

# Approaching The End

By William D. Ricker, Jr.

## Message from the President

In the last issue of *The Client Protection Webb* I shared some thoughts concerning NCPO's first four years. As I complete my tenure as NCPO's President, let me share with you some thoughts about my two years as President and about the next two years under the presidency of Janet Green Marbley of Ohio. It has been challenging to step into the shoes of founding NCPO President Ken Bossong of New Jersey, and comforting to know that Janet will capably correct my missteps. My thoughts about client protection can be summed up by quoting Pogo, that great philosopher of the Okefenokee Swamp, who opined that we were surrounded by insurmountable opportunities. Indeed we are.

Over the last several years, Ken and I have been working on developing interest in a law school symposium on client protection, but, as my greatest disappointment of the last two years, I must report that we have not yet accomplished our goal. Client protection programs are no different than any other part of our profession. They need to be reviewed and renewed on a regular basis. With Janet keeping us on our toes, Ken and I will continue to work to develop a symposium to give client protection the respect it deserves, to ensure it receives a little scrutiny, and to create the basis to develop standards with which to keep funds accountable.

Each of you can contribute to NCPO by keeping us abreast of developments in client protection in your jurisdiction. While reports of new developments help fill the pages of the *Webb*, more importantly, new programs help expand the influence of client protection. All of the ABA model rules designed to prevent theft in the first instance or to catch it early were first tried in one or two jurisdictions, found to be effective, and then placed in the pantheon of model rules. You can also help by sharing your ideas for improving NCPO's service to its members. I recently received an e-mail from Ruby Cochran of New Jersey with a proposal to make our website more user friendly as a greatly expanded source of information about client protection programs with links to each jurisdiction. Our webmaster tells me her idea can be easily (well perhaps he did not say easily) implemented and I look forward to using the addition.

Let me finish this swan song by thanking all of you for the opportunities you gave me to expand my knowledge of national client protection issues over the last two years. I have thoroughly enjoyed my tenure on the several ABA committees that go with the presidency, and, even more, participating in two ABA state client protection fund consultations. Most importantly, I treasure the opportunity I have had to get to know so many of you. My appreciation is exceeded only by my confidence in knowing that the gavel is being passed to Janet's very capable hands. ■

## Nominating Committee Report

The following slate of leaders will be proposed at the Annual Meeting in Vancouver.

### President

Janet Green Marbley (Ohio)

### President-Elect

Carole R. Richelieu (Hawaii)

### Director-at-Large

Betsy Brandborg (Montana)

### Secretary

Georgia Taylor (Nevada)

### Treasurer

A. Root Edmonson (No. Carolina)

### Vice-President (Northeast)

Karen O'Toole (Massachusetts)

### Vice-President (Midwest)

Eileen W. Donahue (Illinois)

### Vice-President (Southwest)

Linda Shely (Arizona)

### Vice-President (Southeast)

David Shearon (Tennessee)

### Vice-President (West)

Martha Gonzalez (California)

### Vice-President (Canada)

Victoria Rees (Nova Scotia)

### Counsel

Frederick Miller (New York)

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authorized to provide such services across the country. Developments are shared with committees and commissions and made available to members, the public and regulatory agencies responsible for the enforcement of unlicensed practice of law statutes.

The current members of the Standing Committee are: Lynda C. Shely, Chair, Phoenix, AZ; Melissa DeLacerda, Stillwater, OK; Sylvia E. Stevens, Lake Oswego, OR; Thomas W. Sumners, Jr., Trenton, NJ; James E. Towery, San Jose, CA; John A. Weiss, Tallahassee, FL; and Robert D. Welden, Seattle, WA.

## Client Protection Consultation Program

For many years, the Committee has provided consultations to lawyers' funds for client protection (also known as client security funds) upon invitation by the highest court in the jurisdiction or the bar leadership. The on-site consultation program offered by the Committee involves sending a team of individuals experienced in the field of client protection, including Committee members and members of the National Client Protection Organization, to examine the structure, operations and procedures of the host lawyers' fund for client protection. In preparation for the consultation, the team reviews relevant court rules, reports and statistics, and examines sample claims. At the consultation, the team conducts interviews with the fund's staff, trustees, bar executives, laypersons, disciplinary counsel, the judiciary and others who have contact with or roles in the system. At the conclusion of its study, the consultation team reports its findings and makes recommendations for the improvement of the system, on a confidential basis, to the state supreme court or bar association. The team also offers follow-up assistance to help implement the recommendations contained in the report.

