A Newsletter for Law Client Protection Funds

# The Client Protection Webb

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## Mark your calendar....

**May 31, 2002**

NCPO's next annual meeting in Vancouver, British Columbia

**Inside**



## Message from the President

# Coming of Age

*By William D. Ricker, Jr.*

When we meet for NCPO's next annual meeting in Vancouver, NCPO will be four years old. It has been an exciting four years. Not unlike a toddler, we first began to crawl, then walk and now we occasionally run in our efforts to continue the growth and development of client protection.

Much progress has been made in client protection in the last four years and NCPO has been right there along with the ABA Standing Committee in pushing for client protection expansion and improvement. But like a toddler of four, we still have a lot of growing years ahead of us.

During the last four years we have grown both in institutional and individual members, our organization has matured, we have regularly published this outstanding *The Client Protection Webb*, thanks to efforts of Fred Miller and all of the literary contributors, we have periodically held regional workshops and we have participated in several state consultations with the ABA.

And we have a new Internet program called **NCPO eForum**, to strengthen our networking efforts. I recently used it to help with a difficult claim that I'm investigating in Florida, and I found the responses on the **eForum** to be invaluable. Try it.You'll like it!

When you join us at the ABA's 18th National Forum in Vancouver on May 31 and June 1, you will experience even more of what NCPO does. The ABA Standing Committee on Client Protection, which sponsors the Forum, invited NCPO to coordinate the difficult claims workshop in 2002 and future years. Needless to say, we jumped at the opportunity to help. I am told we may have some new twists on the difficult claims workshop program in Vancouver. Be sure to make your reservation and join us at the Forum, and arrive early enough to be part of the Friday morning annual meeting.

But as proud as we are of our accomplishments, they are not what make client protection so exciting today. The cutting edge today involves the Chief Justices' National Action Plan which emphasizes client protection funds role as a cornerstone of professionalism. If you are unfamiliar with the National Action Plan review recent past issues of the *Webb* which have thoroughly covered the National Action Plan development.

As part of the implementation of their National Action Plan, the Chief Justices recently called for the establishment of a national professionalism commission as well as commissions in each jurisdiction, and directed that client protection funds be represented on each commission. The Supreme Court of Hawaii is in the vanguard. Indeed, NCPO Vice President Carole Richelieu has been appointed co-Chair of the Hawaii implementation commission.

Like a four-year-old toddler who has just begun life's grand journey, the National Client Protection Organization also looks to the future. We will build on these early steps we have taken. We will continue to support the Standing Committee and the ABA in every way we can for the mutual benefit of clients everywhere. And we will not only enthusiastically support the National Action Plan client protection recommendations, we intend to be on the front line to ensure they are implemented nationwide. See you in Vancouver! ■

# Speaking of Justice

*Welcoming remarks of Chief Justice Thomas J. Moyer, Supreme Court of Ohio, at NCPO's Midwest Regional Workshop, Columbus, Ohio, October 27, 2001.*

Janet, thank you. And President William Ricker, thank you for providing me the opportunity to appear here today.

In the past, I would casually welcome out-of state visitors, but in the wake of recent events, long distance travel is not to be taken for granted. So I extend a special welcome to all who endured long lines and new security precautions to be here.

I also want to welcome those who are close to home, such as Jim Hopple, chair of the Ohio Client Security Board. Jim's strong leadership has been particularly important and effective as the Board has had to respond to a record number of client security claims.

We are pleased that the Ohio Client Security Fund meets all of the objective standards established for client protection funds by the Conference of Chief Justices.

Most of all, I thank each of you for your work and dedication to client security and protection. You have taken some risk by working with programs that are not universally popular. Some lawyers, citizens, and some members of the media oppose your efforts.

I remind our critics of the words of Ralph Waldo Emerson, who wrote in 1862 that the "highest proof of civility is, that the whole public action of the state is directed on securing the greatest good of the greatest number."

His words provide as much inspiration today as they did then. Client security funds provide direct and indirect benefits to all members of the profession and to all citizens. Payments to those harmed by dishonest attorneys help maintain the faith and trust that is fundamental to the rule of law.

The authority of the legal community is grounded in the trust of citizens that we will fairly and efficiently address their needs, help settle their disputes and uphold the rule of law.

Each judge, lawyer and citizen should commend you for your work.

I want to particularly commend Janet Green-Marbley and the staff of the Client Security Fund of Ohio for their tireless and efficient work. They have compiled an impressive record.

Since the fund was created in 1985, more than five million dollars has been paid to clients of dishonest attorneys, and that does not include any tax dollars. All of the awards have been generated from lawyer registration fees.

