A Newsletter for Law Client Protection Funds

The Client Protection Webb

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Looking Ahead....

NCPO Picks Las Vegas

The Nevada client protection fund has offered to host a NCPO Workshop in early 2003. The likely date is Friday, February 28, 2003, with a pre-workshop get together on Thursday evening.

Inside

NCPO Leadership Changes

Elected at NCPO's annual meeting in Vancouver: President Janet Green Marbley (Ohio); President-Elect Carole R. Richelieu (Hawaii); Treasurer A. Root Edmonson (North Carolina); Secretary Georgia Taylor (Nevada); Director-at Large Betsy Brandborg (Montana). Other Directors: Martin A. Cole (Minnesota); Charles Goldberg (Colorado). Past-President William D. Ricker, Jr. (Florida). Counsel Frederick Miller (New York).

Regional Vice-Presidents: Karen O'Toole (Massachusetts); Eileen W. Donahue (Illlinois); Lynda C. Shely (Arizona); David Shearon (Tennessee); Martha Gonzalez (California); and Victoria Rees (Nova Scotia). ■

Message From The (New) President

Janet Green Marbley

I am honored to serve as the third President of the National Client Protection Organization, Inc. Bill Ricker, our Past-President, did an outstanding job leading NCPO. Bill worked tirelessly to advance the mission of client protection. My tenure as President-Elect under Bill's leadership will be a continuing source of guidance during my term as President.

Seven years ago, I became the third Administrator of the Clients' Security Fund of Ohio. My knowledge of client protection was very limited, to say the least. NCPO did not exist as an organization then, but I received much needed help from and support from several of NCPO's founders and members. That informal network of professionals is now a national organization providing information and support to protection funds throughout the United States and Canada.

The enthusiasm expressed at our annual meeting in Vancouver is evidence that NCPO intends to continue its efforts to support programs that help legal consumers who have been harmed by the dishonest conduct of a relative handful of lawyers. I am confident that together we will attain NCPO's priorities and goals.

A recent survey of NCPO's membership indicates that networking and educational activities are of paramount importance to our members. Likewise, our members view ***The Client Protection Webb*** as an invaluable tool for the exchange of helpful information within the client protection community. Thanks to NCPO Vice President Victoria Rees for conceiving and implementing this survey. Thanks also to Fred Miller, NCPO's Counsel, and Director Marty Cole for their work on ***The Webb***; and to the Attorneys Liability Protection Society (ALPS) for its generosity in underwriting the costs of publishing and distributing our newsletter.

NCPO will soon begin the development of a training program for protection fund trustees, particularly newly appointed trustees. It will be an educational effort to acquaint trustees to their fiduciary roles in administering funds, as well as the concepts that are routinely employed in the evaluation of claims. A special committee, chaired by Ken Bossong, has been created to steer the program, and I invite everyone to help us in this important educational effort.

I look forward to the next two years. There's a lot to be done, and there are unique opportunities for promoting integrity in the practice of law, and public confidence in the administration of justice. Join me please in achieving those goals! ■

Report of the Secretary

Georgia Taylor

Twenty-seven attendees heard newly-installed President Janet Green Marbley discuss goals and issues at NCPO's Annual Meeting on May 31, 2002 in Vancouver. Among the topics discussed were enhancements for our Internet website, increased use of our Speakers Bureau, and an educational initiative in the training of new trustees of client protection funds. The members present enthusiastically endorsed an NCPO workshop in Las Vegas, Nevada, in early 2003.

On July 17, NCPO's Board of Directors met via teleconference. The Directors discussed how NCPO might help the Conference of Chief Justices in the implementation of its National Action Plan on Lawyer Conduct and Professionalism. Other items of business included NCPO's support of the Standing Committee's proposals to amend the ABA's Model Rules for Client Protection Funds, a request from the Nova Scotia fund for a representative of NCPO to address the fund's trustees (Ken Bossong was selected), and a critique of the Difficult Claims Workshop that NCPO conducted at the Vancouver Forum.

The Directors and Vice Presidents met via teleconference on September 18. Discussions included a special project on trustee training headed by Ken Bossong. Membership Chair Karen O'Toole is developing a new membership brochure. Bill Ricker agreed to chair the Difficult Claims Workshop at the ABA's next Forum in Chicago. Webmaster Michael Knight reported on his efforts to enhance our NCPO's internet website.

● *Georgia Taylor is the administrator of Nevada's client protection fund.*

NCPO Website Improvements

Check out NCPO''s website: **www.ncpo.org**. It's an outstanding information resource with access to all issues of *The Client Protection Webb*, the *Law Client Protection Fund Bibliography*, as well as links to the ABA Model Rules and access to NCPO Regional Workshops materials. Our volunteer webmaster is Michael J. Knight of the New York Lawyers' Fund: **mjk@nylawfund.org.**

Renovations are underway to make it even better: Planned improvements include access

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Finding Dishonest Conduct in Investment Claims

Kenneth J. Bossong

A client protection fund faced with an investment claim must first determine whether the requisite attorney-client relationship existed between the claimant and the lawyer. (See "*But For the But For Test*", ***The Client Protection Webb***, Vol. 5 No. 1, p. 6.). The next hurdle on the claim's path to an award is finding that the loss resulted from the "dishonest conduct" of the lawyer. This can be equally difficult.