## Standing Committee Publications

The Committee has drafted model rules and texts pertaining to all aspects of client protection, including:

**ABA Model Rules for Client Protection:** This publication contains the *Model Rules for Lawyers' Funds for Client Protection*, *Model Rule for Trust Account Overdraft Notification*, *Model Rule on Financial Recordkeeping*, *Model Rule for Random Audit of Trust Accounts*, *Model Rule for Payee Notification*, *Model Rules for Fee Arbitration* and the *Model Rules for Mediation of Client-Lawyer Dis-*

*putes*. The Preface explains the interrelationship of the Model Rules and the Introduction includes a brief history of the Rules.

**Survey of Lawyers' Funds for Client Protection:** The tri-annual survey offers a national view of lawyers' funds for client protection activities, including new fund implementation, fund management, funding sources, reimbursement awards, claims experience and procedures, public information, loss prevention activities and records management information. The survey details information received from the United States and Canada.

**Salary Survey of Administrators of Lawyers' Funds for Client Protection (1999):** Survey results of the average annual salaries paid to administrators of client protection funds, broken down into large, medium and small jurisdictions.

**Survey of Unauthorized Practice of Law Committees (1999) and the Survey and Related Materials on the Unauthorized Practice of Law/Nonlawyer Practice (1994):** Includes a brief history of UPL, the ABA Model Rules for Advisory Opinions on UPL and state-by-state survey results concerning UPL definition, enforcement, remedies and guidelines.

**Survey of Fee Arbitration Committees (1999):** Survey results concerning the operation and financing of mandatory and voluntary client-lawyer fee arbitration programs.

## Current Projects of Committee

Since 1984, the Standing Committee on Client Protection and its Advisory Commission on Lawyers' Funds for Client Protection have sponsored an annual National Forum on Client Protection. The Forum is the only national informational and educational program for professionals working in the area of client protection. The networking the Forum fosters and facilitates has contributed to the spread of client protection funds to every jurisdiction in the United States.

The 18th National Forum on Client Protection will be held in Vancouver, British Columbia, on May 31-June 1, 2002. The Honorable Gerry L. Alexander, Chief Justice of the Washington State Supreme Court and Simon Potter, 1<sup>st</sup> Vice-President of the Canadian Bar Association, will make the opening remarks at this year's Forum. The Difficult Claims Workshop at this year's Forum will

be presented by the National Client Protection Organization.

In June 2002, the Committee will publish the *Survey of Lawyers' Funds for Client Protection* (1999-2001).

In August 2002, the Committee will be submitting to the ABA House of Delegates proposed amendments to the ABA *Model Rules for Lawyers' Funds for Client Protection*.

The Committee is studying whether it should recommend to the ABA House of Delegates the adoption of an amendment to the ABA *Model Rules of Professional Conduct* that would require lawyers to disclose to their clients when they do not maintain professional liability insurance. ■

*John A. Holtaway, the ABA's Client Protection Counsel, provides legal counsel and primary staff liaison services to the ABA Standing Committee on Client Protection and the Advisory Commission on Lawyers' Funds for Client Protection. Mr. Holtaway is also Staff Counsel to the ABA Commission on Multijurisdictional Practice and works closely with the National Client Protection Organization.*

## Join NCPO

**Become a member of the planet's only networking organization for client protection funds. We now have 27 states as Organizational Members (\$200), and 77 Individual Members (\$25). NCPO dues are tax-deductible. Send to Isaac Hecht, Esq., 315 No. Charles St., Baltimore, MD 21201-4325.**

## NCPO e-Forum

The NCPO e-Forum, our organization's Internet bulletin board, has proven to be an effective tool for networking. To be included, send your e-mail address to [ncpo@mybizz.net](mailto:ncpo@mybizz.net).

To post an item on the NCPO e-Forum, simply e-mail your question or comments to [ncpo@mybizz.net](mailto:ncpo@mybizz.net), and identify it as an item to be posted to the NCPO e-Forum. Your submission message will be forwarded to all members of the group. Questions are welcome. Contact Mike Knight: [mjk@nylawfund.org](mailto:mjk@nylawfund.org).





## Coping with Legal Fees (Part II)

By Frederick Miller

In the Winter 2002 issue of *The Webb*, I discussed the practical difficulties surrounding claims that seek the reimbursement of legal fees from law client protection funds. I suggested that those difficulties would be significantly reduced if state supreme courts required written retainer agreements, and the deposit of legal fees that are paid up front into an attorney trust or escrow account, to be withdrawn from the account as the attorney earns the fee.

