Knowing where to direct your release
Paying attention to details
Knowing why the media would want to use your story

How to Write a Press Release

First, you need to prepare. Gather all the facts, confirm the correct spelling of names, and determine the key points you need to cover. You also need to consider who the release is being distributed to and make sure it meets their needs.

Second, use the inverted pyramid style of writing. Start with the most important points and information and then proceed to the least important detail. This allows the editor to cut the end off if space is short and still not affect the main thrust of the story. Sometimes it is helpful to give your press release a human interest angle by providing a sample (and brief) case history of a client you've helped. Many of the community-oriented papers like this type of lead in and it will increase your chance of getting published.

Third, as you write the release, you'll need to remember not to assume anything. Don't abbreviate. Don't assume people understand legal lingo. And double-check your facts. Also, make sure you give the full title of anyone you are quoting.

Finally, your release needs a few more items before you send it off. You need to include contact information (a name, phone number, email address, cell phone number, even a website address) the media can go to if they have any questions.

When all these details are gathered, type them up in a word processing program so you can email it to them and save them the time of having to retype your information. Make sure you include a release date. If the information is available for immediate use, put "For Immediate Release" at the top.

If you are in doubt about anything, just ask. The media would rather you ask before the fact rather than after.

Make a copy of your release and a list of people you sent it to so you can follow-up if need be and track your exposure.

Dealing with the News Media

Eight tips for dealing with the news media:

Be polite and helpful. In most cases, the media person is calling you regarding a news story or similar opportunity that will help you. The media's perception of your organization is going to be shaped by how you treat them. Treat them like an important client.

Be responsive. Reporters are usually in a hurry to get the information they need to complete a news story before their deadline. Reporters at daily newspapers and reporters at TV and radio stations often call for an interview or a piece of information that they need that day. If you can't provide the information they need when they need it, the opportunity may be lost. I know it's not always possible to provide what they need that fast. But you should make every effort to try.

Put the media in touch with the appropriate person. Reporters often want to speak to the leader of your organization. However, when reporting on a hard news story or working on an investigative story, some reporters will try to get information from anyone they think might be able to provide it – regardless of whether they are authorized or knowledgeable enough to discuss the subject. Refer media calls to those designated, trained and authorized to deal with the media.

Now, if you are able to confirm or provide some facts for the reporter, go ahead and do so. However, if the reporter wants an opinion or statement on something, you'll always be best off letting the head of the committee or your spokesperson do so. Your role will be to make every effort to put the reporter in touch with the chair as soon as you can.

The best response might be "I don't know" rather than "no comment". To be safe, don't address questions you can't or shouldn't answer. And never speculate, guess or provide information that you wouldn't want the general public to know about you or your organization.

The best response to a tough question is often to say something like, "I don't have that information, but I'd be glad to put you in touch with someone who might." Or, let them know you just found out about that situation and don't want to respond without all the facts. Tell the reporter when you'll call them back and make sure you do so.

Unless you're a seasoned veteran dealing with a reporter you've known and trusted for years, don't talk to reporters "off the record." Remember that anything you say to a reporter can be quoted in print or on radio and TV. This is especially important in a potential crisis situation.

Answer questions directly, but do not elaborate on questions you don't like. For example, if you are asked why the public has such a negative image of lawyers, don't feel compelled to provide a whole list of reasons. A good response would be to say you haven't seen any data on the subject, but the lawyers in your state are doing positive things. This will give you an opening to list the positive things happening in your community and the state and with your organization. And never mislead or lie. Your credibility will go down the drain.

Know your audience. Most people don't understand legal terms or procedures, so keep your comments simple. When doing an interview for a newspaper or magazine, you can talk more in depth than when you are doing a television or radio interview. Short sentences and lively quotes are great for radio interviews. And when doing a television interview, make sure you don't speak too fast so everyone can understand you.

Get the basics. When the media comes calling, ask the reporter for her name, phone number, e-mail address, and the name of the media organization she represents. Whenever possible, find out what type of information they are seeking and how soon they need it. Then make sure you communicate all this to your organization's spokesperson. Finally, take time to prepare your response and deliver it with confidence. Don't allow report-

ers to pressure you into talking if you are not ready.

Always maintain your professionalism and don't be shy about following up. You don't want to stoop to the level of an unprofessional reporter. If the reporter's tone or behavior becomes intolerable, politely excuse yourself from the interview. And after the interview is published, if you feel you were misquoted or that an interview agreement was violated, point it out to the editor.

