A Newsletter for Law Client Protection Funds

The Client Protection Webb

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25th National Forum on Client Protection

Friday May 29th

9:00- Noon - NCPO Annual Meeting
1:00 Forum Welcome
1:45 Isaac Hecht Law Client Protection Award
2:00 Town Hall Meeting
3:50 Theft Prevention: The U.S. and Canadian Perspectives
5:00 Networking Reception
6:45 2009 NCPO Dinner and Architectural Tour!

Saturday May 30th

9:00 am to 5:00 pm
Sessions include:

- **Depression, Addiction and Personality Disorders in Attorney Discipline**
- **Hot Topics for Client Protection Funds**
- **Investigating & Prosecuting the Unlicensed Practice of Law: Immigration Cases**
- **A Comprehensive Client Protection Fund.**
- **Recruiting and Training Qualified Fee Arbitrators**
- **Difficult Claims Workshop**
- **Fee Arbitration Workshop**

REGISTER NOW!

ABA 25th National Forum on Client Protection

By Selina S. Thomas

The ABA Standing Committee on Client Protection invites all to attend the 25th National Forum on Client Protection on May 29-30, 2009, at the Chicago Fairmont Hotel, in conjunction with the 35th National Conference on Professional Responsibility.

To commemorate the Forum's Silver Anniversary, the Committee has invited all available Past Chairs to attend and participate in a celebration of the evolution of client protection programs in the United States and beyond.

Since 1984, the ABA National Forum on Client Protection has been organized and presented by the Committee, with assistance from the National Client Protection Organization (NCPO). The Forum is a national program for professionals working in the area of client protection. It is an open arena for an informal exchange of ideas and provides a platform for all colleagues in the client protection field to foster ideas and share their experiences. Attendees include administrators and trustees of lawyers' funds for client protection, fee arbitration programs, and mediation programs; law professors; members of the judiciary; bar association officials; and private practitioners who concentrate their practices in the area of professional responsibility law.

Programs for the 2009 National Forum include: theft prevention from the U.S. and Canadian perspectives; hot topics for client protection funds; investigating and prosecuting UPL in immigration cases; and elements of a comprehensive client protection fund.

This year, the Forum will have two programs geared specifically to fee-arbitration professionals and volunteers. The NCPO will administer its annual Difficult Claims Workshop. Attendees may also sign-up for an individualized session with experienced media relations professionals who will provide techniques for utilizing the media to promote client protection programs.

During the 25th National Forum, the NCPO will also present the 6th Annual *Isaac Hecht Law Client Protection Award*. The award is in honor of Isaac Hecht, a long-time Trustee of the Clients' Security Fund of the Bar of Maryland and an 18-year member of the Standing Committee. The Isaac Hecht Award recognizes an individual, law client protection fund, or other professional organization that has demonstrated excellence in the field of law client protection.

Questions about the Forum may be directed to Selina S. Thomas, Associate Client Protection Counsel, (312) 988-6721 or thomass@staff.abanet.org. Up to date details and registration information are at http://www.abanet.org/cpr/events/cp-programs.html.

Selina S. Thomas is Associate Client Protection Counsel for the ABA Standing Committee on Client Protection.

Be sure to visit the NCPO's re-designed website at **www.ncpo.org!**

Trustees as Advocates for the Fund

by Kenneth J. Bossong

Of all the ways a Supreme Court supports a Client Protection Fund, the three most important are:

1) providing a steady, secure and adequate source of funding;

2) creating an appropriate organizational structure, giving Fund Trustees broad discretion and authority to handle Fund matters; and

3) appointing only the most outstanding individuals to serve as Trustee.

In what ways are persons "most outstanding" for purposes of being appointed a Fund Trustee? There are a number of characteristics. Trustees should be (a) bright and talented; (b) renowned in their field; (c) already distinguished for contributions made in service elsewhere; (d) possessing of a real vision about the legal profession and the justice system; and (e) as a group, diverse in background, nature of practice, and geography.

