A Newsletter for Law Client Protection Funds

The Client Protection Webb

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A Message From the President

Another Loss, Another Friend

Janet Green Marbley

Isaac Hecht died on January 23, 2003, shortly after his 89th birthday. With his passing, NCPO lost one of its founders, and the legal profession in the United States and Canada lost one of its icons. On a personal level, each of us has lost a wonderful and thoughtful and unforgettable friend.

(MD) Daily Record

Isaac Hecht devoted a significant part of his legal career to promoting honesty and trust in the practice of law, and protecting law clients from dishonest conduct by members of the bar. The assistance and support that Isaac contributed to NCPO; to the American Bar Association's Standing Committee on Law Client Protection; and to the Maryland Lawyers' Fund for Client Protection, all stand as monuments to a life, in Holmes' memorable phrase, "lived greatly in the law."

Isaac was, of course, a long-time Trustee and Treasurer of the Maryland protection fund. He helped incorporate, and then served as NCPO's Treasurer. In that capacity, he helped to establish a firm financial footing for this public-service organization. He was also an unofficial, and effective, ambassador to the Conference of Chief Justices. Isaac was a tireless gadfly in promoting law client protection funds. He was adament that the trust of law clients be preserved as the linchpin in every lawyer-client relationship. To Isaac, the law client protection fund represented the American legal profession at its best.

To commemorate Isaac's many contributions to the legal profession in the United States and Canada, NCPO's Board of Directors will establish an award honoring him and perpetuating his devotion to integrity in the practice of law. This award will be given annually to an individual or fund that has demonstrated excellence in the field of law client protection. Details of the Isaac Hecht Award have been assigned to a special committee composed of NCPO's President, Treasurer, and NCPO co-founders Ken Bossong and Fred Miller. Wherever we go with this project, Isaac's family will be an integral part of the effort.

Isaac was truly one one of the nation's pioneers in law client protection. Indeed, he was one of that rare breed of people who achieve the status of a national treasure. Isaac will be missed by all, but he will be remembered by everyone who ever had the good fortune to cross his path. Memorial tax-deductible contributions to the Isaac Hecht Award can be sent to NCPO's Treasurer, A. Root Edmonson, P.O.Box 25908, Raleigh, NC 27611.

Inside

Report of the Secretary

Georgia Taylor

NCPO's Board of Directors met November 13, 2002 via teleconference. Discussions included the printing and distribution of a new membership brochure prepared by Vice President Karen O'Toole; preparations for the Difficult Claims Workshop at the ABA's Annual Forum in Chicago which will be chaired by Former President William Ricker; and planning NCPO's Workshop in Las Vegas on February 28, 2003, chaired by Georgia Taylor.

On January 22, 2003 the Board of Directors and Vice Presidents met via teleconference and discussed efforts to implement a trustee-training program, chaired by Former President Kenneth J. Bossong; ongoing efforts for disclosure of lack of malpractice insurance, reported by Vice President Lynda Shely; improvement of NCPO's listserve (discussed by President Janet Green Marbley); and final plans for the Las Vegas Workshop.

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

Triennial Survey Available on the Internet

The American Bar Association's *Survey of Lawyers' Funds for Client Protection (1999-2001)* is now available on the Internet at: **www.abanet.org/cpr/clientpro/**. According to John Holtaway, the ABA's Client Protection Counsel, 40 of 51 U.S. jurisdictions responded to the triennial survey of the nation's client protection funds. States that did not cooperate are Alabama, Arkansas, Indiana, Kentucky, Mississippi, New Mexico, North Dakota, Tennessee, Utah, West Virginia and Wyoming.

Questions about the survey and how to contact specific jurisdictions should be addressed to Mr. Holtaway at **jholtaway@staff.abanet.org**. It's not too late for the missing states to be included. They can obtain an additional copy of the questionnaire from Mr. Holtaway who says that the ABA's website text of the *Survey* will be amended to include latecomers.

MJP and Law Client Protection: How Do We Co-Exist?