Now, let's say all these media calls you are getting are because of a scandal that's occurred, what do you do? Every situation is different, so here's just a sampling of some of the actions you can take:

Make sure you have a designated spokesperson. Or, say, that spokesperson is unavailable, hold an emergency conference call with your committee members, come up with a consensus on how you want to respond to media inquiries, and quickly prepare a written statement that may be provided to reporters. This way you avoid not commenting at all and you hopefully won't have conflicting statements being issued by several different members of your committee.

You can write letters to the editor to correct misimpressions or misinformation.

You can write and submit an editorial (sometimes called an op ed piece) which explains in detail your stance or opinion on a certain matter.

Arrange for your spokesperson to appear on a public affairs show, radio and/or TV.

Call a press conference if need be.

Return phone calls and if you can't comment at that time, let them know when you can. This will keep the media from hounding you.

And finally, if the situation is more than you can handle, you may want to turn things over to a public relations agency or consultant who has experience in crisis management.

Upgrading the Reputation of Honest Lawyers

Most client protection organizations have brochures that tell about their program. These are great to have available for when people call you requesting information; but, it is sort of a passive way to communicate with people.

To promote your client protection fund, you must communicate. You must make potential clients and supporters aware you exist. And you must help them understand what you do and how you can benefit them.

Organizations mostly communicate with the public through press releases and public service announcements. Success depends on creating awareness that you exist and promoting an understanding of your services. By learning about the media and what their needs and requirements are, you will greatly increase the chance that your press releases and public service announcements will get used.

Rather than viewing the media as your enemy, it's important that you view them as a bridge that transports your message to the public. Maybe you've submitted press releases in the past and never saw them get used or printed, so you've given up.

You've got to remember, the media receives a huge amount of information daily. Your story competes for the same space and time as the other stories. To be successful, you must understand the needs of the media and lots of times this simply involves picking up the phone, finding out the right person to send your information to, how far in advance they want it and in what format (email, mail, or fax) and then just do what they tell you.

▶ *Marla Hockfeld is the former Director of Communications for the State Bar of Nevada and Editor of the award winning magazine,* ***Nevada Lawyer****. She holds a B.A. in Communication, with a major in Public Relations, from the University of Alabama, and is an active member of the National Association of Bar Executives' Communications Section.*

This article is adapted from Ms. Hockfeld's presentation at NCPO's Training Workshop in Las Vegas on February 29, 2003.

National Forum in Florida

The ABA's Standing Committee on Client Protection will hold its 20th National Forum on Client Protection June 4-5, 2004, at the Registry Resort, in Naples, Florida. NCPO will conduct this year's Difficult Claim Workshop. Several members of NCPO will serve on panel discussions.

The Forum is an informational and educational program for professionals working in the area of client protection including client protection funds, fee arbitration and lawyer-client dispute resolution programs. It is an open arena for the exchange of ideas and provides a platform for all colleagues in the client protection field to foster ideas and share their experiences.

Harry Lee Anstead, Chief Justice of the Florida Supreme Court and Roy L. Glass, Chair of Florida's client protection fund will make the opening remarks at this year's Forum. Panel discussions will include: actuarial principles as applied to lawyers; funds for client protection; bankruptcy and the recoupment of claims paid; custodianships; judicial review of fund determinations and the training of fund trustees. There will also be Difficult Claims and Fee Arbitration Workshops and a Town Hall Meeting. During the 20th National Forum, the NCPO will present, for the first time, its *Isaac Hecht Law Client Protection Award*. The award is in honor of Isaac Hecht, a long-time Trustee of the Maryland client protection fund, an 18-year member of the Standing Committee.

If you have any questions or need any additional information, please contact John Holtaway, ABA Client Protection Counsel at (312) 988-5298, **jholtaway@staff.abanet.org.** Registration materials will be mailed out in February 2004 and will be available on-line at: **www.abanet.org/cpr/prconf.html.**

Some Difficult Claims in California

Lori Meloch

The Client Security Fund Commission in California has been challenged by two lawyers who joined forces with a disbarred lawyer and a paralegal, among others, to supposedly provide representation to criminal defendants to obtain early release from prison.

The disbarred attorney and paralegal created a corporation which they used to publish a magazine that is circulated in prisons. The enlisted lawyers, who allow their names to be used as the front for the corporation, appear in "full page" ads that feature their names and pictures. The ads claim that the specifically named lawyers can obtain early release from prison for the inmates, as well as provide other services if needed. The telephone number in the ad is the telephone number for the corporation.

The lawyers entered into contracts with the disbarred lawyer and the paralegal whereby they shared legal fees with them and the others involved in the corporation. All intake functions, client screening and fee collection is done by the non-attorneys who run the corporation. Clients were instructed by the lawyers on billing statements and in dealings with the office staff to make checks payable directly to the corporation. The lawyers were not listed on the corporation's bank accounts into which the checks and other payments were deposited.