Indeed, what sense would it make to go to all the trouble of setting up a Fund – with the implicit promise of protection to the public that it portends – and then appoint Trustees to run it who are disinterested, selfish, mercenary, or cynical about the legal profession and the justice system?

Assuming that those who appoint Fund Trustees agree, and select only the "cream of the crop" to serve as Fund Trustees, it follows that those appointed bring many gifts, and much credibility and standing, to their work. Why not utilize this abundance for the Fund's benefit?

Everyone in the field knows that the most important thing Fund Trustees do is *justice* in deciding claims and in setting Fund policy (and doing so on a timely basis). Not so obvious is the second most important thing Trustees can do: advocating for the Fund so that they can be in a position to do all that is needed to accomplish that first goal.

Does your Fund suffer from inadequate funding? Is it understaffed? Does it lack subpoena power? Staffers, however well regarded, may be dismissed as bureaucrats looking to "enlarge their kingdom" or "protect their turf" when seeking to cure such ills. But a unanimous Board of Trustees, serving without compensation and consisting of, say, a leading Estates lawyer, deans of the Plaintiffs and Defense Bar, a noted Chancery litigator, and a couple of distinguished lay members, is not so easily dismissed when it challenges a Court or a Bar to provide the resources necessary to do the job properly. Advocacy for the Fund, while seldom discussed as such, is an essential part of the Trustees' job. For Trustees, especially those of Funds whose promise is largely unfulfilled, there is a simple question: If not you, who?

Kenneth J. Bossong is Director & Counsel to the New Jersey Lawyers' Fund for Client Protection and a Director-at-Large of NCPO.

Revisiting the Vision

By Michael Miyahira

On May 31, 1998, a small group of passionate lawyer advocates banded together to form the National Client Protection Organization.

Spearheading the effort was the late Isaac Hecht of Maryland, Fred Miller of New York, and New Jersey's Ken Bossong. Among the organization's purposes was to independently complement the activities of the ABA Standing Committee on Client Protection. NCPO was formed to provide a setting where a meaningful sharing of ideas could occur, and work on addressing common issues and concerns would take place on an ongoing basis. So the organization was formed with that in mind:

- To facilitate the exchange of information between the various client security funds that populate the US and other countries that wish to participate
- To provide assistance and support to funds
- To provide seminars and forums that provide educational venues

In October 2004, NCPO undertook a review of its purpose and committed to the following Vision:

> "In three years, the NCPO will be a well-resourced, proactive organization supporting passionate, effective lay and lawyer advocates for law client protection throughout North America."

At NCPO's recent board meeting, resident John Gleason noted that, "It's been four years since we last took a look at the direction that we wanted NCPO to pursue. Perhaps it's time for us to assess the progress we've made and refocus on our Vision for tomorrow." With that, the board approved the formation of a

strategic planning committee headed by Mike Miyahira (Hawaii), assisted by Tim O'Sullivan (New York), Ken Bossong (New Jersey) Bob Welden (Washington) and Janet Marbley Green (Ohio) to do so.

Since its inception, NCPO has been an advocate for strong client protection funds. Notable was the development of the Standards for Evaluating Client Protection Funds, adopted by NCPO in June 2006, that should serve as a set of benchmarks for all client protection funds. NCPO must continue to be a meaningful organization that provides value to its constituents. And now is a great time to re-examine its Vision and strategic plans.

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Michael Miyahira is a Trustee of the Lawyers' Fund for Client Protection of the Supreme Court of Hawaii, and an At-Large Director of NCPO.

NCPO NEWS SHORT
California Raises Payment Limits!

The April 2009 California BarJournal reports that the California Client Security Fund has increased its maximum reimbursement award to $100,000. The increase affects losses occurring after Jan. 1, 2009. Californina has also eliminated the "marriage penalty" and now permits married couples to submit two claims to increase maximum reimbursement eligiblity to $200,000. Previously, maximum eligiblity was only $50,000.

California lawyers contributes $40 to the fund annually as part of bar dues. Congratulations to the California Client Security Fund!