How These Claims Arise

Recall the scenario. Client and lawyer are sitting at a table. Client has just come into a wad of money (personal injury settlement, sale of real estate, beneficiary of an estate, whatever). "So" lawyer asks thoughtfully, "What are you going to do with ALL THAT MONEY?" "I dunno" replies client, "put it in a bank, I guess." Lawyer is horrified, but wait, this is client's lucky day. Lawyer just so happens to have another client whose XYZ Corp operates a restaurant (or develops real estate, whatever) XYZ needs money for a prospect right now and is willing to pay above market interest. Lawyer is so sure of this can't-miss opportunity that he's willing to give his personal guarantee.

Variations

Since client is now a claimant, the money is gone and lawyer is either judgment proof or living in Rio. Now what? Depends on what happened. There are two extremes for which the analysis is easy. That means they seldom come up, of course, but they are helpful in considering the analysis.

Easy case #1: There was no other client, no XYZ Corp and no restaurant. Lawyer simply took claimant's money and is spending it on various pleasures in Rio. That is pure theft, in the guise of a loan. Funds not finding dishonest conduct here are kidding themselves.

Easy case #2: XYZ Corp. exists, and claimant's money went to it. The restaurant simply failed, as restaurants sometimes do. This bears no resemblance to a conversion. If there is a fund in North America that would pay this claim, please e-mail me an explanation immediately.

Moving the hypotheticals from the extremes toward the middle yields fact patterns resembling the claims that leave fund trustees and counsel ready to tear their hair out:

(1) XYZ Corp. does exist but (a) is the alter ego of lawyer or (b) is owned by lawyer's brother-in-law (c) to whom lawyer owes money.

(2) Lawyer promised client a first mortgage on XYZ's property and provided a copy of a mortgage, but it (a) was a *fifth* mortgage; (b) would have been a first but was not recorded (and others subsequently were recorded); (c) was on a property not owned by XYZ Corp.; (d) was not executed by an authorized representative of XYZ; or (e) covered insufficient equity because lawyer misrepresented the property's value.

(3) XYZ Corp. existed apart from lawyer and its principals were thieves. It is hard to tell whether or to what extent lawyer was part of a conspiracy.

An Approach

There are infinite variations. If some of this is distressingly familiar, honing in on these factors helps:

(1) What exactly did claimant believe the investment to be? Get every detail. What did lawyer say and do to induce the investment? What were claimant's expectations and how were they created? Was wrongdoing implicit in the offer?

(2) Compare to (1) what lawyer actually did with claimant's money.

(3) If it went anywhere but to XYZ Corp., *and* if that placement benefitted lawyer, we are on our way to a finding of dishonest conduct.

(4) If it went to XYZ Corp., the fun begins:

A. What relationship does lawyer have to XYZ? Owner? Officer? Debtor?

B. If lawyer was an owner, were there others? Who, and what relationship?

C. In whose name was the investment made? If there was stock, for example, was it issued in the name of claimant or lawyer? If XYZ is a legit third party, have its principals ever heard of claimant?

D. Did lawyer receive, or expect, a benefit to himself in placing the investment?

Commission? Finder's fee? Stature?

E. Can lawyer prove he invested any of his own money in this "can't-miss" deal? If not, why not? This is especially germane if lawyer's defense to the claim is that XYZ's principals were the bad guys, unbeknownst to lawyer.

F. If lawyer argues the loss resulted from negligence rather than dishonesty (as in failure to record mortgage), take a good look at who benefitted thereby.

G. What did XYZ do with claimant's money? Why is it unavailable?

H. If claimant received anything of value as return on the investment, was it from lawyer or XYZ?

The Analysis

The finding on dishonest conduct is as fact-sensitive as that on attorney-client relationship. In analyzing all the factors, some principles suggest themselves:

If claimant's money was used to place a *bona fide* investment in claimant's name with a third-party entity, the claim will probably be rejected no matter how ill conceived, foolish or disastrous the investment turns out to be. The fund is not a guarantor of investments.

There are a number of bad acts by a lawyer which, without more, will not be enough to amount to dishonest conduct, including:

- bad investment advice
- bad legal advice
- puffing, exaggeration, even outright misrepresentation
- negligence or malpractice

The element that is lacking when lawyer's bad behavior falls just short of compensable dishonest conduct is *unwarranted benefit to the lawyer*, often (but not necessarily) undisclosed to the claimant. Funds must regularly explain that the dishonesty they address is akin to stealing, not lying.