No work is performed by the lawyers, or anyone else, for the inmate clients. Usually, it is the family members of the inmates who pay the fees to the corporation upon the promise that the named lawyers will visit the inmates and begin work to obtain early release. In the approximately 50 applications that have been filed with the fund, there were rarely any visits to the inmates, and there were no documents reviewed or filed. Eventually, requests for information from the clients or the family members are ignored, or the telephone number is changed.

The difficulty with these cases is meeting the requirements of Rule 2 of the Client Security Fund rules, which provides that the funds must have come into the lawyer's hands. In most of these cases the funds were paid directly to the corporation.

In objecting to payments from the fund, these lawyers argue that they did not receive the advance fees. They claim that the requirements of Rule 2 have not been met, because the advance fees were made payable to the corporation and given to employees who deposited the funds into bank accounts on which the lawyers were not signatories.

The Commission has determined in its tentative decisions in these matters that the requirements of Rule 2 have been met. Although the payments were made through the corporation, rather than being paid directly to the lawyer, the Commission has concluded that these funds came into the lawyer's hands. The corporation was effectively the lawyer's office, he or she participated in illegal fee sharing with the non-attorneys at the corporation and the lawyer had an obligation to supervise the office, and to stay informed as to what the non-attorneys in the office were doing in their dealings with clients. This duty included staying informed regarding the collection of legal fees and the work or lack of work being performed for clients.

The Commission concluded that there was such reckless disregard of the lawyer's duties to the clients that the conduct rose to the level of dishonest conduct as required under Rules 2 and 6 of the fund's rules.

The Commission determined that the dishonesty included Rule 6(b), because the lawyer failed to perform more than an insignificant portion of the services he agreed to perform and Rule 6(e), because the lawyer engaged in acts of deceit which proximately led to the loss of money by his or her clients.

▶ *Lori Meloch is Senior Counsel at the State Bar of California's Client Security Fund.*

Hawaii Eyed

The ABA/NCPO Consultation Team (John Holtaway, Janet Marbley and Bob Welden) are greeted in style by Hawaii Trustees Gayle J. Lau, Curtis Y. Harada, Michael D. Miyahira, and Magali V. Sunderland, as well as Hawaii Fund Administrator Carole R. Richelieu, at the historic Willows Restaurant. The next day they commenced their rigorous examination of Hawaii's law client protection system.

Nevada Supreme Court Justice Nancy A. Becker

John Gleason, Howard Stern and Chuck Goldberg discuss the unique role of fund trustees.

Las Vegas Workshop
A Huge Success!

Janet Green Marbley

On February 28, 2003, more than 40 client protection administrators, staff, and trustees, gathered in Las Vegas, Nevada for the fifth NCPO Training Workshop. The Nevada Client Protection Fund and the Nevada State Bar Association hosted the workshop, which was a great success. Georgia Taylor and her Nevada colleagues, as well as NCPO's planning committee, are to be commended for a job well done!

The Workshop was held at the Tuscany Suites Hotel in Las Vegas. A reception was held the night before the Workshop began, followed by dinner for the group on Las Vegas' legendary "Strip". The reception and dinner provided a wonderful opportunity to meet and greet one another while enjoying the wonders of Las Vegas.

The Workshop began with welcoming remarks by Justice Nancy A. Becker of the Nevada Supreme Court. The Workshop agenda included a presentation on 12 different areas of client protection, including how to interview claimants, dealing with the media, the role of trustees, loss prevention programs, and sanctions and restitution. The Workshop provided an excellent overview of the various topics, and provided an opportunity to discuss and exchange information.

NCPO was founded to be an educational resource for the exchange of information among client protection funds throughout the United States and Canada. The Las Vegas Workshop provided an excellent opportunity to do just that and more. Thanks again to Georgia Taylor, Fred Miller, and the other members of the planning committee, the Nevada State Bar, and to the Workshop participants.

Coffee Break. John Holtaway and Chuck Goldberg

Welcome! Deborah Davis, Marj Perrin and Michelle Berkey of the Nevada State Bar

Root Edmonson discusses coping with abandoned law practices.

▶ *Janet Green Marbley is NCPO's President, and the Administrator of the Ohio Supreme Court's Client Protection Fund.*

When is a Loan Not a Loan?

Robert W. Minto, Jr.