The ABA Consultation Program

By Janet Green Marbley

The Standing Committee on Client Protection works to fulfill the American Bar Association's goal to develop and strengthen client protection programs. The Committee offers its services, expertise and resources to jurisdictions throughout the United States and Canada. One of the primary ways that the Committee can assist your fund is through its on-site consultation program.

The on-site consultation program involves sending a team of individuals experienced in the field of client protection, including members of the National Client Protection Organization (NCPO), to examine the structure, operations and procedures of the host jurisdiction's lawyers' fund for client protection.

In preparation for the consultation, the team reviews relevant court rules, reports and statistics, and examines sample files. While on-site, the team conducts interviews with the fund's staff, fund trustees, bar executives, laypersons, disciplinary counsel, members of the judiciary and others involved in carrying out the fund's mission and goals.

Following the conclusion of the on-site portion of the program, the consultation team prepares a confidential written report of its findings, including recommendations for improving the operations of the fund. The report and recommendations is submitted to the highest court in the jurisdiction, the state bar association or the fund's trustees. The consultation team also offers follow-up assistance to help implement the recommendations contained in the report.

In the past seven years, the Committee has conducted six client protection fund consultations. If you think your fund could benefit from the consultation services offered by the ABA Standing Committee on Client Protection, you are urged to contact John A. Holtaway, ABA Client Protection Counsel, at (312) 988-5298, jholtaway@staff.abanet.org. or Selina Thomas, ABA Assistant Client Protection Counsel, at (312) 988-3721, sthomas@staff.abanet.org.

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Janet Green Marbley is Administrator & Counsel of the Supreme Court of Ohio Clients' Security Fund and Chair of the ABA Standing Committee on Client Protection.

Mark Your Calendars!!

2009 NCPO Fall Workshop
Portland, Oregon!!
September 2009

Check www.NCPO.org for registration information!

A Loan is Not a Loan - When it's a Wrongful Taking

by Adam M. Lutynski[1]

Introduction

In an earlier issue[2], Robert W. Minto, Jr. provided a thoughtful analysis of one of the most vexing problems faced by client protection funds: when, if ever, should a fund reimburse a claimant whose lawyer failed to repay a client loan? Mr. Minto examined the issue "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." His conclusion was that reimbursement for defaulted loans is rarely, if ever, appropriate.

Different Analysis

With the greatest respect, I offer a different analytical framework that may lead to a contrary conclusion. This framework depends far less on subjective evaluations of client sophistication to determine if there is a wrongful taking but relies rather on an evaluation of objective compliance with Rule 1.8(a) of the MODEL RULES OF PROFESSIONAL CONDUCT (2002 EDITION). [3]

Rule 1.8(a) Requirements

The first lesson of RPC 1.8(a) is quite simple: lawyers shall not borrow from or lend to their clients because it creates a conflict of interest. Despite this conflict of interest, the drafters apparently concluded that an absolute prohibition on such loans might be too restrictive. Why else would they have provided a three-step procedure by which a lawyer may transform a loan from a prohibited transaction into a permitted transaction?

The first step toward transformation is the delivery of a document from lawyer to client that "fully" discloses the transaction and its terms in language that "can be reasonably understood by the client." [4] The comment to Rule 1.8 notes that disclosure should include "the material risks of the proposed transaction." Neither Rule 1.8 nor its comment specifies the details of this "full" disclosure. However, the contents are not difficult to figure out. After all, the proposed transaction is a loan. What do individuals and corporations do when they apply for a loan? If the loan is secured, they provide collateral and considerable financial information. If the loan is unsecured, they provide more detailed financial and related information to the prospective lender. It is reasonable to view this disclosure document as the functional equivalent of a prospectus in the world of corporate finance and securities law. So, the lawyer should do what corporations do when they raise money in the public debt market: disclose specifically the factors that any lender wants and needs to know about a prospective debtor: net worth; cash flow; business history and prospects; risk factors; history of loan repayments; bankruptcies and so on. All this is to be done in "language that can be reasonably understood by the client." That means plain English, free of jargon and techno-speak.