In recent years the fund's staff and its Board have had to resolve some of its most pressing challenges, including $800,000 in awards to the former clients of a Youngstown attorney. It is a dubious distinction, but that is a record payment for the misdeeds of one attorney.

**We talk about justice in times of trouble because it is in justice that we find comfort, even solace.**

More than half of that total could have been saved if Ohio would have required insurance companies to notify clients when a settlement payment is issued to an attorney. In the history of the Client Security Fund, nearly 25 percent of the payments could have been avoided if clients had been notified when their attorney received an insurance payment.

Many of you are from states that enjoy the benefits of notification. I know New Jersey and New York have adopted such a law and have reduced payments arising from settlement theft.

I included a request for a notification law when I addressed a joint session of the Ohio General Assembly in March this year. As it has done in the past, the insurance industry has threatened to oppose the bill despite the fact that such a law would also limit the liability exposure of an insurance company.

We would appreciate any advice you may have that would help win over a reluctant insurance industry.

Enacting sound precautions such as a payee notification law would be a fundamental step toward restoring the trust citizens hold for our system.

The work of us all has become even more important since the attack on America on September 11th.

The President, the British Prime Minister, cabinet members here and abroad have vowed to bring our enemies to justice. Think of that promise. Think of the clarity of purpose, and its reflection of moral determination: bring our enemies to justice.

Can we imagine a more profound demonstration of our belief in the American system of justice? In our commitment to the rule of law?

Why does the President say we will bring terrorists to justice?

The word can denote an eye for an eye but it also suggests the prospect of bringing international terrorists into an American courtroom even though such a course of conduct would lead to dangers beyond our worst fears: but we have done it.

We talk about justice in times of trouble because it is in justice that we find comfort, even solace. Predictability and consistency are basic key elements of the rule of law.

Within such high expectations expressed in the words, "bring them to justice" is a message to us: that we conduct our professional lives pursuant to the highest standards of our profession. If we do that, our national leaders can say and the citizens of the world can believe that those words have real meaning.

To serve the public in the capacity of a lawyer or a judge is a privilege, and I am proud to say that the vast majority of our colleagues still treat it as such. I have been honored to serve among colleagues whose integrity and dignity remain unblemished.

But we must remain ever vigilant if we are to represent the institution that provides safe harbor in times of strife.

If we are to imagine a court system that engenders trust and confidence, integrity is not simply an option. It is the essence. And client protection funds demonstrate another dimension of our belief in that principle.

We in our profession have a concern for order, and justice and honesty and decency that overrides a concern for material gain.

We are the ones, and the only ones, who can be sure that the law remains the bond that holds our society together — but to do so we ourselves must respect the courts; respect the process; and respect one another.

Today and tomorrow, may we demonstrate that respect with an intensity that enables our national leaders to proclaim to the world "we will bring them to justice." I commend you for your work. ■

## NCPO eForum

Thanks to the technological wizardry of Michael Knight, Deputy Counsel to the New York Lawyers Fund for Client Protection, NCPO has a new and efficient system of communication by e-mail. It's called the **NCPO eForum** –basically an e-mail "tree" which forwards a single message to a defined group of e-mail addresses. The result is a virtual bulletin board for NCPO members. Responses to a member's message or question are forwarded within the same group. Mike Knight has volunteered to administer this special service for NCPO.

The **NCPO eForum** consists of the e-mail address of each NCPO member who wants to be included in the group. Members can be added by sending a request to **ncpo@mybizz.net**. Your e-mail address will be acknowledged and will be included in the NCPO group.

To post an item on the NCPO **eForum**, e-mail your question or comments to **ncpo@mybizz.net**, and identify it as an item to be posted to the **NCPO eForum**. The message will be forwarded to all members of the group. You can respond to a **NCPO eForum** message by replying to the original message or sending a new message to **ncpo@mybizz.net**. Replies are then forwarded to the forum's members. Questions are welcome. Contact Mike Knight: **mjk@nylawfund.org**. ■

## Election of NCPO Officers and Directors

The election of NCPO's directors and officers will take place at NCPO's next annual meeting in Vancouver, British Columbia, on May 31, 2002. Offices to be filled include the President Elect, Treasurer, Secretary, one Director At-Large, and NCPO's six regional Vice-Presidents. The Board of Directors has appointed a Committee on Nominations: Jane Green-Marbley (OH), Kenneth J. Bossong (NJ), Frederick Miller (NY), and Georgia Taylor (NV). The Committee requests recommendations from NCPO members for these important posts. Contact Chair Janet Green-Marbley at **marbleyj@sconet.state.oh.us**, or any member of the Committee.