Thus emerges a kind of Benefit Test: Was the "investment" placed by the lawyer for his or her own benefit, or that of the claimant? Note that the foolishness of the investment neither saves a true investment from rejection nor prevents an award where lawyer sought benefit for himself with claimant's money. These are subtle points, particularly the latter.

Noting how poorly he had done in the deal himself, a lawyer once defended a claim, in effect, by saying he was a schmuck, not a thief. The two are not mutually exclusive, concluded the Trustees in approving an award. Where the lawyer had used claimants' money to invest in his own name, he could not defend on the basis that the benefit he sought for himself was unrealized because XYZ's principals were slicker than he was.

Focusing on who could benefit from placement of claimant's money has two other advantages. First, it encourages a helpful distinction between the mere spending of money and potentially productive use. Cruises and fancy cars for the lawyer had no chance of creating value for claimant; a backhoe for a builder or down payment on property for a developer may be a different story. Second, following the benefit can lead to collateral sources of recovery, such as assets, or a deal subject to constructive trust.

Conclusion

Conversions of clients' property, however cleverly or elaborately disguised as investments, should be reimbursed by client protection funds. Failed investments, however sympathetic, should not. Getting these claims right is hard work, but worth the effort to do justice. ■

● *Kenneth J. Bossong is Counsel to the New Jersey Lawyers' Fund for Client Protection, and a former President of the National Client Protection Organization.*

Bounced Check Litigation

A bank's failure to provide notices of dishonored checks drawn upon a lawyer's escrow account is a basis for proceeding against the bank for breach of contract and negligence. New York's Dishonored Check Reporting Rule requires participating banks to provide the client protection fund with written notice whenever a lawyer's escrow account check bounces. When a dishonest lawyer's bank defaulted in providing notice, the New York fund sued the bank after reimbursing $1.6 million stolen by the lawyer. The trial court refused to dismiss the complaint. It held that the bank may be liable for breaching its contract with the fund to provide notice, and also in negligence for failing to make inquiry about clear signs of fiduciary misappropriation. **Lawyers' Fund v Dime Savings Bank**, No. 24711/99 (Sup. Ct.,) Nassau Co. 2001, aff'd _ A.D. 2d_(2nd Dep't 2002). ■

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NCPO Website Improvements

to the NCPO e-Forum, a members-only list serve; and a map of USA Client Protection Funds offering comprehensive data about the nation's funds. Members will also be able to review selected information from the ABA's survey on Client Protection Funds and see national results in a graphical format. See you online! ■

Chief Justices Adopt Implementation Plan

In January 1999, the Conference of Chief Justices approved **A National Action Plan on Lawyer Conduct and Professionalism**. With input from NCPO, the Conference's plan squarely assigned responsibility for the administration of client protection programs to the high courts of each state as an integral component of their authority to regulate the legal profession and promote public respect for our legal institutions.

The **Action Plan** defines in black letters the essential features of a functional client protection program, beginning with the standard that a fund must "substantially reimburse" losses resulting from a lawyer's misuse of client and escrow property. Also, that funds be financed by mandatory assessments on the lawyers in each jurisdiction; that fund assets be declared to constitute a trust; that funds be administered by a mix of lawyers and lay persons; and that funds must publicize their existence and activities.

The Conference has adopted and published an **Implementation Plan for the National Action Plan.** The texts of both plans are posted at the Conference's Internet website: **http://ccj.ncsc.dni.us/**. Of special interest to the client protection community is the Conference's recommendation that every supreme court establish an implementation committee, with a diverse membership including a representative of the state's client protection fund. These committees will engage in strategic planning to implement the initiatives proposed in the **National Action Plan.**

The Conference also recommends the creation of a National Action Plan Implementation Committee, which would be charged with the responsibility of sustaining the Conference's efforts to promote and implement the recommendations in the National Action Plan. Suggested liaisons to the national committee include representatives from national professional organizations, including NCPO. ■

Florida's Client Protection Fund

William D. Ricker, Jr.

In January 2002, The Florida Bar celebrated the 35th anniversary of its Client Security Fund. Florida has a unified Bar and the Client Security Fund Committee is like any other standing committee of the Bar. The fund's revenues are allocated in the Bar's annual budget.

The CSF Committee is comprised of between 30 and 40 volunteer members of the Bar and, beginning in 2003, two public members who investigate claims and meet three times yearly to discuss and recommend payment to the Bar's Board of Governors. Lawyer members serve without compensation. There is an assigned Bar lawyer/director who is shared with other Bar entities, and a full-time fund coordinator who is responsible for the intake and assignment of claims and other necessary record keeping.