Janet Green Marbley

Multi-jurisdictional practice ("MJP") is the term used to describe authorized legal work done by a lawyer in a state in which the lawyer is not admitted to practice. The ABA's House of Delegates recently amended Model Rule of Professional Conduct 5.5 to identify those circumstances in which a lawyer may practice law, on a temporary basis, in a state where he or she is not admitted or licensed to practice law. The intent was to develop straightforward and uniform MJP rules that could be used as a blueprint by states in the development of their own rules in this area.

MJP rules will have a significant impact on law client protection funds. Two issues head the list. States must decide whether their client protection funds will reimburse law clients who sustain losses resulting from (1) the activities of lawyers who are licensed in the fund's state, no matter where the transactions occur; and (2) whether the fund will reimburse law clients who are harmed by the activities of lawyers who are authorized to practice, but not licensed, in their state.

Under the model MJP rules, lawyers may be authorized to practice in states where they have not contributed to the financial support of local client protection funds. This could operate to bar reimbursement to law clients who have been victimized by a lawyer's dishonest conduct. In its June, 2001 Statement to the ABA Commission on Multi-jurisdictional Practice, NCPO proposed that a lawyer practicing in a state under MJP rules should be required to contribute to the client protection fund of that state. This proposal sought to ensure that clients are protected financially in the event that they sustain losses caused by lawyers practicing under MJP rules.

NCPO's proposal was not included in the Commission's recommendations. However, the Commission did recommend that lawyers engaged in multi-jurisdictional practice should be subject to discipline in the jurisdictions in which they practice. (Rules 6 and 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement were amended in accordance with this recommendation.) The disciplinary requirement has, therefore, been addressed.

Currently, most states' client protection rules provide for reimbursement for defalcations by lawyers who are "admitted" to practice in that state. If a lawyer is licensed in more than one state, the fund in the state where the defalcation occurred will normally reimburse the client. If the defalcation occurs in the state where the lawyer is not licensed, but who is authorized to practice under MJP rules, the client may be denied reimbursement unless he or she lawyer was required to contribute to the protection fund.

The comments to Rule 1 of the ABA's Model Rules for Client Protection (2002 Edition) provide that lawyers admitted *pro hac vice* should both pay into the protection fund and have their conduct covered by the fund. A similar requirement in local MJP rules will insure that clients will be protected in the event that they fall victim to a defalcation by a lawyer practicing under MJP rules.

State by state, bar associations and courts will be studying the proposals of the ABA's Commission on Multi-jurisdictional Practice. Get involved and work to persuade your state supreme court to address the client protection issues presented. Examine your fund's eligibility rules. How will they mesh with MJP rules proposed for your state? Protect the mission of your fund to protect legal consumers from dishonest conduct in the practice of law. Both programs— client protection and MJP— can and should co-exist without conflict.

▶ *Janet Green Marbley is President of NCPO, and the administrator of Ohio's client protection fund.*

Retainers in Trust Accounts: Client Funds or a Client Fund Minefield?

Robert W. Minto, Jr.

Unearned fees, ah yes, the new source of frustration for client protection funds. An advance fee deposited to trust accounts: Is it a retainer? Is it a deposit against which fees will be drawn as earned? Is it earned on receipt? Can it be earned on receipt? Is there a clear understanding between the client and the lawyer as to when it is to be earned? Is doing bad legal work a basis for a claim against a fund if the money is not there to be repaid? What happens if a fee arbitration panel says that the fee is unearned because of poor representation? Will that support a claim against the fund? The list is endless and the rules are not uniform from jurisdiction to jurisdiction.[1] At the end of the day we need to answer three basic questions: (1) What is an "unlawful taking"? (2) Is the client any less harmed by a lawyer that takes a fee and does no or poor legal work whether the fees were deposited in an operating account or deposited to a trust account? (3) Today, is "client protection" more than just protection from lawyers who steal from clients?