## Regional (or National) NCPO Workshops?

Foremost among NCPO's goals is the support of law client protection funds through educational programs. One effort in that direction has been several "regional" workshops; typically one-day sessions hosted by American and Canadian protection funds. They began with a workshop in Boston, then in Nashville, Chicago, Phoenix, Halifax, and Columbus, Ohio. More than 100 fund trustees and administrators have attended, at little or no cost to NCPO.

In November, NCPO's Board of Directors appointed an ad-hoc committee to develop recommendations to improve this educational out-reach effort. Fred Miller of New York was asked to chair the committee, in concert with Ken Bossong of New Jersey, Eileen Donahue of Illinois, and Karen O'Toole of Massachusetts.

As a member of NCPO, your views and suggestions are important. Is an annual conference appealing? What time of year? Should the conference be tailored to address the concerns of fund trustees, or administrators, or both? Is a two-day conference more appealing than a one-day event? What sort of conference would your fund likely to provide reimbursement for you? If you were king (or queen), what site would you select? Share your thoughts and hints with Fred Miller at **Millerfg@aol.com**, or any of the committee. Confidentiality will be respected, of course. ■

## Ohio Hosts NCPO Regional Workshop

*By Ruby Cochrane*

NCPO's Midwest Regional Workshop was held on Saturday, October 27, 2001, in Columbus, Ohio, at the Adam's Mark Hotel. Ohio's client protection fund hosted the event. The keynote speaker was the Hon. Thomas J. Moyer, Chief Justice of the Supreme Court of Ohio.

The morning session covered ways to make it more difficult to steal clients' funds and less difficult to catch a thief. The first topic discussed was "hot topics" in loss prevention mechanisms. Ken Bossong (NJ) and Tim O'Sullivan (NY) talked about financial record keeping requirements, random audits of trust accounts, bounced check/overdraft notification by financial institutions where attorney accounts are maintained and how that benefits those institutions, and payee notification by insurance companies and how that can benefit insurance carriers.

A Connecticut statute requiring notification of the payoff of mortgages was also presented. The theoretical aspects of client protection funds were addressed when Isaac Hecht (MD) and Bill Ricker (FL) discussed to what extent protection funds actually protect clients, and led a follow up discussion on evaluating Funds after the National Law Journal's notorious report, "An Empty Promise".

The afternoon was devoted to more practical aspects, with Ruby Cochrane (NJ) discussing how to do a financial asset investigation. Mike Knight (NY) addressed technology and client protection, discussing the use of technology in investigations and fund administration, and client protection websites. Brenda Catlett (DC) and Janet Green-Marbley (OH) led a session treating difficult claims. ■

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

## Become a Friend of NCPO

Membership in NCPO is not the only way to express support for our efforts to promote integrity in the practice of law. NCPO is a tax-exempt and not-for-profit corporation. Annual contributions of dues by individuals ($25) and organizations ($200) are tax deductible.

Now there's a new designation for financial contributors: **Friends of NCPO**. It's a way for nonmembers to support NCPO, and for members to supplement their annual dues contributions.

Contributions in any amount will be accepted and acknowledged by NCPO for your tax records. Become a **Friend of NCPO**. Send a check to the fund's Treasurer: Isaac Hecht, 315 North Charles St., Baltimore, Maryland 21201-4325. Indicate that you want to be counted as a friend.

# Reimbursement of Lawyer Theft: The Client Protection Fund Perspective

*By William D. Ricker, Jr.*

*Editor's Note: This article, published in two parts, has been adapted from President Ricker's presentation to a conference of attorneys and professional liability insurance executives in Newport, RI, on October 11, 2001, sponsored by Target Professional Associates.*

Lawyer theft of client property is not a new phenomenon. In as early as 1828, the Florida Territorial Legislature enacted a law providing that lawyers could be disbarred for failing to turn over client money.[1] Over the years, many more than a few clients have lost their life's savings, lost the only resources available for them to recover from serious personal injuries, lost their homes and lost their inheritances. While theft of a client's property is not normally thought to be an insurable event, and still is not as to the defalcating lawyer, the advent of innocent partner coverage in professional errors and omissions policies may provide for reimbursement of the client's loss.

If there is no insurance to cover a loss, or if the insurance is insufficient, the legal profession has created law client protection funds as potential sources of reimbursement for the client. Payment for losses, however, whether by the profession or the insurance industry, comes with little likelihood of recovery from a lawyer who is, hopefully, heading for jail, but in any event is probably unable to respond to a judgment. It is in the joint interest of the profession and the insurance industry to work together to produce programs to reduce loss in the first instance or to detect loss early in order to keep the hemorrhaging to a minimum.