For client protections funds, this seems to be the $64,000 question when a client loans an attorney money and the attorney fails to repay the loan.[1] I hope to place the question in perspective from the frame of reference of a protection fund's purpose and over-riding obligation: to protect clients from attorneys who steal their money or property. In this regard, ethical rules are largely irrelevant (unless the fund's rules specify otherwise).

If a lawyer accepts a loan of money from a client and executes a debt instrument (note), in favor of the client and subsequently defaults on the note, can the client make a claim for reimbursement? Short answer: generally no. Long answer: still generally no, but it may well depend on facts that are not clear from the "four corners" of the transaction. Let's examine the elements required for most funds to be able to pay the claim: (1) an attorney-client relationship (2) a taking of client property by the attorney, and (3) a terminal determination of attorney wrongdoing related to the taking (generally in the form of disbarment, suspension, criminal conviction or civil judgment).

For this discussion we can assume an attorney-client relationship, but can we assume that the relationship is tied to the loan or do we even need to? I think it is safe to say it probably doesn't matter. In every case I have seen, the only reason that the loan was made was because the client trusted the lawyer and wanted to help a trusted advisor out of a financial situation. In short, these clients are not generally in the lending business and wouldn't have made the loan but for the attorney-client relationship.

Having cleared hurdle #1 we turn to the issue of a taking by the attorney. If we have a loan, we have an expectation that the funds would at some point be returned (presumably with interest) but what we don't have is the usual entrustment of funds for the client's benefit.

The loan evidences an intent by the parties that the attorney would use the money for his or her own purposes and that it would be repaid as part of a commercial transaction between a borrower and a lender. Does the mere existence of the trusting relationship between the attorney and client change the nature of the transaction? I don't believe so.

The last criteria offers us little help as a civil judgment on a promissory note would not prove or even indicate a wrongful act on the part of the attorney, and criminal conviction, disbarment or suspension based on failure to repay the note is not likely, short of a really strong case of fraud in the inducement.

Where does this leave us? No one can seriously argue that the attorney acted appropriately; this because of the position of power enjoyed by the attorney in the transaction.[2] Surely the client should be repaid by somebody. It's also true that many, if not most, experts agree that it's a rare case involving these facts where it's appropriate for a client protection fund to respond with repayment. We must remember that the fund is not a guarantor of attorney conduct or ethical behavior where misappropriated client funds or property are not involved.

In the case of a loan, sadly, at the time the attorney uses the funds, they were his or hers to use, just as they would have been had the loan been made by a commercial lender. Consider your view of our scenario if the client involved was a commercial bank. We would not even be discussing the issue where a bank loan was involved. However that same bank has the same privilage (note that I did not say "right") to make a claim against the fund if the attorney steals from moneys advanced by the bank to an attorney's trust account as part of a commercial closing where the attorney is the closing agent.

So why is there is a difference about how we view the bank and the individual lender? Simply it is level of sophistication. The bank knows the risks involved in making loans and the individual may not. On the other hand the individual may also be a very sophisticated business person every bit as capable as the bank in understanding of the risk. So is the difference one of client sophistication rather than individual vs. corporate?

Sophistication may be relevant in making discipline and ethics decisions, but it has no place in the determination of the standard of care of money held in trust by attorneys. Attorneys owe the same duty to the sophisticated and the unsophisticated alike whether they are corporations or individuals and our determination to pay or not to pay must likewise be based on facts, not emotions. So as bad as we feel about the individual who loses money from a loan to an attorney, protection funds must apply the rules they have been given.

It follows that discipline may be appropriate where a client lacks sophistication, but a payment by a protection fund would not be. After all, as decision makers for client protection funds, we must constantly remind ourselves, as in the case of uninsured attorney malpractice, there will be times when we might like to make payment from the fund, but it is simply not appropriate. Until courts and bar associations provide the funding and the mandate for comprehensive client protection, we can't be the source of payment for all attorney-client ills.

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1 *Every fund has a different spin on the issue so I will editorialize only from the perspective of my vantage point as a member of the State Bar of Montana Fund for Client Protection and the President of a Lawyers Professional Liability Insurer.*

2 *This, of course, assumes an unsophisticated client.*

▶ *Robert W. Minto, Jr. is a Trustee of the Montana Fund For Client Protection and the President and CEO of the Attorney Liability Protection Society (ALPS) of Missoula, Montana*

MJP & Safe Harbors - Safe For Whom?

Kenneth J. Bossong

Most jurisdictions are likely considering various concepts of multi-jurisdictional practice (MJP). What follows is just one person's opinion, but I do find some of this stuff scary, from a client-protection standpoint.