Law client protection funds exist to reimburse economic losses caused by the "dishonest conduct" of attorneys. The rules of most client protection funds define "dishonest conduct" as a wrongful act in the nature of theft or embezzlement of law client money and property. Some rules explicitly include, as an example of dishonest conduct, a lawyer's refusal to refund unearned legal fees that were paid in advance, with a citation to Rule 1.16 of the Model Rules of Professional Conduct.

One way to deal with unearned fee claims is to equate a lawyer's dishonest conduct in these claims to an allegation of "theft by deceit" or "larceny by false promise". That requires evidence that the claimant's lawyer took legal fees with the intent not to provide the promised legal services, or under such circumstances that the lawyer should know that the promised services would not be provided.

The New York Lawyer's Fund has articulated this standard of eligibility in its rules:

*In a loss resulting from an attorney's refusal or failure to refund an unearned legal fee as required by the [NY] Lawyer's Code of Professional Responsibility, "dishonest conduct" shall include an attorney's misrepresentation, or false promise, to provide legal services to a law client in exchange for the advance payment of a legal fee.*

*An attorney's failure to perform or complete a legal engagement shall not constitute, in itself, evidence of misrepresentation, false promise or dishonest conduct.*

*Reimbursement of a legal fee may be allowed only if (i) the attorney provided no legal services to the client in the engage-*

*ment; or (ii) the legal services that the attorney actually provided were, in the trustees' judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee conciliation bureau, or an accounting acceptable to the trustees that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.*

*In the event that a client is provided equivalent legal services by another attorney without cost to the client, the legal fee paid to the predecessor attorney will not be eligible for reimbursement, except in extraordinary circumstances.*

This standard was adopted in 1990. One way it's implemented is an early heads up to claimants: when the Lawyer's Fund receives an unearned fee claim, the claimant is sent a special acknowledgment letter which sets forth and highlights the rule. When claimants are interviewed, the interview tracks the provisions of the rule. If their claims are ultimately denied (and most fee claims are), the provisions of the rule are oftentimes cited to the claimant.

Not a perfect solution perhaps, but certainly a highly helpful tool in managing a caseload that is dominated by this species of attorney-client complaint. ■

## NCPO Membership Survey

NCPO continues to focus on the planning and prioritizing of its activities and initiatives. Toward that end, the Board of Directors this year sought out direct input from the membership on protection fund issues, issues, priorities and the perceived value of NCPO.

The project was conceived and implemented by Victoria Rees, administrator of Nova Scotia's client protection fund and NCPO's Vice-President for the Canadian Provinces. A survey was faxed to all NCPO members in January. We received a moderate rate of response from members covering a broad geographic region, as well as representing the range of small to large funds (by number of claims).

Respondents were asked to rank in priority and value to them the various NCPO activities. Networking ranked as the most (cont'd. on p. 7)

## Money Matters

**How To Do Financial Asset Investigations (A Practical Guide for Private Investigators, Collections Personnel, and Asset Recovery Specialists)** By Ronald L. Mendell Charles C. Thomas Publisher, Ltd., of Springfield, Ill. (2000) \$ 27.95

By Ruby Cochran

Every client protection fund should have this book in its library. It's up-to-date, with references to helpful websites, and it's easy to read. A beginner (like myself) can learn a lot of useful information while a more experienced person can still glean helpful tidbits.

**How To...** opens with a discussion of the basic ways to identify an individual; name, address, social security number. Well known and obscure places and ways to get this information are noted in multiple chapters, as well as areas where this information is needed to get more information. Identifying and locating relatives and associates of your target is covered by a full chapter. Another chapter is devoted to information brokers and other sources.

Locations where stolen funds can be hidden include using the money for life insurance policies, paying down mortgages, buying money orders or bearer bonds. Dissolved partnerships and corporations may still own assets. Assets may be hidden with stockbrokers, in safe deposit boxes, or in a collection of art or coins. The book discusses these and more. Search techniques for locating business assets are covered, including plant visits and piercing the corporate veil.

A fictional investigation walks the reader through the steps taken by the author. The final chapter discusses Internet sources. Useful forms for gathering, organizing and analyzing information are provided in the text. ■

*Ruby Cochran is Secretary to the Board of Trustees of the New Jersey Lawyers' Fund for Client Protection.*

**NCPO on the Internet:**

[www.ncpo.org](http://www.ncpo.org)