Law client protection funds are created to reimburse clients for losses caused by their lawyer's theft of clients' money or other property. The funds receive their resources from assessments on the lawyers practicing in a jurisdiction. The assessment can be a separate charge, usually in conjunction with licensing fees, or, as in jurisdictions with unified bars, they can be part of the annual bar dues. Although every jurisdiction in the United States now has a fund, it has been a relatively long road to get to where we are today. The original predecessor to American client protection funds was formed in New Zealand in 1931. The first U.S. fund was established in Vermont in 1959, but by that time client protection funds already existed in New Zealand, Australia, Canada, England, Scotland and Ireland. By 1976, 46 states had created funds, but in the years between 1959 and 1998 some jurisdictions created and then lost their funds, while other funds were purely voluntary creations of local bar associations supported by voluntary contributions that did not survive the test of time. It was not until 1998 that every U.S. jurisdiction—including the District of Columbia—had a jurisdiction- wide law client jurisdiction fund in place.[2]

Client protection funds not only enhance the public image of the legal profession, they set lawyers apart from every other profession by providing a source of funding which comes from contributions of the vast majority of honest lawyers to pay for the sins of the very few dishonest lawyers. Client protection funds provide a pool of resources for victim-clients that is not available from any other source. Client protection funds are not insurers. They do not reimburse for negligence and they are not fee arbitration committees. They only reimburse clients whose lawyer has stolen their property. [3] Surveys over the years have shown that it is not nearly as cost effective to insure or bond the dishonest lawyer for theft as it is to maintain a well designed, well funded and well administered client protection fund.

But even though every jurisdiction has a fund in place, the effectiveness of client protection funds varies dramatically across the United States. Client protection funds were created in part to meet a public service need of the organized bar, but most funds were, and too many still are, well kept secrets that do not appear to serve the public purpose for which they were implemented, and certainly do not meet the Conference of Chief Justices' 1999 National Action Plan challenge that every fund "substantially reimburse" client losses.[4]

Client protection funds are an integral part of the lawyer regulation system in this country. Funds need to exist because our profession is not perfect, and realistically cannot be perfect, in ferreting out dishonest lawyers either before they are licensed or before their dishonest conduct occurs. To the extent the professional malpractice insurance industry provides innocent partner coverage, the industry and the organized bar should be working together to develop programs to prevent loss in the first instance, or, at a minimum, to detect losses early in the dishonest lawyer's career. Following the experience of a few jurisdictions that have been willing to experiment, the American Bar Association has promulgated several model rules creating programs which act to lessen the opportunity to steal or which more efficiently detect dishonest practice.[5]

To be continued

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[1] Section 7, Act of November 10, 1828, Compilation of Pub. Acts of Territory, 1839. See also, Petition of Florida Bar Ass'n, 186 So. 280, 285-286 (Fla. 1938).

[2] This brief history is taken from the Model Rules for Client Protection, 1-5, ABA Center for Professional Responsibility (1999).

[3] Client protection funds are resources of last resort and funds typically exercise complete discretion in making awards. Rule 14, *Model Rules for Lawyers' Funds for Client Protection*, American Bar Association (1999).

[4] Section II D 4 of 1999 National Action Plan on Lawyer Conduct and Professionalism, A Report of the Working Group of Lawyer Conduct and Professionalism, adopted by the Conference of Chief Justices January 21, 1999.

[5] See, e.g., Model Rules for Trust Account Overdraft Notification (in order for a bank to handle trust account money it must agree to notify the bar of any overdrafts), Model Rule on Record Keeping, Model Rule for Random Audit of Trust Accounts (designed to catch trust account problems early), and Model Rule for Payee Notification (requires insurers to notify claimant when settlement check is sent through a third party). There is virtually no research on the effectiveness of these model rules, although there is a growing wealth of favorable anecdotal evidence. The National Client Protection Organization has been seeking a source of funding for a quality, academic level research project. Any assistance a carrier in the professional malpractice industry could give would be beneficial to both the bar and the industry.

## Coping With Legal Fees

*By Frederick Miller*

"It's malpractice." "It's breach of contract." "It's neglect." "No, it's a fee dispute." Wait a minute. It's all of these, and more: it's a claim to a client protection fund that asks for the reimbursement of legal fees that were paid to a former attorney for what turned out to be nothing, very little, or dreck.

Most claims to protection funds across the nation involve legal fees, notwithstanding that an excessive or unearned legal fee, in itself, does not constitute a reimbursable misuse of law client money. Unless there's "dishonest conduct" amounting to theft, the trustees of protection funds do not have the legal right to reimburse anything.