When a claim is assigned to a Committee member, the member initiates an investigation, which may include obtaining information from the disciplinary branch of the Bar, talking to the claimant, speaking with witnesses and hearing from the respondent attorney. Following the investigation, which is supposed to be completed in 90 days, the member recommends claim disposition to the Committee. The recommendation of the Committee is forwarded to the Board of Governors. Before the full Board considers a claim, a reviewing member from the judicial circuit from which the claim arose reviews the claim and makes a recommendation on payment. The Board must approve awards in excess of $10,000.

Over the last several years, the Board of Governors has enacted regulations designed to streamline procedures and speed the payment of approved claims. The first change was to grant the fund administrator the authority to investigate and evaluate all claims for $500 or less and place their recommended disposition on the Committee's consent agenda. That procedure has reduced the number of small claims that must be investigated by Committee members. The second change granted the Committee the final decision on awards of $10,000 or less. All other awards require approval by the Board of Governors. A major new policy will limit committee membership to six years.

Florida has two types of monetary limits on claims, but no limit per lawyer. Claims for the reimbursement of unearned fees are limited to $2,500. All other claims are limited to $50,000. In the early years of the fund, these limits were significantly lower: $300 for unearned legal fees, and $3,000 for misappropriations.

In the mid-1980s the Board of Governors asked the Committee to find reasons to pay valid losses, rather than reasons to deny reimbursement. The effect on the fund was to increase the number and amount of awards. But too often, the fund is unable to fully pay all approved awards. The problem is addressed in a regulation that provides for the immediate payment of the first $25,000 of an award, with each unpaid portion in excess of $25,000 to be placed into a pool to be paid at the end of the fiscal year (June 30), on a pro rata basis until available funds are exhausted. This policy should result in full payment of 90 percent of approved awards.

Over the years the annual lawyer assessment has ranged from the original $2.35 to the current $20.00. The current funding formula generates $1.4 million for reimbursement. The fund's administrative costs are paid by interest earned on the reserve fund or general Bar dues.

Florida is like most funds in requiring that the loss is caused by the wrongful act of a member of the Florida Bar. Pursuant to a 1977 decision of the Florida Supreme Court, a loss caused by a mere fiduciary relationship between a person who happens to be an attorney and another party is not sufficient to permit reimbursement. The loss must arise out of a traditional attorney-client relationship. *In Re Amendment to the Integration Rule and Bylaws Respecting Clients' Security Fund*, 346 So.2d 537, 538 (Fla. 1977).

The fund has the usual exclusions: no investment losses or thefts unrelated to an attorney-client relationship; no losses of law partners or relatives of the wrongdoer; and no losses by government agencies, institutional lenders, insurance companies, publicly held companies or subrogees, unless the claim is brought on behalf of an otherwise eligible claimant. There is two-year statute of limitations, but it is flexible enough not to do injustice to equity.

Millions of dollars have been reimbursed during these 35 years. While Florida lawyers can take great pride in their efforts to right wrongs, much remains to be done. Both the maximum limits on awards and the annual lawyer assessment are too far below those in comparable jurisdictions. Florida has adopted the ABA model rule on overdraft notification, but not the equally helpful rule that requires insurers to notify clients of personal injury settlements. Nonetheless the client protection movement is alive and well in the Sunshine State and clients are better served because of it. ■

● *William D. Ricker, Jr. is a longtime leader of the Florida Bar and its client protection fund. He is the Immediate Past-President of the National Client Protection Organization.*

Arkansas Adopts Overdraft Notification Rule

Effective July 1, 2002, the Arkansas Supreme Court requires the reporting of overdrafts in client trust accounts maintained by Arkansas lawyers. The new program calls for an overdraft notification agreement between the Supreme Court, through its Office of Professional Conduct, and financial institutions throughout the state. Financial institutions will not have to have separate agreements with the lawyers who have client trust accounts with them. If a financial institution does not agree to the overdraft notification, no law firm trust account can be maintained with that bank. The Court also amended its law firm recordkeeping rule. The text of the new rules can be found on the Supreme Court's website: **www.arkbar.com**. Click on the button "New and Noteworthy". ■

New Discipline Policy in New Jersey

As reported in the *New Jersey Law Journal* (8/6/02), the state Supreme Court has created the new punishment of indefinite suspension for offenders "on the

cusp of disbarment" who seem capable of rehabilitation. Under a new court rule lawyers who are given an indefinite suspension will be permitted to petition for reinstatement after five years.

The New Jersey Supreme Court acted in response to complaints from the bar about the Court's policy of permanent disbarment. That policy will continue, but the new rule gives the Court the option of deciding, at the time of discipline, that a lawyer's career might be salvageable. It did not say what circumstances would make a lawyer eligible for indefinite suspension; but possibilities include misconduct attributable to a lawyer's mental disease or substance abuse where recovery is underway at the time of discipline. ■

Judicial Review in New York

Timothy J. O'Sullivan

New York law permits claimants who are denied reimbursement from the New York Lawyers' Fund, which is a government agency, to challenge the Trustees' determination in what are called "Article 78 Proceedings".