> **"It's time that we define rather than just accept our destiny."**

Frankly, when most of our funds were established, the entire subject of fees in trust accounts was not significant. Most retainers were not deposited to trust accounts; they were deposited to general operating accounts. Why? Simplistically, lawyers were not hourly workers. We got paid by the piece or by the result. Deeds cost a specific amount, forming partnerships or corporations were billed on a fixed fee basis and probates were almost always done on a percentage of the estate. Let's face it: our funds were set up to make a client whole if the lawyers stole from the client. We were more concerned with funds on deposit for closings, deposits of disputed funds, and assets collected in the process of settling estates. Today the rules are different. Title insurance companies handle most real estate closings in many jurisdictions, probate as we knew it in the last century has been replaced by living trusts, and joint tenancies and lawyers trust accounts simply are not handling the volume of funds that they used to. Today an audit of a general practitioner's trust account will show a few retainers (deposits), litigation settlements and moneys for payment of costs an attorney expects to expend in handling a client's matter.[2]

The line between malpractice and stealing has blurred and frankly the public doesn't care which is which. If clients pay money to a lawyer and don't get the result promised or (implied), they feel taken. Does it matter to them that the money was deposited to a lawyer's general account, or deposited to a trust account? No. Frankly, most of our clients would be hard pressed to tell us the difference, because we generally do not do a very good job of educating our clients at the beginning of the representation as to how the whole process will work and the difference between fee bill and deposits. Public expectation of what we as client protection funds cover is greater today than it has ever been before, and by default (mostly) our Bars are allowing us to assume greater burden without a corresponding increase in the assessments that support the fund.

It's time that we define rather than just accept our destiny. In the short term we need to cover what we intend to and not cover malpractice and bad lawyering. In the long term we need to inspire and direct a discussion within the Bar and with the public of what "client protection" really means and affirmatively determine whether our Bars are prepared to embrace the concept of "Comprehensive Client Protection," including impaired lawyer issues, client protection fund issues, professional liability issues and, lastly, lawyer discipline. Presently, these are all being handled by different factions within and outside the organized Bar without coordination or even collaboration. In the end, I don't hold out a lot of hope that we will see the coordination and collaboration that "Comprehensive Client Protection" requires, but at least we will have sensitized the Bar and the public to the differences between the various issues. Then, maybe we will be able to cover what funds were intended to cover and not every lawyer's sin that nobody else does.

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[1] *This problem can be laid at the feet of bar associations and courts that persist in believing that "our jurisdiction is different" and we need different rules of professional conduct and different rules for the administration of our fund for client protection in order to administer the practice of law.*

[2] *In those jurisdictions where lawyers still handle real estate and business sale closings, please forgive this simplification.*

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

New Malpractice Insurance Disclosure Rule

The Supreme Court of New Hampshire has approved a new rule that requires lawyers in private practice to disclose to their clients if they carry less than $100,000 (per occurrence) and $300,000 (in the aggregate) in legal malpractice insurance. The new rule takes effect March 1, 2003. The new Rule 1.17 of the Model Rules of Professional Conduct requires that notice to a new law client be provided on a separate form to be signed by the client and be kept on file for at least five years after termination of representation. Also, within 30 days of the effective date of the rule, lawyers must provide similar notices to existing clients for their signatures.

The Case In Favor of Mandatory Disclosure of Lack of Malpractice Insurance

James E. Towery

If you apply to the state where you live for a driver's license, virtually every state will require that you show proof of financial responsibility, usually in the form of proof of insurance. Similarly, apply to your state for a contractor's license, and again, you will be required to show proof of insurance. The reason for these requirements is simple and common sense—to obtain a state license, you must demonstrate that you have the ability to protect the public if anyone is injured by your negligence in your use of that license.

However, if you apply to your state for a license to practice law, you will have to pass a bar exam and demonstrate good moral character, but you will *not* be required to prove that you have malpractice insurance. And if you are negligent in using your license to practice law, and as a result one of your clients is injured, well, that's the client's tough luck.

This is one of the dirty little secrets of the legal profession: the fact that no state (except for Oregon, more on that later) requires that lawyers in private practice demonstrate proof of financial responsibility. One of the ironies of the situation is that many clients no doubt presume that all lawyers are required to carry malpractice insurance. The clients often discover the fallacy of that assumption for the first time when they attempt to sue their uninsured lawyers.

However, there has been an encouraging trend recently, led by state supreme courts rather than by state bar associations. That trend is the adoption in several states of rules of professional conduct that require a lawyer who lacks professional liability insurance to disclose that fact to every client.