What's the reason for these claims? Think about a lawyer and a plumber. One way they differ is that the lawyer's code of ethics commands her to refund unearned legal fees to a law client. Not so with plumbers. And this command persists, notwithstanding that a client's advance fee may have been used to buy a new stereo outfit for the lawyer's BMW.

The typical loss alleged in these claims pales in comparison to losses in transactions that involve the transfer of real estate, the administration of estates and trusts, other escrow engagements, and the counseling of clients regarding the investment of their funds. Yet claims involving legal fees are among the most difficult to investigate and resolve. As one fund's trustee put it, "Give me a $50,000 theft from a widow any day. We approve an award in five minutes. Then we spend an hour arguing over a $250 legal fee claim."

Why? There are several reasons. Foremost is the fact that the usual respondent is, or was, a sole practitioner who ignored rudimentary business practices. One of them is a writing (a retainer agreement, or an engagement letter) that memorializes the mutual commitments of the attorney and the client. After all, how can a client protection fund, or a fee-arbitration panel, or any other agency, determine the reasonableness of a legal fee if there's no written agreement?

It would be different, of course, if respondent lawyers in these claims cooperated with fund investigations. But that's not the case. Most refuse to participate, or to provide the claimant's legal file. These circumstances require trustees to determine claims by default, not by a careful weighing of the facts. That would not be so bad if claimants were all honest and forthcoming in pressing their claims. But that's not the case: claimants are no more honest than lawyers, and are probably less so when the lure is a cash award from a client protection fund.

Two-hundred page retainer agreements are not the solution. But court rules requiring written retainer agreements or engagement letters and the deposit of legal fees paid in advance into a lawyer's trust account would constitute giant strides in consumer protection and professionalism.

The fiduciaries of a protection fund cannot reject legal fee claims wholesale simply because they are difficult to investigate. But neither should they sacrifice the integrity of their fact-finding responsibilities by approving reimbursement by default. In the long run, it's better that funds review their experiences with unearned legal fee claims. If treating a client's legal fees as trust property, and requiring written engagement letters, would enhance efficiency and protect clients from economic abuses, what better step than to share these facts with the justices of your supreme court?

To be continued

### American Bar Association Contacts

For information in the client protection field, and access to information maintained by the American Bar Association, contact John A. Holtaway. Tel: (312) 988-5298; or jholtaway@staff.abanet.org Also at the ABA is the always helpful Debra (Debi) D. Taylor. (312) 988-5325; or debrataylor@staff.abanet.org

### Letter to the Editor

*Dear Editor:*

In 1997, the Massachusetts Clients' Security Board established the William J. LeDoux award to honor Mr. LeDoux, who served as a member of the Board from 1987 to 1997, including seven years as Board chair. The LeDoux Award is presented to a claimant's counsel who demonstrates extraordinary *pro bono* efforts in assisting a client present a claim to recover reimbursement for losses resulting from the misappropriation of client funds by an attorney.

Mr. LeDoux died in 1998, one year after the award was established. Fortunately, he was able to attend the first award presentation. Not only is the award an excellent way to honor both Mr. LeDoux's memory and the recipient, it provides a great opportunity to publicize the work of the fund. The annual presentation occurs in the courtroom of the Massachusetts Supreme Judicial Court by a member of the Court. This year Associate Justice Martha B. Sosman presented the award, a wooden plaque with a brass front bearing the recipient's name and date of presentation. I enclose a copy of her thoughtful remarks. Following the presentation, the Court hosts a reception to which all of the LeDoux award recipients are invited as well as current and former Board members. The press attends the presentation, which results in articles and photos in the numerous newspapers that serve the community.

I encourage all client protection funds to consider establishing an award to honor a trustee, an attorney, or an organization that has provided outstanding services in connection with the recovery of client funds.

*Karen D. O'Toole*
*Massachusetts Clients' Security Board*
*Assistant Board Counsel*

**NCPO on the Internet:**
***www.ncpo.org***

# But for the "But For" Test . . .

*By Kenneth J. Bossong*

Most client protection experts would readily agree that the most difficult category of claim involves an investment with a lawyer. For those funds that resist the powerful (but lamentable) urge to automatically reject every claim with the word "investment" in it, difficult issues are presented in all three of the requisite elements of a reimbursable claim: an attorney-client relationship, dishonest conduct, and loss. Of these, the most difficult issue is that of the attorney-client relationship. Faced with a series of devastating losses in the mid-1970's, the Trustees of New Jersey's fund devised a standard which is widely known as the "But For" test to determine when a sufficient attorney-client relationship exists in an investment-type claim.