Stated simply, the issue is to what extent, if any, and under what circumstances a lawyer not licensed in a jurisdiction may nevertheless be permitted to practice there. Situations in which unlicensed lawyers may practice in a jurisdiction have come to be referred to as "safe harbors"; that is, areas in which it is safe to operate without fear of prosecution for the unauthorized practice of law.

The biggest problem with many safe harbors under consideration is their vagueness. Few support the idea that lawyers admitted in any jurisdiction should be able to just wander anywhere they can convince someone to hire them. Not to worry, we are told, practice in our jurisdiction by lawyers licensed elsewhere will be limited to that which is "temporary" or "occasional", or "related" somehow to a practice where licensed. Perhaps the unlicensed lawyer has some sort of relationship with someone who is licensed, or (one of my favorites) is thinking about asking to be admitted *pro hac vice* in a matter. Such language provides illusory protection, and invites all sorts of mischief:

- Enforcement will be problematic, at best. It will take years of litigation to find out how occasional "occasional" has to be, for example, if it is enforceable at all.
- Such "standards" restrain only the scrupulous. Inevitably, the least scrupulous will be the most brazen in utilizing safe harbors. They will do whatever they want, wherever they want, and worry about arguing the definitions of these vague terms in the unlikely event they ever get caught.
- The clients they find, or who find them, are likely to be among the more vulnerable and least sophisticated.
- Most MJP schemes have no mechanism for knowing who is taking advantage of the safe harbors. No one in the regulatory system has any way of knowing who they are, what they are doing, or even that they are out there.
- The dangers will be brought into bold relief when things go wrong. While flitting in and out of jurisdictions, some of these folks are going to act badly. There will be unethical behavior and malpractice with and without coverage.

I am most concerned about what happens when they steal. Faced with such a scenario, client protection funds unable to consider claims against persons not licensed in their jurisdictions have a couple of choices, both lousy. Changing their rules to permit consideration of such claims greatly increases exposure, with no additional revenue. While a terrible prospect for most funds, the alternative is even worse: no remedy for their victimized citizens (other than to leave them to the mercy of the fund in the miscreant's home state).

I don't care how easy or difficult a jurisdiction wants to make it to be authorized to practice there. I also don't care what being authorized to practice is called. For those making these tough calls, I do urge three basic principles:

However easy or hard you want to make it, and whatever you want to call it, being authorized to practice law in your jurisdiction is significant. Who is, and who is not, so authorized must be known, quickly and easily.

Anyone who has the privilege of being authorized to practice in your jurisdiction ought to be held accountable and responsible, at least to the extent of being subject to discipline and the annual assessment. (The latter presupposes, of course, that your fund benefits from the preferred method of financing: an annual assessment.)

The client protection fund should have jurisdiction to consider claims based on the dishonest conduct of anyone authorized to practice law in your jurisdiction.

(Editor's Note: Keep reading.)

▶ *Kenneth J. Bossong is Executive Director and Counsel of the New Jersey Law Client Protection Fund, and NCPO's first President.*

MJP and Law Client Protection

Charles Goldberg and John S. Gleason

The agenda for NCPO's workshop in Las Vegas included an informative presentation of the American Bar Association's new model rules on the multi-jurisdictional practice of law. Clearly there will be practical problems for client protection funds when they are confronted by losses caused by "out-of-state" lawyers, but who are lawfully practicing in their jurisdictions pursuant to these "MJP" rules.

At the workshop, we suggested that NCPO work on developing a uniform model rule to prevent disputes between jurisdictions where a lawyer who is licensed in State A causes a loss in State B, where the lawyer had been admitted pro hac vice, or had been engaged in law-practice activities. We propose that NCPO and funds nationwide consider a uniform rule modeled after the "most significant relationship" approach set forth in Restatement (Second) of Conflicts of Law §§ 6, 145 and 188. We offer for study and consideration the following:

In claims involving dishonest conduct by a lawyer who is licensed in State A but is either admitted *pro hac vice* in State B, or who has rendered legal services pursuant to an attorney-client relationship in State B where the loss to the client has occurred, the loss should be borne by the law client protection fund where the lawyer is licensed and has his or her "principal place of business." An analysis of a lawyer's "principal place of business" is to be determined after assessing which state has the most significant contacts with the dishonest lawyer. Among the factors to be considered are:

- **The domicile of the lawyer;**
- **The residence of the lawyer;**
- **The number of years the lawyer**

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Message from Seattle

Editor's Note: Bob Welden, new Chair of the ABA's Standing Committee on Client Protection, has accepted an invitation to author an article of interest for each edition of *The Client Protection Webb*. Here's the first.