One recent case involved the denial of reimbursement for a theft of money which the claimant had entrusted with his lawyer to bribe federal officials who were investigating the claimant for criminal activity. In *Beutz v NY Lawyers' Fund*, 187 Misc. 2d. 359 (Sup. Ct., Albany Co. 2000), the court held that the Trustees' determination had a rational basis and was not arbitrary or capricious.

In another claim where there was inconclusive evidence whether a loss constituted a theft of escrow money or the repayment of a loan to the claimant's attorney, the Trustees denied reimbursement on the ground that the claimant had not provided satisfactory evidence of an eligible loss. The claimant challenged this determination and succeeded in having the trial court annul the Trustees' determination. That decision was reversed on appeal. The appellate court held that the Trustees' determination was neither arbitrary nor capricious. *Matter of Haskins v NY Lawyers' Fund*, No. 25544/1999 (Sup. Ct., Suffolk Co. 1999), rev'd, 286 A.D. 2d 440. (2d Dep't 2000).

In a third proceeding, a prison inmate challenged the administrative dismissal of his claim seeking the reimbursement of $750 in unearned legal fees. The court held that the determination had a rational basis, and was not arbitrary, capricious or made in violation of lawful procedure. *Plater v O'Sullivan*, No. 7340-00, Sup. Ct., Albany Co. 2000), aff'd _ A.D.2d _ (3rd Dep't 2002). ■

● *Timothy J. O'Sullivan is the Executive Director and Counsel of the New York Lawyers' Fund for Client Protection.*

Trustee Training in Nova Scotia

Victoria Rees

The Nova Scotia Barristers' Society's Reimbursement Fund held it's first "Trustees' Training" session in mid-July in Halifax. The session was led by Kenneth J. Bossong of New Jersey and David McKillop of Ontario, both NCPO members. The training focused on Nova Scotia's protection fund policies; the role of fund trustees; and the best practices of protection funds in other jurisdictions in the United States and Canada. Ken and David were invited to participate in the evaluation of difficult claims on the fund's agenda.

This education session was extremely well-received by the Nova Scotia trustees, and helped them broaden their thinking as they embark on a full-scale review of the fund's statutes and regulations. The session was invaluable in helping the fund address a wide range of new and difficult pending claims. Possible changes in Nova Scotia resulting from the session include a change in the name of the fund; a lengthening of the filing period from 12 to 24 months; and clarifying the fund's role and purpose. ■

● *Victoria Rees is the administrator of Nova Scotia's client protection fund, and a Vice-President of NCPO.*

A Simple Gift *by Tricia Nagel*

Arthur R. Littleton died on July 23, 2002 at the age of 76. While on a trip to South Africa last March, Art suffered what was believed to be a stroke. In fact, it was an inoperable brain tumor.

Art was born on Philadelphia's Main Line. He attended The Haverford School, Swarthmore College, and received his undergraduate and law degrees from the University of Pennsylvania. Art served in the Navy in the Korean Conflict, and later joined his father's law firm.

Art filled a room physically. He was six feet, six inches tall with an athletic build courtesy of his football days, and hair that had grayed prematurely. He chaired ABA committees on client security funds and paralegals, and numerous educational, civil and charitable organizations. He volunteered his time and expertise taping audio recordings for "Recordings for the Blind and Dyslexic." Art took up skiing when he was in his 40s, and stuck with it till the end. He golfed, sailed and could navigate by the stars. He embraced computers and every high-tech gadget he could obtain. Art traveled to every corner of the world.

I can tell you that a long-term challenge - and nothing less than a labor of love - was Art's involvement with client protection funds. And what a challenge he had when in the 1970s he became the primary force in a small organization with little funding: the Philadelphia Bar Association's Client Security Fund. It became Art's "baby" - nothing less and nothing more; his way of giving back to the profession. At that time, the fund could reimburse only about 10 percent of eligible losses. The words that Art lived by, however, were: "Justice delayed is justice denied." He simply would not accept that this was the best the legal profession could do. He set a goal of a state-wide client protection fund providing total reimbursement on a timely basis. Although it took Art until 1982, he successfully persuaded Pennsylvania's Supreme Court to create a client protection fund financed by a mandatory lawyer assessment. It took another eight years to increase the fund's maximum limit from $25,000 to $50,000. Art served as the first Chairman of the Pennsylvania Fund for the maximum term of six years.