**The "Question"**

The "question" may come at the end of a closing for the sale of real estate, or the disbursement of a litigation settlement, or of a large bequest. However it comes up, it is often the precursor to a claim for reimbursement. "So", the trusted lawyer asks, "what are you going to do with all that money?" Whatever the client says in reply, the lawyer's response is typically the same: the brow furrows. Concern and silence fill the room. "Surely, you can do better than that!" Then there follows a description of a can't-miss proposition to which the lawyer is privy because it either involves another client, or because, as a local sophisticate, he or she has the right connections. And, of course, this golden opportunity is being shared with only a few favored clients.

**The Problem**

Client protection funds do not exist to serve as guarantors for investments that happen to be placed by or through lawyers. This was the basic truth which opened every analysis of investment-type claims. Then came Harry Kampelman. For the community of Eastern-European Jewish immigrants in Passaic County, New Jersey, Harry was *THE* lawyer. These folks would not have conceived of bringing a legal matter to anyone else. Kampelman began favoring his clients with opportunities to participate in real estate investments. Since the fund ended up receiving 100 claims against Kampelman, few of his clients could apparently resist his overtures. To shorten a very long story, legend has it that Kampelman's record was 14 different "first mortgages" on the same piece of property - that he did not own. As they contemplated the awful facts of these claims, the Trustees concluded that these claimants epitomized the people that the fund was created to help. And to distinguish them from those whose claims were not compensable, the Trustees articulated the "But For" test.

**The Test**

In addition to all of the normal considerations of compensability, the Trustees set forth the following primary consideration upon which they should base their determination that a claim merits reimbursement: *The loss arose out of and in the course of the attorney-client relationship. But for the fact that the dishonest attorney enjoyed an attorney-client relationship with the claimant, such loss could not have occurred*."

**An Analytical Framework**

Were the "But For" test only a standard, it would be helpful. But its true value lies in the analytical framework that accompanies it. In applying the test, the Trustees are to consider a number of factors:

1. The disparity in bargaining power, including respective educational background and business sophistication, between the attorney and claimant;

2. The extent to which the fact that there was an attorney-client relationship overcame the normal prudence of the claimant;

3. The extent to which the attorney, by virtue of the attorney-client relationship with the claimant, became privy to information as to the claimant's financial affairs, (considering it particularly significant if the attorney knew of the fact that the claimant had available assets or was expecting to receive assets which were ultimately wrongfully converted by the attorney);

4. Whether or not a principal part of the transaction arose out of a relationship requiring a license to practice law. For this evaluation, four further factors are mentioned; (a) whether the transaction originated with the attorney or not; (b) the reputation of the attorney in the community, especially as to the scope and nature of the practice and business involvements; (c) the amount charged for legal services, if anything as compared with charges for finder's fees or the like; and (d) the claimant's prior history of investment or business transactions with anyone, including attorneys.

**Applying the Analysis**

The beauty of this analysis is that it gives the Trustees a principled structure for the exercise of their discretion. Many of the considerations that give the Trustees pause in handling these difficult claims are taken into account. For example, claims feel different when the money at stake constitutes the life savings of proverbial widows and orphans as opposed to speculation money advanced by sophisticated business people. Factor # 1 explicitly recognizes this as a part of the analysis. Who approached whom with the "investment" concept seems to matter somewhat; that's Factor #4(a). Factor # 3 is particularly useful. Lawyers who trade on their licenses, and take advantage of attorney-client relationships, to gain access to a person's assets have little argument when a fund replaces those assets, even if the theft was not directly within a represented transaction.

**Other Considerations**

Two offshoots of the major factors are worthy of mention. In considering whether the attorney-client relationship overcame the claimant's normal prudence, (Factor #2 above), the chronology of that relationship comes into play. When the attorney-client relationship was prior to the claimed transaction, the sheer amount of time elapsed between them will be a factor considered. Secondly, where the "investment" used to induce the claimant to participate was purported to be a transaction involving another client of the law practice, it seems more difficult to conclude that the lawyer's license to practice was incidental to the transaction under Factor #4.

**A Special Case: The Campbell Doctrine**

If there was no prior attorney-client relationship, is the claim doomed? Generally it is, but not necessarily. One further wrinkle has been added to the "But

For" analysis. Affectionately dubbed the Campbell Doctrine after Ralph Campbell, the New Jersey Trustee who proposed the analysis, it holds that even if there were no prior attorney-client relationship, the Trustees may find a sufficient current attorney-client relationship if in the handling of the claimed transaction, the lawyer performed duties traditional to the practice of law, such as preparation of notes, mortgages, security agreements and other legal documents. Claims where the respondent was brokering a deal, and in which respondent's license to practice law was incidental, continue to be rejected.