Although the organized bar has taken an ostrich-like approach to this issue, the problem of uninsured lawyers is a real one. Estimates vary, but most experts in legal malpractice insurance believe that one-third or more of American lawyers in private practice are uninsured. The question then becomes: is this a problem that needs to be addressed? Surprisingly, the response from the organized bar has largely been that the problem should be ignored.

The Oregon Model

Of all the jurisdictions, only Oregon has squarely addressed the issue. Since 1978, Oregon has had mandatory malpractice coverage for all lawyers in private practice, through the Oregon State Bar Professional Liability Fund. This fund affords minimal levels of $300,000 coverage per occurrence, at a current premium of slightly more than $2,000 per year. Oregon's fund has worked well, and has protected clients of all Oregon lawyers from the risk of uninsured losses.

However, there are sound reasons to question whether Oregon's model would work well in other jurisdictions. The Oregon fund was established at a time when the insurance markets were far more favorable than they are today. There are approximately 7,000 lawyers in private practice covered by Oregon's fund. It is unlikely that this model would work as well in a state like California, which has over 120,000 lawyers in private practice, and a far greater diversity in types of practice and risk levels. The concern is that if proper insurance underwriting were used in a mandatory plan in a state like California, that premium levels would be prohibitive for many practitioners, especially those in solo or small firms and/or those with limited incomes from their legal practice.

Mandatory Disclosure of Lack of Insurance

An alternative approach to the issue of uninsured lawyers is to require lawyers to disclose to their clients if in fact the lawyer is uninsured. California first adopted this approach in 1988, by including such a disclosure in written fee contracts, as required by California Business & Professions Code Sections 6147 (contingent fee contracts) and 6148 (hourly and other fee contracts). As originally enacted, the California statute required an affirmative disclosure by all attorneys as to whether they carried malpractice insurance. In the early 1990's, this was amended to require a written disclosure only by those attorneys who lacked insurance. The California statute worked well, with a minimum of complaints from lawyers. However, that statutory requirement sunsetted at the end of 2000, and has not been re-enacted.

In 1999, the Supreme Courts of Alaska and South Dakota broke new ground in this area. Both courts adopted modifications of their Model Rules of Professional Conduct that mandated disclosure of the lack of malpractice insurance. In Alaska, for example, Model Rule 1.4 regarding communications, was amended to require that a lawyer notify a client in writing if the lawyer has no insurance or insurance of less than $100,000 per claim or $300,000 annual aggregate, or if the lawyer's insurance was terminated. The South Dakota rule amended Rule 1.4 to require a similar communication to clients as a component of a lawyer's letterhead.

Anecdotally, after the adoption of these rules in Alaska and South Dakota, the lawyers reacted in a predictable fashion. A significant number of lawyers who had previously been uninsured obtained malpractice insurance shortly before the effective date of the new rules. In other words, the new rules provided a positive incentive for uninsured lawyers to obtain insurance, so that they would not be required to make the disclosure to clients of lack of insurance.

In April of 2001, Ohio joined this trend. The Supreme Court of Ohio voted (in a 5-2 decision) to amend the Code of Professional Responsibility to require lawyers who lack malpractice insurance to notify their clients of that fact using a standard form. The New Hampshire Supreme Court adopted a similar rule, which becomes effective on March 1, 2003, requiring disclosure to clients of lack of insurance. The Nebraska Supreme Court is also studying a proposed rule. In addition, the Virginia Bar has had a rule requiring that lawyers report to the State Bar whether they have malpractice insurance. In 2002 the Virginia Bar decided to put that information online, to make it more accessible to the

public. Over 25,000 hits were received on the bar's website within the first week after the information was posted on the website.

As a result of the movement of these various courts to require mandatory reporting, in 2000 the ABA Standing Committee on Client Protection decided to propose a similar amendment to the ABA Model Rules. The Standing Committee requested that the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) to include such a provision in the Ethics 2000's general overhaul of the ABA Model Rules, but Ethics 2000 declined the invitation. After encountering some opposition from other ABA entities and a general lack of support, the Standing Committee on Client Protection has elected not to forward any such proposal to the ABA House of Delegates at present.

Objections to Mandatory Reporting

As the debate on this issue of mandatory reporting has spread over the past several years, opponents have voiced a variety of objections to the concept. Some objections are philosophical, others are technical in nature.