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An Experiment in Demographics

Michael J. Knight

The Model Rules for Lawyers' Funds for Client Protection identify publicity of fund activities and development of consumer protection and information programs as among the affirmative duties and responsibilities of a fund's Board of Trustees. [1] These efforts are vital to the early detection of losses and the prevention of losses. Also, there are benefits to funds that publicize their efforts and institute prevention programs including reduced claims and improved public perception of the legal profession.[2]

All funds, whether created by a judiciary or a bar association, share a common thread: losses span the range of legal practice. In New York, as in many other states, claims and awards are categorized into several main practice areas (*e.g.*, Collection, Estates and Trusts, Unearned Legal Fees, Investments, Settlements, Realty Escrow, and "Other", our miscellaneous category). Our statistics are then calculated to reflect problem practice areas, and our Trustees, in turn, seek to produce consumer information and protection programs and focus public information efforts to address these problem practice areas.[3] Our fund has also published several consumer education brochures and pamphlets,[4] using the same collected information.

A continuing challenge, however, is how and where to target this information to produce the greatest result. While information regarding types of misconduct in claims is extremely useful in fashioning attorney regulation, it is not as helpful in identifying the most vulnerable client, our target audience.

With the advent of greater technology and a better ability to analyze data, we began to track Age, Occupation and Gender from our database. As an internal experiment, we recently reviewed over 3000 filed claims since 1996 and analyzed the raw data to make educated conclusions about where we find most of our victims, and our business. The highlights:

Claimant Occupation

In New York, since 1996, 3001 claimants listed an occupation on their reimbursement application. Because of the wide diversity of individual occupations, it was necessary to divide all occupations into seven basic occupation categories: **Disabled, Incarcerated; Middle/Blue Collar; Professional Employment; Student; Retired** and **Unemployed**.

The largest number of filed claims in the sample came from the Middle/Blue employment area (1,831 claims). Next was Retired persons (467) followed by Professionals (301).

Likewise, the largest losses alleged were from the category of Middle/Blue employment ($46.9 million), followed by Retired persons ($21.7 million) and Professionals ($12.4 million).

Finally, the largest amount of awards reimbursed were within the category of Middle/Blue employment ($10 million), followed by Retired persons ($5.4 million) and Professionals ($2.3 million).

For each occupation category, we further identified the type of misconduct involved. For example, of the 1,831 claims filed by Middle/Blue income claimants, 1,004 of these claims involved unearned retainers, of the 467 claims filed by Retired Persons, 125 involved realty claims, and so on.

Claimant Age

Since 1996, 2,791 claimants listed their age on their reimbursement application. Again it was necessary to separate all ages into the following categories: **Ages 15-20; Ages 21-30; Ages 31-40; Ages 41-50; Ages 51-60; Ages 61-70; Ages 71-80 and Over Age 80**.

The largest number of filed claims in the sample came from claimants Ages 41-50 (743 claims), followed Ages 31-40 (701) and Ages 51-60 (517).

The largest losses alleged were from the Age 41-50 category ($16.9 million), followed by the Ages 51-60 category ($16.8 million) and Ages 71-80 category ($13.9 million).

Finally, the largest amount of awards reimbursed were within Ages 51-60 category ($3.9 million), followed by Ages 41-50 category ($3.8 million) and Ages 71-80 category ($2.8 million).

Again, as with occupation, each age group was analyzed by type of misconduct: For example, the 743 claims filed by claimants Age 41-50 included 393 claims involving unearned retainers.

Claimant Gender

Finally, 3001 claimants listing an occupation on their reimbursement application also indicated a gender. Non-gender titles such as a business or an Estate were treated as **"Other"**.

Gender is the least reliable of the demographic data collected from our database. The information tallied represents only an initial determination of whether our claimant is a **"Miss", "Ms.", "Mrs."**, a married couple - **"Mr. and Mrs."** or simply a **"Mr."**. Often, these designations change during a claims investigation when it's learned, for example, that an estate is a proper claimant, or a claim is shared by a husband and wife, etc.

The largest number of filed claims in the sample came from the "Mr." category (1,451) followed by "Ms." (541) and "Mrs." (433). The largest losses alleged were also from the "Mr." category ($46 million), followed by the "Mrs." ($11.7 million) and "Mr. and Mrs." ($11.6 million).

Finally, the largest amount of awards reimbursed were within the "Mr." category ($7.4 million), followed by "Ms." ($3.2 million) and "Other" ($2.9 million).

Conclusion

Obviously, this is a topical treatment of raw data, but an important first step in identifying the types of victims we deal with. We are refining our information, cross-referencing it and hope to use the results as a guide to better target all strata of legal consumers.

Collection and analysis of this demographic information provides a unique opportunity to calculate probabilities and predict trends which, when married to traditional information regarding attorney misconduct, will permit the New York Lawyers' Fund to more accurately and wisely invest public information and education outreach efforts.

I would encourage all funds to undertake a similar review of claims demographics, even if only for the most recent reporting year. As this information

is collected and shared, NCPO may also be used as the conduit to combine the data to produce national and geographic trends.

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[1] Model Rules for Lawyers' Funds for Client Protection, RULE 7(E), (I).