**Conclusion**

The "But For" test provides a principled, yet richly nuanced, approach to the most difficult of client protection fund claims. It is easier to not bother distinguishing bad investments from thefts by lawyers in the guise of investments, but that approach misses opportunities to do justice where badly needed. But for the "But For" test, deserving claims go unpaid. ■

*Kenneth J. Bossong is the Executive Director of the New Jersey Lawyers' Fund for Client Protection, and a Director of NCPO, Inc.*

## Alcohol and Drug Abuse in California

The State Bar of California has persuaded the State Legislature, and Governor Gray Davis, to authorize a diversion and assistance program for lawyers impaired by alcohol or substance abuse. The statute is Chapter 129 of the Laws of 2001, and it was modeled after a successful treatment program that has been operated by California's Medical Board for the state's medical community.

The objectives of the new diversion program are to enhance public protection by identifying lawyers with impairment caused by substance or alcohol abuse, or mental illness, hopefully before they harm their clients and the public, and to provide treatment that will enable those lawyers to return to the practice of law.

Lawyers will be able to enter the program through the attorney discipline system, or by self-referral. Treatment is not an alternative to discipline. Lawyers will have to pay the costs of treatment and testing, and they will be subject to the same practice restrictions and restitution obligations that apply in traditional disciplinary proceedings.

The program will be financed by California lawyers: $10 of each $390 State Bar annual membership fee is earmarked for programmatic costs. According to a report from the Senate's Office of Research, the diversion and assistance program would save the State Bar $1.6 million for every 100 lawyers enrolled in the program. That's because it costs the bar association $2.9 million to discipline 100 lawyers, as opposed to the $320,000 cost of rehabilitating them. ■

## Congratulations and Thank You

*Editor's Note: We are pleased to reproduce the remarks of the Hon. Martha B. Sosman, Associate Justice of the Supreme Judicial Court of Massachusetts, upon the annual presentation of the LeDoux Award.*

The legal profession - like many professions - undertakes the difficult task of trying to police its own, to identify and discipline those members of the profession who fail to adhere to the ethical standards that the practice of law requires. However, the legal profession in Massachusetts, through the Clients' Security Board, goes further than that, as we look beyond the discipline imposed on the offending member of the bar and seek to remedy the wrong, damage, injury and injustice done to clients as a result of an attorney's ethical failures. The Board, and those who represent claimants before the Board, undertake to fulfill a higher responsibility of our profession. They recognize a responsibility not only to their own individual clients, but a responsibility that the profession has to *all* clients, a responsibility to remedy the wrongs inflicted on clients when *any* member of the legal profession abuses a client's trust. I, on behalf of the Supreme Judicial Court, thank the Board for its dedicated service to our profession and to our collective clients.

The LeDoux Award is given in honor of the late William J. LeDoux, who served with distinction on the Board for a decade, including seven years as Chair. This award recognizes an attorney for exceptional service in representing claimants before the Board. Representation of claimants - client victims - is no easy undertaking. By the nature of the professional misconduct perpetrated against the client victim, the offending attorney has often lost his or her livelihood as a result of appropriate bar discipline. While the discipline is well-deserved, the financial consequences make it unlikely that the attorney will be able to make full restitution - or oftentimes even any restitution - to the client. And, all too often, the misappropriated funds have long since been spent. It requires persistence, determination, and a willingness to undertake an uphill battle to pursue such claims to compensate client victims. Those who undertake such cases do great service both to the claimants they represent and a great service to our profession.

Today's recipient of the LeDoux Award, Douglas Salvesen of the law firm of Yurko & Perry, represented two separate claimants, both victims of the same offending attorney. Both cases were pursued through judgment against the attorney, through diligent, exhaustive, but unsuccessful attempts to locate assets from which those judgments could be satisfied, and ultimately through successful claims to the Clients' Security Board. Both clients were made whole by the Board's award this past July.

Mr. Salvesen, I'm sure your clients have thanked you for all you did for them. Today, by this well-deserved LeDoux award, you also receive thanks from the court and from the legal profession for your efforts to enforce our collective obligations to injured clients. Congratulations and thank you. ■


**NCPO**

NCPO now has 75 individual and 27 protection funds as members. Send your check to Treasurer Isaac Hecht, 315 North Charles St., Baltimore, MD 21201-4325.

# News In Brief

### Consumer Protection in Virginia

Does your lawyer carry malpractice insurance? Does your lawyer have a disciplinary record? If you're wondering about a member of the Virginia bar, you can find that information on the State Bar's website: **www.vsb.org**. This information has been available by telephone inquiry for several years. Now legal consumers can access it on the Internet.