One of the most frequent objections is to question the need for such a rule. In other words, where is the evidence that uninsured lawyers are currently harming clients? Where is the evidence, opponents ask, of malpractice judgments against lawyers that are uncollectible due to lack of insurance?

It is a fair criticism that no study exists that provides data on these points. The entity within the ABA that most logically could conduct such a study, the Standing Committee on Lawyer's Professional Liability, has never conducted such a study.

However, a study is hardly necessary to demonstrate that client harm results from uninsured lawyers. Without question, lawyers who lack insurance commit malpractice, just as do those with insurance (and likely with greater frequency). And no one can seriously question that claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. If you doubt this, simply ask any lawyer in your community who handles plaintiff legal malpractice claims about the subject. Such a lawyer will tell you that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim is modest (*i.e.*, with potential damages of $100,000 or less), many plaintiffs' malpractice lawyers will elect not to file suit, because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. It is difficult to count claims never pursued due to lack of insurance.

Another objection to mandatory reporting is the suggestion that client protection funds already address the issue. That is simply not the case. Client security funds have a more limited purpose—to reimburse clients when lawyers steal money. The rules of client security funds do not permit reimbursement for simple acts of negligence by a lawyer. Malpractice claims are the only manner by which a client can seek redress for simple acts of negligence.

Some of the technical objections include that mandatory disclosures don't include the nuances of the adequacy of the legal malpractice carrier, or the issue of when a diminishing limits policy (where liability coverage diminishes as expenses of defense are incurred) causes coverage to fall below a certain level. It's true that such nuances are not covered by many of the mandatory disclosure rules. Certainly such considerations should be considered in drafting disclosure rules. However, these are not compelling arguments for failing to address the problem at all. An imperfect solution to the problem of uninsured lawyers is better for the public than no solution at all.

Conclusion

An apocryphal story from law school is the professor who says: "Allow me to frame the question, and I will dictate the answer." In the debate over mandatory reporting rules for uninsured lawyers, much depends on how the question is framed.

Supporters of mandatory disclosure frame the question as follows: when a client hires a lawyer, is the lawyer's lack of insurance a material fact that the client is entitled to know? It is hard to fashion a persuasive argument that clients are not entitled to that information. Lawyers operate under a state license, and have a monopoly on "practicing law." With that monopoly go certain obligations. Full disclosure to clients of material information regarding the representation is certainly one of those obligations. And if you don't believe that most clients would consider information about lack of insurance to be material, I suggest that we put that question to a cross-section of law clients and consumers. You may be surprised by the response.

▶ *James Towery is a past chair of the ABA Standing Committee on Client Protection, and past president of the State Bar of California. He is a shareholder of the firm of Hoge, Fenton, Jones & Appel in San Jose, CA.*

Bounced Checks and RICO

New York City lawyer David Schick engineered an investment fraud in distressed mortgages which resulted in $82 million in losses to his victims. Part of Schick's fraud involved the use attorney trust accounts in three NY banks as escrow accounts for the investments. The fraud was accompanied with more than 500 dishonored checks and overdrafts, involving nearly $125 million. The three banks were required to report bounced checks to the New York Lawyers Fund for Client Protection. They did not. Claims to the Lawyers Fund for reimbursement were rejected as being ineligible. In a creative attempt to recoup their losses (with treble damages), the investors sued the banks for engaging in a civil racketeering enterprise. The 2d Circuit Court of Appeals has dismissed their RICO action, which was based on the banks' failure to report bounced checks which, in turn, prevented an disciplinary investigation and notice to investors. All is not lost, however: the investors can continue their state claims against the banks in their District Court action. *Lerner v. Fleet Bank N.A.*, 1/22/03, Docket # 01-7755

A Holiday Reverie

Kenneth J. Bossong

Conversation at a holiday gathering of co-workers, or family and friends:

Remember when that no good, SOB lawyer went down, and took my life savings with him?

Oh, yeah, I've been meaning to ask you, are you OK?

That's what I wanted to tell you about. When he was disbarred and all my money was gone, I thought I was dead. I didn't know what I was going to do.