The views expressed in this piece are exclusively those of the author. They are not the views of the Clients' Security Board of the Supreme Judicial Court of Massachusetts.

The second step of transformation is another document whose content is prescribed by RPC 1.8(a)(2). In it the lawyer must advise the client of the desirability of having the advice of independent legal counsel for the loan transaction. Following its delivery, the lawyer must give the client a "reasonable opportunity" to seek out that independent counsel.

RPC 1.8(a)(3) describes the document that is the third and final step in transforming this prohibited transaction into a permitted transaction. It is the client's informed, written consent to the "essential terms of the transaction, the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction." RPC 1.0(e) describes "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Claim Analysis - Documented or Undocumented Loan?

When a client protection fund entertains a reimbursement claim from a former client whose lawyer defaulted on a loan made by that client, its very first task is to ask for the documents required by RPC 1.8(a). If the lawyer delivered the three required documents, the loan can be deemed "documented." If the lawyer failed to deliver some or all of the three required documents to the client, the loan is "undocumented."

The Undocumented Loan

If one or more of the three documents required by RPC 1.8(a) is missing, the Fund faces a partial or total failure of compliance by the lawyer. It must then select the type of analysis to use in determining the gravity of such non-compliance.

Dishonest Conduct - Totality of the Circumstances

One of the essential elements of a "reimbursable loss" is "dishonest conduct" by the lawyer. So, the fund must ask itself whether non-compliance with RPC 1.8(a) amounts to "dishonest conduct" as defined in Rule 10 C of the 2002 Edition of the MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION.[5] The comment to Rule 10 C provides helpful guidance:

> The basic concept is one of conversion or embezzlement. Subparagraphs (1) and (2) make clear that if the essential nature of the transaction was conversion, dishonest conduct will be found even where the lawyer took money in the guise of a fee, a loan or an investment. Indeed, employing such a ruse is part of the dishonesty.

Since the "basic concept" is conversion, some definitions may prove helpful. "Any unauthorized act which deprives an owner of his property permanently or for an indefinite time."[6] "The essence of conversion is the wrongful deprivation of property."[7]

Armed with the definitions, the fund may continue its analysis. Was the receipt of the loan an "unauthorized" or "wrongful" exercise of dominion or control over the money? Since direct evidence of the lawyer's intent is rarely available, intent can be inferred from the facts and circumstances surrounding the transaction.

No citation is needed for the proposition that ignorance of the Rules of Professional Conduct cannot excuse or exonerate a lawyer's violation of a rule. As a consequence, the lawyer is presumed to have had knowledge of RPC 1.8(a). Failure to comply with the rule is substantial evidence that the lawyer obtained control over the money wrongfully or without authorization by means of the undocumented loan. That combined with the other circumstances surrounding the loan could lead a fund to conclude that the lawyer engaged in dishonest conduct and the claimant is entitled to reimbursement.

A fund may establish a hierarchy among the three requirements of RPC 1.8(a). For example, it could decide that a failure to deliver the document required by RPC 1.8(a)(2)[8] is not material provided the RPC 1.8(a)(3)[9] document addressed the substance of the missing document. For example, the signed informed consent could include the following: "Two weeks before the date of this informed consent, my lawyer advised me during a face-to-face meeting that I should have separate counsel represent me in the proposed loan transaction. We spent one-half hour discussing the pros and cons of such representation and my lawyer even offered to pay up to $1,000.00 in legal fees to the lawyer I selected to represent me. I thought this matter over for seven days and then telephoned my lawyer one week ago and explained that I chose not to retain independent counsel."

Assuming substantial compliance with the other requirements of RPC 1.8(a), one could imagine a fund deciding that that the client's written informed consent cured the absence of the 1.8(a)(2) disclosure and that the loan was, in fact, documented.