There's a lot more to client protection than client protection funds. Obviously. As an organized bar, lawyers do a lot to protect clients, as evidenced by the fact that every state in the Union has a client protection fund. True, some are stronger than others, but there is at least some recourse when a client is the victim of a dishonest lawyer.

However, as a profession we have not done much to protect clients from the negligent, incompetent or disabled lawyer who harms clients through malpractice. Surprisingly, there has been no study to show whether uninsured lawyers are harming clients, or whether malpractice judgments are not pursued or not collected because of the lack of professional liability insurance. But client protection fund trustees and administrators have some empirical evidence that clients are being harmed. Every year a number of fund applications are denied on the grounds that the application is based on negligence or malpractice, and not on dishonest conduct.

In the brief space of this article I can only touch on some of the proposals that have been made to address this issue. Maybe, as some suggest, they are solutions in search of a problem, or maybe they reflect one of the great failings of the American legal system. To get some flavor of the debate on this issue, read the *pro* and *con* statements on the ABA website at ***www.abanet.org/legalservices/downloads/lpl/mandatorydisclosure.pdf***.

Here are 3 approaches that have been proposed:

- Disclosure. The Standing Committee on Client Protection proposed an amendment to Model RPC 1.4 that would require that lawyers disclose to prospective or existing clients that they do not maintain malpractice insurance. Although supported by the National Organization of Bar Counsel, no other ABA entity supported the proposal. Alaska, New Hampshire, Ohio and South Dakota have adopted amendments to their rules that require such disclosure.

As an alternative, the Standing Committee will propose a *Model Rule on Financial Responsibility*, similar to the ones adopted in Delaware, Michigan, Nebraska, North Carolina and Virginia. The proposed Model Rule requires lawyers to disclose on their annual registration statement whether they maintain malpractice liability insurance or have another form of adequate financial responsibility. This information would be made available to the public by the registration authority.

- Establishment of funds similar to client protection funds that would provide compensation for some minimal level of damage caused by malpractice. What the limits would be and how claims would be determined have not been fully discussed, but the idea is that a fund like this would protect clients from harm where the lawyer had no insurance, or the claim was so small that the client could not reasonably prosecute a claim.
- Mandatory insurance. The reality is, this is not likely to happen. Oregon is the only U. S. jurisdiction that requires lawyers in private practice to be insured, through the Oregon Professional Liability Fund. In every other jurisdiction in the U. S. where it has been proposed, the bar has successfully opposed it. The reasons for this can be debated at length. Some call it the bar's "dirty little secret" that lawyers are not required to be insured. They point out that in many states you have to be insured to roof a house, manicure a poodle, or drive a car, but not to deal with the most important legal affairs of clients.

We need to think about this, and talk about it, and argue about it, and see what needs to be done. And then we need to try to do it. See you in New Orleans.

Archer Anoints Welden

Dennis Archer, President of the American Bar Association, has appointed Robert D. Welden to serve as Chair of the ABA's Standing Committee on Client Protection for 2003-2004. Welden is General Counsel of the Washington State Bar Association (WSBA), and a former Regional Vice-President of the National Client Protection Organization (NCPO).

The ABA Standing Committee on Client Protection, which works closely with NCPO, provides support for client-protection programs in every jurisdiction in the United States and Canada. The committee also examines practice issues concerning the unauthorized practice of law, model fee arbitration and mediation rules to resolve disputes between clients and their lawyers, and promotes other client-protection programs.

Washington was one of the earliest states in the United States to champion client protection, and has had a client-protection program in place since 1960. In 1992, the WSBA and the Washington State Supreme Court instituted a mandatory client-protection assessment for all its active lawyers. "Washington has been a leader in the realm of client protection," said Welden, who has been involved in issues relating to client protection since 1985, and a member of the ABA Standing Committee on Client Protection since 2001, "and we have one of the best programs. It is a great privilege to be appointed to this position."

Welden was a staff attorney for the WSBA from 1981 to 1988, and in 1988 became the Bar's general counsel. Prior to coming to the WSBA, he was in private practice, and staff attorney for Seattle Indian Center Legal Services and the Seattle-King County Public Defender's Office. Since 2002 he has been administrator of the Washington Practice of Law Board, and from 1998 to 2001 was vice president of the NCPO. He has been chair of the ABA Advisory Commission on Lawyers' Funds for Client Protection since 1999, and was a member of the ABA Access to Legal Services Committee and the ABA Task Force on the Model Definition of the Practice of Law. Welden earned his J.D. in 1970 from the University of Washington.