Sure. Don't blame you.

Well, there's this thing; I heard about this thing called the Client Protection Fund.

Yeah?

They took care of it! All of it.

What?! What do you mean,"took care of it"?

They reimbursed what he took.

What is this? Who are they?

It's a fund that all the lawyers and judges pay into so if something like this happens, there's help. Now, I had to prove what happened. But once I did, they moved pretty quickly. They replaced every dime he stole. And they were even nice about it! I mean - when I told my story, they actually seemed to care.

Lawyers do this? They pay for this?

"Yes, I know, hard to believe. They didn't make me feel like an idiot, either. They said I wasn't wrong to trust a lawyer; that's what you're supposed to do. I just had to explain what happened, give them copies of checks and everything, and answer some follow-up questions. The only other thing they asked me to do was assign them my rights and agree to cooperate when they try to recover what they paid me.

Bet they're busy, with all the dishonest lawyers.

Guess what: out of all the thousands of lawyers, they told me only a tiny handful do this kind of dishonest.

Lucky You. You found one of them.

Actually, I am *feeling a lot luckier than I was about six months ago. I now know we're going to be OK.*

Hmmm...

Whether four, forty or a hundred are listening. it is important that conversations like these take place everywhere in North America. It's not the only possible discussion when lawyer dishonesty has occurred, of course. Consider what is said about lawyers when client protection funds are unknown, underfunded, inaccessible, or unresponsive.

Positive words are never guaranteed, but the odds are increased when a fund does what it should, does it well, and does it timely. A smart fund takes a little extra time and effort to clearly explain itself to its claimants. Every heart and mind convinced that the justice system does work, after all, makes it that much more likely that it will work well.

Given the vagaries of human nature, it is impossible to control how people react. A fund's goal, then, is not to ensure that the above conversation always takes place, but, more precisely, that it always *deserves* to take place.

▶ *Kenneth J. Bossong is the Executive Director and Counsel of the New Jersey's Lawyers' Fund, and a founder and past-president of NCPO.*

Bankruptcy Lawyers Hit on Pennsylvania Fund

The Pennsylvania Lawyers Fund for Client Security is facing major losses resulting from the dishonest conduct of two bankruptcy lawyers. The first attorney handled a number of Chapter 13 and 11 bankruptcies. His clients deposited funds with him which he was supposed to use to pay creditors in accordance with bankruptcy plans. His clients' creditors were stiffed, and their funds were used to underwrite the attorney's lavish lifestyle. The fund has received nearly 50 claims, alleging an aggregate loss of $3.7 million. The fund's potential exposure, given its maximum $75,000 per claimant award limit, ranges in the area of $2 million. The fund has aready awarded $527,172. The attorney has been disbarred by consent, and is the subject of a federal criminal investigation.

The second attorney operated a bankruptcy mill which dealt primarily with Chapter 7 bankruptcies. He would advise the clients that the fee was $1,495, all of which had to be paid before work would begin. Once the total fee was paid, which took some clients over a year to pay making monthly payments, the clients would receive a "kit." Many clients paid fees, completed and returned the kits and the attorney never prepared and filed the bankruptcy petitions. The fund has 107 claims, with an aggregate claim loss of $151,264. It appears that most, if not all, of the losses are eligible for reimbursement. This lawyer has been disbarred on consent.

▶ *Thanks for this news to Kathryn J. Peifer, administrator of the Pennsylvania Lawyers Fund for Client Security.*

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Judicial Review of Fund Decisions

Frederick Miller

The ABA's Model Rules for Client Protection Funds suggests, in Model Rule 13, that determinations of Boards of Trustees are final, and not subject to judicial review. Don't be too sure! How can a public agency, in this day and age, immunize itself from judicial review where a claimant alleges that the agency illegally denied reimbursement for a lawyer's theft? And what about interpretations of court rules and law? Who gets to decide? As some might ask, "Isn't that why we have courts?"