II. Conclusive Presumption of Dishonest Conduct

Another approach may be to presume[10] from the lawyer's failure to present a documented loan that the lawyer intended to engage in a prohibited conflict of interest with the effect of defrauding the client at the time the loan was made. Why? Because RPC 1.8 is imperative (not permissive) in its use of the phrase "shall not" and thus defines "proper conduct for purposes of professional discipline."[11] An undocumented loan means that the lawyer failed to carry the burden of transforming the forbidden loan into a permitted transaction. Absence of the documents required by RPC 1.8(a) could be viewed as conclusive evidence of the lawyer's intent to defraud the client and to wrongfully take control of the client's money.[12] If 1.8(a) means anything, it means that when a lawyer fails to comply with it the lawyer wrongfully takes possession of the loaned money at the moment he receives it.

This approach is analogous to a strict liability theory in tort. Once a plaintiff establishes that the product was defective, liability results from that fact alone. Translation: After a client-claimant establishes that the loan was undocumented, the loan is not a loan but rather an act of conversion.

A lawyer who fails to comply with RPC 1.8(a) when borrowing from a client is no different from a public corporation that fails to make the disclosures required by the securities laws when seeking to raise capital in the public debt markets. The corporation is guilty of securities fraud.[13] Likewise, the lawyer, at best, is guilty of professional misconduct[14] worthy of sanction[15] and, at worst, guilty of deceptive practices in Mr. Minto's jurisdiction.[16] Reimbursement from the fund is appropriate.

A Loan is Not a Loan When it's a Wrongful Taking - *Cont'd from Page 5*

III. Rebuttable Presumption of Dishonest Conduct

If the preceding alternative is either too rigid or mechanistic for some funds, an alternate approach is to view the lawyer's failure to deliver some or all of the RPC 1.8(a) documents as a rebuttable presumption of intent to defraud at the time of accepting the loan. The disciplined lawyer may then introduce evidence to negate that presumption. Failure to introduce rebuttal evidence permits the fund to conclude that the presumption stands and reimbursement to the claimant is appropriate. Imposing this burden on the lawyer is analogous to that imposed in disciplinary proceedings involving a conflict of interest. There, the lawyer "must prove that the client's consent was obtained after full disclosure of the conflict." [17]

The Documented Loan

When a fund encounters a documented loan, its task is to examine how well the documents conform to the RPC 1.8(a) requirements. If the tendered documents fall short of the requirements, the fund might well decide that the loan is undocumented. It would then continue to analyze the claim as if it were an undocumented loan from the outset.

The Place for Subjective Analysis of Client-Claimant Sophistication

Suppose a disciplined lawyer produces all three documents required by RPC 1.8(a) and they appear at first blush to constitute a documented loan. At that point a fund may wish to evaluate the sophistication of the client-claimant to determine his or her ability to appreciate and understand those documents. The first disclosure document must be in "language that can be reasonably understood by the client." A fund may wish to inquire whether the claimant could understand the language used in the document and thus had the capacity to give informed consent. This could involve questioning of the claimant about educational background, business experience, financial expertise and the meaning of certain terms used in the RPC 1.8(a) documents. If the fund finds too great a disparity between the language used and the client's level of understanding it may conclude that the lawyer's compliance was apparent, not real. In that situation, the fund may find a wrongful taking worthy of reimbursement.

"Fair and Reasonable to the Client"

When the documents appear to comply with the 1.8(a) requirements and thus create a documented loan, the fund has one additional level of analysis available. It may ask whether the loan was "fair and reasonable to the client" as required by RPC 1.8(a)(1). Depending on the facts, this inquiry could be quite narrow or far-reaching. For example, if the prevailing interest rate for an unsecured loan was 9% but the lawyer committed to pay the client only 4%, one might say that such a loan was neither fair nor reasonable to the client. Similarly, just because the lawyer agreed to pay a market interest rate does not necessarily make the loan "fair and reasonable." The lawyer's credit may have been so bad and his financial condition so precarious that no one would lend him a dime unless he paid a risk premium in the form of a higher interest rate or unless he provided worthy collateral to secure the loan. This inquiry could become quite fact intensive and may require some outside expertise in the form of a bank loan officer.