[2] Bossong, Kenneth J., *Let's Get the Word Out About Clients' Security Funds*, Bar Leader (March/April 1987).

[3] An example of this in New York was the 1988 implementation of Insurance Department Regulation 64 (11 NYCRR 216.9). In response to mounting forged endorsement thefts by attorneys, the Trustees sought implementation of an insurance notification provision requiring third-party notice to a law client for any personal injury settlement payment issued to an attorney which exceeded $5,000. This program drastically reduced personal injury settlement claims to the fund.

[4] See, New York Lawyers' Fund for Client Protection, *A Practical Guide to Attorney Trust Accounts and Recordkeeping*, 3rd Ed. (1997); *What's a Power of Attorney? Answers for New Yorkers* (1996); *Avoiding Grief With A Lawyer – A Practical Guide* (1998). ■

● *Michael J. Knight is Deputy Counsel of the New York Lawyers' Fund for Client Protection*

Rest in Peace

Former Kentucky Bar Counsel **Barbara S. Rea** died on July 5, 2002. Barbara served as Bar Counsel from 1994 until her retirement in 2001. As Bar Counsel, Barbara was responsible for Kentucky's client protection fund. She served as President of the National Organization of Bar Counsel in 2000-2001, and was a member of the ABA's Standing Committee on Client Protection from 1996-1999, and served as the NOBC's liaison from 1999-2001. Barbara's courage and determination during her final illness was an inspiration to everyone who knew her.

@ ease

The Practice of Law

Frederick Miller

It's no secret that the devil lurks in details, and in the ambiguity of many client protection fund rules. Most go back to the 1960s. It's no criticism to say that they were drafted by legal ethicists who had little or no practical experience in client reimbursement programs. One result is that fund trustees 50 years later spend a lot of time interpreting fund rules and regulations.

Helpful in this regard is a rule which provides that a fund's regulations should be construed to do equity, and advance the best interests of the fund. Substantially reimbursing losses is a high priority, of course, but the trustees also bear the fiduciary obligation to preserve the fund as an effective institution of justice.

What might endanger a fund's existence? How about a batch of sophisticated frauds involving investments? That just might do it. And that possibility haunts many funds throughout the nation and Canada.

The Model Rules don't provide much help on investments losses. So trustees must look elsewhere, like the ingenious "But for" test pioneered in New Jersey and adopted by many funds nationwide to evaluate claims founded in fraud.

I have long urged funds to construe their regulations liberally to prove the bar's commitment to public service, justice and equity. After all, if not us, who else? But investment transactions pose unique threats to funds, and it's important that funds carefully articulate coverage policies.

Not everything billable that a lawyer might in her office involves the "practice of law". Where do we draw the line? Check out *In re Grand Jury Subpoenas Dated 3/9/02* (SDNY. No. M11-189 (DC), 12/13/01), a proceeding involving former White House Counsel Jack Quinn who was retained by the fugitive Marc Rich to lobby President Clinton for a presidential pardon. He succeeded, and in a later criminal investigation, he invoked the attorney-client and work-product privileges to withhold documents from a federal grand jury.

District Court Judge Denny Chin refused to quash the subpoenas. In effect, he held that Quinn and his colleagues were working as lobbyists with law degrees, not as Rich's advocates in civil, criminal or administrative proceedings.

Common sense saves many a day. It's important that funds not get overwhelmed by artfully drawn and complicated statements of claim. Remember: not everything that a lawyer does is the practice of law, not even when a dishonest lawyer claims otherwise. ■

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A Simple Gift

He then became the Fund's first General Counsel.

What I cannot tell you about Art is the impact that he made on the lives of those with whom he came in contact both personally and professionally; his patience, kindness, generosity of heart and soul; his need to give back to the profession. Nor can I tell you the depth of loss that I feel at his passing.

At Art's memorial service, his grandson spoke of how Art lived by seizing the moment and truly enjoying it. His daughter told of Art's love for the law and how he felt that the Pennsylvania client protection fund was something akin to a higher calling to him. At the service, the Shaker tune "Simple Gifts" was played because Art was, after all, simply one of the best gifts we ever had.

● *Tricia Nagel served as the first administrator of Pennsylvania's client protection fund.*

Letters to the Editor

Letter to the Editor:

The New York Lawyers' Fund is seeking to plug a gap in court rules to safeguard law client funds and property when a lawyer is suspended from practice, or disbarred.

I would welcome help from jurisdictions which have rules which address this aspect of client protection. Sincere thanks to fund administrators in New Jersey, Massachusetts, Washington and British Columbia for sharing with me their experiences and programs.

Tim O'Sullivan
tos@nylawfund.org

News In Brief

Veteran New York Trustees Step Down

The New York Lawyers' Fund is losing more than 32 years of hands-on experience with the retirements of Trustees Ray W. Manuszewski and Theodore D. Hoffmann. Mr. Manuszewski has served as the fund's Treasurer since 1981. Trustee Hoffmann, the fund's Vice-Chairman, has served since 1990. Fund trustees in New York are appointed by the state's high court and serve three-year terms, which are renewable.