An interesting case in point is ***Greenhorne & O'Mara*** (hereafter simply Greenhorne), now working its way through the courts of Maryland. Isaac Hecht asked that I write about it for ***The Client Protection Webb.***

Ten years ago, Spencer and Marie Fogel were seriously injured in an automobile accident caused by the negligence of a third party. Their medical expenses were covered under Mr. Fogel's health insurance plan with Greenhorne, his former employer. Greenhorne is a construction design firm with several hundred employees. The Fogels' medical expenses totaled $354,290, which Greenhorne paid. The health insurance plan subrogated the Fogels' causes of action to Greenhorne to the extent of the $354,290.

Douglas R. Thomas of Beltsville, Maryland, the Fogels' personal injury attorney, agreed to honor Greenhorne's subrogation rights claim in escrow. (Under Maryland law, Thomas was a lawyer acting as a fiduciary, and the client protection fund honors fiduciary losses.) On March 14, 1995, Thomas settled the Fogels' claims with the negligent driver's insurer for $1.6 million. There was no notice to Greenhorne, nor any payment of its $354,290 subrogation lien. Thomas apparently used the money for law office and personal expenses.

Greenhorne sued Thomas, who consented to a $450,000 personal judgment, payable in installments. Thomas paid $29,000 before defaulting. On February 19, 1997, Greenhorne filed a disciplinary complaint against Thomas who, three years later, consented to his disbarment.

On February 10, 1998, the Maryland Court of Appeals, the state's high court, approved an amendment to the rules of the Client Protection Fund which bars claims by a business organization with 10 or more employees.

Nearly a year later, Greenhorne filed a claim with the protection fund. The trustees denied the claim on June 30, 1999 and reaffirmed its denial on December 28, 1999. The Trustees based its determination on the "10-employee" rule, and added that Greenhorne failure to notify the negligent driver's insurance carrier of its subrogation claim was contributory negligence which bars an award from the Maryland fund.

In accordance with law, Greenhorne appealed the trustees' determination to the Maryland Court of Appeals on January 11, 2000. It argued that the Court's rule changes in February 1998 could not be interpreted to bar reimbursement to Greenhorne for thefts that occurred in 1995, three years before the rule change.

While the Greenhorn appeal was pending, the Court of Appeals amended its rules of procedure, effective November 6, 2002, to provide that final determinations of the trustees of the Client Protection Fund of Maryland be judicially reviewed in the Circuit Courts of Maryland.There are 24 county-based Circuit Courts.The next day the high court transferred the Greenhorne appeal to the Circuit Court of Baltimore County for decision. In an unrelated appeal involving a prisoner's $14,000 reimbursement claim for unearned legal fees, the high court transferred it to the Circuit Court in Washington County for decision.

Sounds like something for a bar exam, doesn't it? The good thing is that the Maryland Lawyers' Fund will survive, whatever the courts finally get to say.

Letters to the Editor

Letter to the Editor:

With the advent of multi-jurisdictional practice, I recommend that all states pursue a two-pronged policy:

(1) Every lawyer admitted to practice pro hac vice should be required to pay the usual client protection assessment fee; and

(2) Each fund assume jurisdiction over claims against lawyers admitted pro hac vice, and treat such claims as any other.

While not solving all MJP problems, this protocol would close a potential hole in the safety net that our profession affords the public. Simultaneously, client protection funds would receive additional revenues commensurate with the risk assumed.

For a host of reasons, it's inevitable that some funds will balk at covering the behavior of "their" lawyers practicing elsewhere in the United States.

It's appropriate to affirm the connection between a judicial system's admission of a lawyer to practice, and system's taking responsibility for the consequences of that policy.

The reimbursable loss will be borne in the only place it had any chance of being prevented. This is not only just; it spurs implementation and innovation of loss-prevention mechanisms.

Just a guess, but I would expect fund revenues from these assessments will far exceed claim payments in the long run.

Kenneth J. Bossong
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19th Annual Forum Convenes in Chicago

The ABA's Standing Committee on Client Protection has sponsored a National Forum on Client Protection annually since 1984. The Committee will host the 19th National Forum on May 30-31, 2003, at the Fairmont Hotel in Chicago, Illinois.

Programs at this year's forum include: the integration of client protection funds, fee arbitration and lawyer regulation and discipline; the multi-jurisdictional practice of law; and malpractice insurance versus client protection funds. There will also be a Difficult Claims Workshop (presented by the NCPO); a fee arbitration workshop and an expanded town hall meeting.