If the fund concludes that the terms of the loan were not "fair and reasonable" even though it was documented in apparent compliance with RPC 1.8(a), it may conclude that RPC 1.8(a) had been violated and continue its analysis of the totality of the circumstances.

Conclusion

Loans between lawyers and clients are forbidden because they produce conflicts of interest. They can be transformed into permitted transactions only by following the requirements of RPC 1.8(a) and creating a documented loan. RPC 1.8(a) provides client protection funds with a useful tool to objectively analyze claims from former clients whose lawyers defaulted on loans from those clients. If a lawyer failed to comply with 1.8(a) before accepting a loan from a client, the loan is undocumented. A fund has three alternatives to determine whether an undocumented loan is dishonest conduct: it may examine the totality of the circumstances; it may create a conclusive presumption that the lawyer intended to defraud the client at the time of accepting the loan or it may create a rebuttable presumption of the lawyer's wrongful intent. Acceptance of client funds by means of an undocumented loan is not only professional misconduct worthy of sanction but it also may be a wrongful taking or conversion deserving of reimbursement from any client protection fund. Subjective analysis of client sophistication should be used only if the lawyer created a documented loan in apparent compliance with RPC 1.8(a). Finally, a fund may determine whether the loan was "fair and reasonable to the client" by examining all the details of the loan transaction.

ENDNOTES

[1] Assistant Board Counsel, Clients' Security Board of the Supreme Judicial Court of Massachusetts. The author gratefully acknowledges the insights and assistance of Michael Fredrickson, Karen D. O'Toole and Carol Wagner but exonerates them for any defects in the piece, all of which are his sole responsibility.

[2] The Client Protection Webb, "When is a Loan Not a Loan?" Fall 2003, p.8.

[3] RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES provides:

"(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

"(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

"(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

"(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

[4] RPC 1.8(a)(1)

[5] 10. C. provides: "As used in these Rules, 'dishonest conduct' means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including but not limited to: (1) Failure to refund unearned fees received in advance as required by [Rule 1.16 of the ABA Model Rules for Professional Conduct]; and (2) The borrowing of money from a client without intention to repay it, or with disregard of the lawyer's inability or reasonably anticipated inability to repay it."

[6] BLACK'S LAW DICTIONARY, 300 (5th ed. 1979)

[7] I*n the Matter of Michael G. Sebela*, No. 3128968 Attorney Respondent, Il. Disp. Op. 92 CH 577, Filed May 17, 1994

[8] "(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction;"

[9] "(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

[10] RESTATEMENT (Third), THE LAW GOVERNING LAWYERS, § 126 is the analogue of RPC 1.8 (a). Comment a. to § 126 states: "This section is a specific application of the general prohibition of conflicts of interest in § 121. Conduct that violates this section is presumed to cause the material and adverse effect on representation that creates a conflict of interest under § 121." (Emphasis supplied.)

[11] ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002 Edition), Scope, ¶[14] See also, Scope, ¶[19]: "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."

[12] Mr. Minto differs: "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."

[13] See Item 503(c) of Regulation S-K (17 C.F.R. § 229.503(c)) for the risk factors discussion required in the prospectus portion of a registration statement. "Where appropriate, provide under the caption 'Risk Factors' a discussion of the most significant factors that make the offering speculative or risky." Risk factors include operating history or lack thereof, lack of profitable operations in recent periods, and current financial position. See also Rule 10b-5 of the Securities Exchange Act of 1934 (17 C.F.R. § 240.10b-5) which provides: "It shall be unlawful for any person, directly or indirectly . . . to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . ."

[14] See cases of lawyer discipline collected at 9 ALR 5th 193, §§ 17-32.

[15] "Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client." STANDARDS FOR IMPOSING LAWYER SANCTIONS, Std. 4.61, AMERICAN BAR ASSOCIATION, 1986. See Stds. 4.61 - 4.63 for sanctions short of disbarment appropriate for less culpable states of mind.