### Awards in Wisconsin

*The Wisconsin Lawyer* reports that all awards from the State Bar's client protection fund now total $1.6 million, paid to 281 eligible claimants. More than half of those awards ($806,000) were paid in the years 1999-2001. Two recent awards in excess of $150,000 have been approved, but payment deferred because of insufficient fund reserves. Wisconsin lawyers contribute $15 annually to support the fund.

### All Deliberate Speed in Hawaii

The Conference of Chief Justices has approved a plan to implement its National Action Plan on Lawyer Conduct and Professionalism. Keep an eye on the Conference's website for the text of the implementation plan: **www.ccj.ncsc.dni.us**. On November 6, 2001, the Supreme Court in Hawaii moved forward by establishing a special Committee to Formulate Strategies for Implementing the National Action Plan, reportedly the first in the United States. NCPO members appointed to the Committee include Michael Miyahira and Carole Richelieu, with Carole serving as Co-Chairperson. Aloha Hawaii!

### Awards in Washington State

Robert Welden, the administrator of Washington State's client protection fund, reports that the fund's activities in 2001 included the consideration of 62 applications for reimbursement. Those claims involved 22 lawyers. Forty-six claims were approved, and $208,000 in awards paid. Twelve claims were denied. A copy of the fund's annual report is available on the Internet: **www.wsba.org/c/lfcp.**

### F. Lee Bailey Disbarred in Florida

The Florida Supreme Court has disbarred famed criminal defense lawyer F. Lee Bailey for misusing $6 million in securities that belonged to a law client. In a plea agreement negotiated by Bailey in 1994, his client–an international drug dealer–agreed to forfeit his assets to the federal government. Bailey, also a member of the Massachusetts bar, converted portions of the portfolio to personal use, including the payment of claimed legal fees.

### Client Protection in Canada

Lawyers in Canada are regulated by Law Societies, and solicitor trust accounts are governed by fiduciary standards similar to those in the United States. The appellants in *Edwards v. Law Society of Upper Canada (Ontario)*, claimed that the Law Society had a duty to insure that a dishonest solicitor operated his trust account properly, or to warn them that the Law Society had abandoned its supervisory responsibilities. The solicitor had used his trust account in a $9 million investment fraud. The Supreme Court of Canada dismissed the appeal. The Law Society had no private duty of care to the victims, who were not law clients but participants in a business promotion. The Court noted that the Law Society protects consumers with a client protection fund and mandatory malpractice insurance.

### Engagement Letters in New York

Judith S. Kaye, Chief Judge of New York, announced in her State of the Judiciary Address (1/15/02) that written engagement letters will be required in most attorney-client relationships beginning March 4. Engagement letters will describe the scope of legal services to be provided, applicable fees, expenses and billing practices and, where applicable, the client's right to arbitrate disputes over legal fees.

### Business in Baltimore

Isaac Hecht, Treasurer of Maryland's client protection fund, reports that $160,000 has been paid to clients of M. Christina Gutierrez, reimbursing legal fees paid to the "no-holds barred" criminal law practitioner who was disbarred in May, 2001. Pending claims involving Gutierrez total $140,000. Meanwhile at the statehouse, the Trustees are asking the Legislature to change the fund's name to the "Client Protection Fund of the Bar of Maryland".

### 100 Percent in New York

Timothy J. O'Sullivan, administrator of New York's client protection fund, reports that all client losses last year were reimbursed 100 percent. The fund provides coverage of $300,000 per eligible loss. Last year 160 eligible claimants shared $5.3 million in reimbursement.

Since 1982, the fund has received 11,000 claims. Roughly half have been rejected as ineligible. Only five of the 5,500 rejected claimants have judicially challenged the determination. None have succeeded. In other litigation, the New York fund is suing a major bank for its failure to provide the fund with notices of bounced checks on a lawyer's escrow account.

### Reimbursement Awards in Nevada

Georgia Taylor, administrator of the Nevada client protection fund, reports a total of 41 awards in 2001. The awards total $125,000. The Nevada fund caps awards at $15,000 per claimant, and imposes an aggregate limit of $25,000 on losses by a single lawyer. Awards to 10 claimants last year were adjusted by these limits; but no award was pro-rated because of insufficient fund reserves.

### Mega Award in Montana

*The Montana Lawyer* reports that the Montana's client protection fund has approved a $350,700 award to reimburse money stolen from an estate by a now-disbarred Billings lawyer. It is the largest award in the fund's history, if not in the nation. In good years, the fund receives about 20 claims, mostly for unearned legal fees.

*In Memorium*
Gilbert A. Webb, Esquire

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