Registration materials will be available on the Internet at: **www.abanet.org/cpr**. For details, contact Ben Woodson at (312) 988-5308, or **WoodsonB@staff.abanet.org**

News In Brief

Now There are 50

A dishonest bankruptcy lawyer and the New Mexico Supreme Court have effectively killed the client protection fund of the New Mexico State Bar. Eligible claims for the refund of advance legal fees involving the lawyer (who was quietly permitted to resign from the bar) overwhelmed the fund's reserves, and the Supreme Court refused the bar's request for a $15 per capita lawyer assessment surcharge. The State Bar paid fully all eligible claims from its assets and closed the fund on January 31, 2003. NCPO has no members from New Mexico.

Multi-jurisdictional Practice Report on Internet

The ABA's Commission on Multi-jurisdictional Practice has published its final report, *Client Representation in the 21st Century*, as adopted by the ABA's House of Delegates in August 2002. The final report is available at the website of the ABA's Center for Professional Responsibility: **www.abanet.org/cpr**. The ABA encourages each state to adopt policies relating to the multi-jurisdictional practice of law.

Attorney Trust Account Overdraft Rule Adopted

The Delaware Supreme Court has adopted an attorney trust account overdraft rule, effective January 1, 2003. The new Rule 1.15A, in the Delaware Lawyers' Rules of Professional Conduct, follows the provisions of the ABA's model rule. The new Delaware rule is reported at **www.dsba.org/rule1.15A.htm.**

Report from Hawaii

According to Carole Richelieu, administrator of Hawaii's Law Client Protection Fund, there were 40 pending claims at the beginning of 2002. Sixteen fresh claims were filed during 2002. Twenty-one claims were closed. Awards were approved in eight claims. They involved four conversions; one loan, three unearned retainers, and six former lawyers who have been disbarred, or who resigned in lieu of discipline. Five of 13 claims were rejected where banks had reimbursed the clients' losses (more than $92,000). Losses alleged in 2002 claims totalled $318,747. Reimbursement awards totaled $79,429. Hawaii's fund greeted 2003 with 35 pending claims.

Get Tough in Louisiana

The Supreme Court of Louisiana has disbarred a lawyer who stole more than $2.5 million belonging to 345 clients. According to the Court, Morphis "used his law license not to foster the high standards of the profession, but as a license to steal from the citizens of Louisiana." (*Matter of Nicholas S. Morphis,* 12/4/02, Docket # 01-B-2803).

The Court also ordered that Morphis' disbarment be permanent so that he cannot ever apply for readmission. Disbarred lawyers in Louisiana are ordinarily allowed to seek readmission after five years. A court rule adopted in 2001 permits the Court to impose the penalty of "permanent disbarment".

Client Protection in Michigan

According to the January 2003 issue of *The Michigan Lawyer*, efforts are underway to change the funding system for the state's client protection fund. A committee of the state bar association has proposed that the fund be financed by an annual assessment of $15, rather than by unpredictable appropriations from the association's annual budget. The committee also proposes that the individual cap for an award be increased from $25,000 to $50,000; and the aggregate cap for losses caused by one lawyer be increased from $100,000 to $200,000. The Michigan fund was established by the state bar association in 1966.

Safekeeping Advance Retainers

The ABA has amended Model Rule 1.15(c) of Professional Conduct, as proposed by NCPO, to require the deposit of advance legal fees and expenses into a lawyer's trust account, to be withdrawn as earned. This is one of numerous amendments to the Model Rules that the New Jersey Supreme Court is considering. The Court invites written comments by April 15, 2003, submitted to Stephen W. Townsend, Clerk of the Supreme Court, Hughes Justice Complex, POB 970, Trenton, New Jersey 08625-0970.

Conversion by Paper Shredder

The Supreme Court of Oregon has clarified that a lawyer who receives papers from a prospective client and then loses, or inadvertently destroys them in a paper shredder, may be disciplined for professional misconduct. Those papers constitute client property. They must be safeguarded. And it matters not that the lawyer never spoke to the prospective client, or agreed to represent her. (*Matter of Spencer,* 11/22/02. Docket # S49362).

In Memorium
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