MJP and Law Client Protection

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has been licensed in each jurisdiction;

- **The jurisdiction where the lawyer votes;**
- **The jurisdiction where the attorney is licensed to drive an automobile;**
- **The location of the lawyer's principal office;**
- **The location where the attorney-client relationship arose;**
- **The primary location where the legal services were to be rendered;**
- **The place where the loss arose; and**
- **Any other significant contact.**

Doubtless there are other approaches that might be utilized, but we submit that a sound conflict of law rule, regardless of how it is formulated, should be adopted by each state. This is a wonderful opportunity for NCPO to take the lead.

(Editor's Note: President Janet Green Marbley invites readers' comments and suggestions on the Goldberg-Gleason proposal. E-mail Janet at: ***marbleyj@sconet.state.oh.us/.)***

▶ *Charles Goldberg is Chair of the Colorado Law Client Protection Fund, and John S. Gleason is Bar Counsel for the Colorado State Bar.*

Help!

The Client Protection Webb needs news and feature articles from every jurisdiction in order to serve its mission as a meaningful newsletter for the client protection community in the United States and Canada. Remember, the *Webb* is the only newsletter we have. Items needed include rules changes, examples of difficult claims, your fund's claims experience, court decisions, personnel changes, policy and rule proposals. E-mail your contributions to the Editor: **millerfg@aol.com**.

News In Brief

More Reimbursement in Illinois

Eileen Donahue of Chicago reports that effective April 1, 2003, the Illinois Client Protection Program has increased its $10,000 award maximum to $25,000; and its $100,000 aggregate maximum per dishonest lawyer to $250,000.

Ditto in Ohio

The Supreme Court of Ohio has approved an increase in its client protection fund award limit from $50,000 to $75,000. So reports fund Administrator Janet Green Marbley, who says that the increase was effective on August 1, 2003. Also, that the Ohio fund is attempting to get in place a trust account overdraft rule, and an insurance payee notification rule.

Claims Decline in New York

Reimbursement claims to the New York Lawyers Fund continued to decline in 2002. Timothy J. O'Sullivan, the fund's Executive Director & Counsel, cited several reforms in New York for the downward trend in claims, including the court system's "bounced check rule" and consumer education programs. After climbing steadily throughout the 1990's to a peak of 625 reimbursement awards in 1997, the number of new awards in 2002 dropped to 187. The fund provides $300,000 coverage for each eligible loss. Nearly all losses resulting from the theft of law client funds are fully reimbursed.

LawyerTrust Accounts and Medical Liens

The Oklahoma Supreme Court May 27 publicly reprimanded a lawyer who disbursed settlement proceeds from a personal injury action without notifying the medical providers who had a claim on the money, or without researching controlling law governing the priority of medical providers' liens (*Matter of Taylor*, 5/27/03)

Getting Tough(er) in Florida

The Florida Supreme Court suspended for three years a lawyer who stole more than $62,000 in legal fees that belonged to his law-firm employer, and announced that henceforth the theft of law firm funds will carry the presumptive sanction of disbarment. In the court's *per curiam* opinion, the court ranked the transgression on the same plane as stealing from clients, saying that that both types of theft constitute very serious violations of the public trust. (*Matter of Arcia*, 5/29/03)

Open for Business Again in New Mexico

Christine Halter, Director of Member and Public Resources for the State Bar of New Mexico, reports that "we are once again taking claims for the client protection fund. It is being reinstated as previously administered with a cap of $2500 per claimant." The State Bar's Board of Commissioners has approved a $50,000 allocation to the fund from the State Bar's general fund for 2004. The Supreme Court is considering policy and rule recommendations submitted to it by the American Bar Association. The State Bar closed the fund on January 31, 2003, when the Supreme Court refused its request for a $15 lawyer assessment to maintain the fund's solvency.

Payouts Grow in New Jersey

The Trustees of the New Jersey Lawyers' Fund for Client Protection, which is funded by the Garden State's lawyers and judges, recently announced $650,695 in reimbursement awards to law clients of 16 dishonest lawyers. The protection fund provides $250,000 coverage for individual losses, with a maximum aggregate limit of $1 million per attorney.

Malpractice Insurance Disclosure Spreads

Oregon is the only state which requires lawyers to maintain malpractice insurance. But recent court rules in Michigan, Nebraska, North Carolina and Virginia require lawyers to disclose annually whether they carry malpractice insurance. In Nebraska, Virginia, and North Carolina, that information will be available to the public. Michigan is collecting the data for "statistical purposes" says a bar official, and no public disclosure is contemplated. Going even further, rules in Alaska, New Hampshire, Ohio, and South Dakota require lawyers in those states to inform clients and prospective clients if they do not maintain minimum levels of malpractice

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News In Brief

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coverage. Stay tuned.