[16] See 45-6-317 (1) (c), MONTANA CODE ANNOTATED 2003. "A person commits the offense of deceptive practices when the person purposely or knowingly: … (c) makes … a false or deceptive statement addressed to any person respecting the financial condition of the person making … the statement for the purpose of procuring a loan … regarding that person's financial condition."

[17] *In the Matter of Wayne H. Eisenhauer*, 426 Mass. 448, 452 (1998)

Adam M. Latynski is Assistant Board Counsel to the Clients' Security Board of the Supreme Judicial Court of Massachusetts.

A Lesson from Connecticut: Time for a Spring Cleaning!

By Michael J. Knight, Sr.

Not many folks get a warning shot.

Recent circumstances surrounding the attempted 'cash-grab' of $2 million in Client Security funds in Connecticut as a "Deficit Mitigation Measure" [1](a/k/a' budget scheme') in Connecticut should have sent a deafening percussion through the rank and file of the client protection community. Now more than ever, it is important for each Fund to review its systems of autonomy and funding to ensure that political fiat never supercede professional obligation and the defense of the legal profession's integrity.

The Connecticut State Legislature, and its Governor, ultimately recanted, restoring funding and preserving the honor of its State Client Security Fund, but the danger to recognize is in the attempt. At the same time, Connecticut's structure, and the immediate response of Connecticut's Judiciary and legal community repelled that attempt.

The NCPO Standards for Evaluating Client Protection Funds were adopted in 2006 and remain an outstanding and relevant resource with which to measure the effectiveness of client protection programs.

Organizational independence remains the primary goal of a Client Protection Fund. The standards recommend that a Fund should be an entity of the jurisdiction's highest court "...as an exercise of the Court's power and duty to regulate the practice of law."[2] This characteristic of the Connecticut Fund, that it was established by the rules of the Connecticut Superior Court, appears to have provided the constitutional basis to frustrate the Legislative and Executive branches' efforts.

The standards also direct that a Fund should constitute a trust - "separate and independent from any other fund or entity of the Court, bar association, law society or government agency."[3] Again, Connecticut's funding structure includes this very language. It proved an effective defense against misapplication of dedicated trust funds. Indeed, in an outstanding article penned for the Connecticut Law Tribune, *"Your Trust Has Been Violated*", Peter L. Costas a former President of the Connecticut State Bar Association correctly observed, "It is submitted that the history of the rule and of the implementing statute require a finding that the Client Security Fund was and is established as a trust fund so that its funds could not be captured by legislative action".[4]

Thus, silver linings abound in the storm clouds. The Connecticut experience reflects the value of sound structure and funding and also serves as a model for a unified and effective response to such overreaching. As well, this experience has validated the purpose of NCPO and its membership which was steadfast in offering support to our beleaguered colleague.

In these challenging economic times, the wake up call can be answered. NCPO's Standards for Evaluating Client Protection Funds are available on the NCPO's website at www.ncpo.org/standards2006.pdf . Also, the NCPO stands ready as a willing and proud partner of alll client protection funds in their efforts to fortify their own programs and ensure the integrity of our special trust funds and our shared goal to protect legal consumers from the dishonest conduct in the practice of law.

Michael J. Knight, Sr. is Deputy Counsel for the New York Lawyers' Fund for Client Protection. Mr. Knight is also Counsel and Webmaster for the National Client Protection Organization, Inc.

(Endnotes)

[1]CT House Bill 6602, Amendment LCO # 4212 (January Session 2009)

[2] NCPO Standards for Evaluating Lawyers' Funds for Client Protection, Rule 1.1

[3] NCPO Standards for Evaluating Lawyers' Funds for Client Protection, Rule 1.3

[4]Costas, Peter L., *Your Trust Has Been Violated*, Connecticut Law Tribune, March 9, 2009.

The Client Protection Webb

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Time to renew your NCPO membership!

NCPO membership is an invaluable resource that offers training, workshops and an Annual Forum for Law Client Protection Funds in the United States and Canada!

E-mail Eileen Donahue at edonahue@iardc.org for more information or download a membership renewal form from **www.ncpo.org** !