Peace Reigns in Hawaii

The Supreme Court of Hawaii has amended its rules to create a nominating committee to fill vacancies on court agencies like the client protection fund. Previously only the Hawaii State Bar Association had that authority.

Another rule change gives the Supreme Court sole authority for approving the fund's budget, after review and comment by the State Bar. The fund's budget was previously subject to bar association approval. The rule changes conclude a contentious struggle between the bar and the fund over the fund's finances and management. The fund's new website can be found at **www.lawyersfundhawaii.com.**

Progress Report from Illinois

Illinois' client protection fund approved 73 claims totaling $257,219 to eligible victims of dishonest lawyers in 2001. The fund has a $10,000 maximum limit on awards, and the majority of client losses are fully reimbursed. Most losses in 2001 involved the refund of legal fees paid in advance. The fund was created by the Illinois Supreme Court in 1994.

Leaders Elected in Maryland

The Client Protection Fund of the Bar of Maryland (new name!) has re-elected its leaders to new terms: Richard A. Reid as Chairman; Barbara Ann Spicer as Vice-Chairman and Secretary; and Isaac A. Hecht as Treasurer.

New Administrator in Michigan

Robin Lawnichak has been appointed the Administrator of Michigan's client protection fund. Robin can be reached at **Rlawnichak@mail.michbar.org**. Welcome to our community Robin!

Minnesota Fund Relocates

Marty Cole and the Minnesota Client Security Board have relocated to 1500 Landmark Towers, 345 St. Peter St., St. Paul, MN 55102-1218. (800) 657-3601.

Settlement Authority in Nebraska

A personal injury settlement made by a lawyer without the client's express authority, or acquiescence in open court, is not binding upon the client. The Nebraska Supreme Court holds that the lawyer-client relationship in itself does not provide a lawyer with implied or apparent authority to settle a client's claim without the client's express approval. *Luethke v Shur*, 8/9/02

Model Rules Amended

A package of amendments proposed by the ABA's Standing Committee on Client Protection were approved at the ABA's August 2002 meeting. The amendments, described as "fine-tuning" revisions, include expanding the definition of covered lawyer to include suspended and disbarred lawyers; encouraging disciplinary agencies to inform victims of lawyer dishonesty about client protection funds; extending the time period for filing claims to five years; barring investment losses; barring consequential and incidental damages; and requiring restitution from dishonest lawyers.

Sharing the Pain

The client protection funds of New Jersey and New York continue to share the cost of reimbursement where a loss involves a dishonest lawyer admitted to practice in both jurisdictions. The most recent claim resulted in equal contributions by both funds to reimburse a $188,532 theft by a lawyer who was retained in New York to administer a New Jersey decedent's estate.

Brenda Catlett Retires

Brenda Catlett has retired as the administrator of the Client' Security Trust Fund for the District of Columbia, a post she held since 1984. Brenda is a past Chair of the ABA's Advisory Commission on Lawyers' Funds for Client Protection, and has been a active supporter and member of NCPO.

Thanks to Brenda's efforts to increase NCPO membership, the DC fund received NCPO's "110% Award" in June, 2001. That award recognized that all Trustees and staff of the DC fund were members of NCPO. Brenda looks forward to new responsibilities as Grandmother Catlett. We will sure miss Brenda!

California Blizzard

The Client Security Fund of the State Bar of California celebrates its 30th anniversary this year. Business remains brisk, with more than 1300 claims for reimbursement filed each year. The fund's 2001 annual report can be found at **www.calbar.ca.gov/calbar/pdfs/csfreport_2001.pdf.**

Progress Report from Washington State

Thus far in 2002, the client protection fund in Washington State has approved $250,000 in reimbursement awards (which it designates as "gifts") to 47 eligible victims of 20 dishonest lawyers.

The Supreme Court recently granted the protection fund subpoena powers, which permits the fund to investigate claims where the state's office of disciplinary counsel lacks jurisdiction.

Tough Love in New York City

The obsession of a middle age lawyer with a young blonde stripper has resulted in awards of $2 million plus from the New York Lawyers Fund. The devout lawyer/family man stole client funds to finance his 5-year affair with the stripper which, by the way, he swears was strictly Platonic. Mitchell Rothken is serving 3 to 9 years in state prison.

In Memorium
Gilbert A. Webb, Esquire

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Frederick Miller, Editor
5 Chestnut Hill South
Loudonville, New York 12211
Telephone and Facsimile: (518) 465-8682
millerfg@aol.com

Designer: Adept Impressions
2196 Webster Drive,
Schenectady, NY 12309
Telephone: 518-372-6533
Fax: 518-382-9322
adeptimp@nycap.rr.com

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