New Trustees in Maryland

Janet Moss, Administrator of Maryland's client protection fund reports three new Trustee appointments by the Maryland Court of Appeals: attorneys Patrick A. Roberson, Cecelia Ann Keller, and Leonard H. Shapiro. Barbara Ann Spicer, Vice-chair of the Board, has been elected Chair of the Board of Trustees to succeed Richard Reed.

Progress Continues in Colorado

Charles Goldberg, Chair of Colorado's law client protection fund, has co-authored with Alex C. Myers, a third-year student at the University of Denver College of Law, a comprehensive analysis of the Colorado fund's history, structure, procedures, and experiences."The Colorado Attorneys' Fund for Client Protection" was published in the November 2003 issue of *The Colorado Lawyer*. The fund was established by the Colorado Supreme Court in 1998. Thus far it has reimbursed eligible victims $235,141. The fund has a $25,000 maximum limit on awards. E-mail Chuck Goldberg for a copy of the monograph: **cgoldberg@rothgerber.com.**

Last of the Wine

A New York City lawyer who bought a bungalow in Hawaii and a world-class wine collection while stealing from the accounts of disabled and mentally ill people he had been appointed to protect as legal guardian has been sentenced to serve a three to nine-year prison sentence. The lawyer was disbarred after pleading guilty to stealing more than $2.1 million from 17 incapacitated clients. Fortunately, state law requires guardianships to be insured, and all victim losses have been covered. Kress' wine collection, which was stored in New Jersey, was sold at auction for several hundred thousand dollars to repay victims and creditors.

Reimbursement Rises in Oregon

Sylvia E. Stevens, Assistant General Counsel of the Oregon State Bar, reports that the State Bar's law client protection fund paid $98,664 in reimbursement in 2002. Claims pending at year's end totaled $108,000. The maximum limit per loss in Oregon is $25,000. The fund is financed by a $5 annual assessment on Oregon's lawyers. The largest number of claims seek reimbursement of unearned legal fees, and the largest losses involve the theft of trust and estate assets.

L.A. Law

The National Law Journal reports that the District Attorney of Los Angeles has created a task force that has the exclusive assignment of prosecuting lawyers who have committed crimes, most often against their law clients.The three-year old unit has thus far won 16 convictions, and has eight cases pending. There are about two dozen open cases under investigation by the three assistant district attorneys who staff the special unit. The cases prosecuted include the theft by disbarred lawyer Leonard Samuels of a $190,000 medical malpractice settlement that alleged a failure to diagnose his client's stomach cancer.The client died before Samuels' trial.

News from Nova Scotia

Victoria Rees reports that her fund has been struggling with a multitude of unearned fee claims, as well as lawyers loaning, borrowing and brokering loans for and from clients. The fund considered a policy which would deny unearned fee/retainer claims, but opted for a new policy based on the ABA's Model Rules and others in U.S. and Canadian jurisdictions. Related amendments to the Nova Scotia Rules of Ethics and trust account regulations respecting loaning, borrowing and brokering of loans by lawyers is under consideration.There's also a new protection fund up there called the Land Registration Act Compensation Fund. Created by the Nova Scotia bar in partnership with the provincial government, the fund's purpose is to compensate losses arising from fraud and dishonesty under a new Land Registration Act system. Contact Victoria for further information: **vrees@nsbs.org.**

Full Reimbursement to Massachusetts Victims

Karen D. O'Toole, Assistant Board Counsel for the Massachusetts law client protection fund reports that the fund's 2000 Annual Report has been posted on the fund's handsome new website: **www.state.ma.us/ClientsSecurityBoard/**.The fund reimbursed $1.1 million to 69 eligible law clients in 2002, fully reimbursing nearly every loss.The fund closed the year with 115 pending claims, alleging $10.9 million in losses, another new record.

Reforms in Michigan

Victoria V. Kremski, Assistant Regulation Counsel for the State Bar of Michigan reports that the Supreme Court has approved a $15 annual assessment on each lawyer to finance the law client protection fund.The Court has also appointed a special committee to review all aspects of the fund's structure and operations, including insurance and bonding for risks now covered by the fund..

Impaired Lawyers and Client Protection

The ABA's Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 03-429(6/11/03) which identifies the obligations of law partners and supervisors when a law firm colleague develops a mental impairment which threatens the firm's clients.

In Memorium

Gilbert A. Webb, Esquire

The Client Protection Webb
The Client Protection Webb is a public-interest publication of the National Client Protection Organization, Inc.

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