A Newsletter for Law Client Protection Funds

The Client Protection Webb

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WEBB SEEKS NEW EDITOR AS BOSSONG RETIRES

Ken Bossong is retiring from the New Jersey Lawyers' Fund after a little more than 30 years as Director and Counsel. His plans are not set as this edition goes to press, but it is unlikely that future commitments will permit him to continue as Editor of NCPO's official newsletter, *The Client Protection Webb*.

NCPO President Bob Welden welcomes applications or nominations for the position of Editor of the *Webb* at his email address: bobw@wsba.org.

Compensating Losses Resulting from Business Transactions

by Charles Mortimer, Jr.

As in most jurisdictions, the Trustees of the Colorado Attorneys' Fund for Client Protection routinely pay claims in which lawyers have essentially stolen from their clients. Retainers are kept but not earned. Settlement documents are forged and the funds misappropriated. Following the ABA Model Rule for Lawyers' Funds for Client Protection, the Colorado Fund defines an eligible claim as one that must be caused by the dishonest conduct of an attorney. C.R.C.P. 252.10(a) "Dishonest conduct" includes "one or more wrongful acts committed by an attorney in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value…" C.R.C.P. 252.10 (c)

Where does this leave clients who have lost money to lawyers in business transactions? The ABA Model Rule provides that borrowing money from a client without intention to repay it, or with disregard of the attorney's inability or reasonably anticipated inability to repay it, constitutes dishonest conduct. ABA Model Rule 10 C. (2); C.R.C.P. 252.10 (c)(2). But direct evidence to prove such a proposition is difficult to come by.

When a lawyer engages in a business transaction with a client, Colo. RPC 1.8(a) requires the attorney to go through a particular disclosure process to avoid engaging in a conflict of interest. Proof of a Rule 1.8(a) violation does not necessarily provide affirmative answers to the questions: Did the lawyer have an intention to repay the money when he borrowed it? Did the lawyer disregard his inability or reasonably anticipated inability to repay it?[1] So the question remains: setting aside those cases where the evidence is clear that the lawyer did not intend to repay a loan, or disregarded his inability to repay it, when, if ever, should claims for losses resulting from business transactions between attorneys and clients be paid?

Stated differently, is proof of a Rule 1.8(a) conflict ever proof of dishonesty? Bankruptcy law provides useful insight.

In *In re Riebesell*, 586 F.3d 782, (C.A.10 2009), the 10th Circuit Court of Appeals affirmed both the Bankruptcy Appellate Panel and the Bankruptcy Court's decisions that an attorney could not discharge a debt owed to a client arising out of a loan transaction because the disclosure requirements of Rule 1.8(a) were not given. The court specifically found, based on a preponderance of the evidence, that the attorney's failure to make the disclosures required by Colo. RPC 1.8(a) constitutes a "false representation" within the meaning of 11 U.S.C. §523(a)(2)(A).

To establish nondischargeability there is also an element of proof that requires examination of the evidence beyond the mere failure to make the disclosures required by 1.8(a): "the intent to deceive."

The 10th Circuit reasoned "that the intent to deceive, which must be proved in order to determine a debt non-dischargeable, may be inferred from the totality of the circumstances. In re Young, 91 F3d 1367 (CA-10 1996)." The court concluded that Riebesell's position of trust as his client's attorney factored largely in the finding of an intent to deceive. In addition, Riebesell discharged debts to other clients who had loaned him money. And Riebesell transferred title to his residence to his wife shortly before he filed bankruptcy. These circumstances demonstrated an intent to deceive.

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Compensating Losses From Business Transactions *(cont'd from Page 1)*

If the failure of an attorney to give disclosures required by RPC 1.8(a) constitutes a false representation sufficient to avoid a discharge of a debt under the bankruptcy code, and the fact of an attorney-client relationship helps support a finding of an intent to deceive, does the failure to give Rule 1.8(a) disclosures always constitute dishonest conduct such that a claim for losses by a client in a business transaction should be paid by the Fund? Probably not. Rule 1.8(a) requires several "disclosures."

To paraphrase: The terms of the transaction must be fair and reasonable and must be transmitted in writing in a manner that can be reasonably understood by the client. The client must be advised in writing of the desirability of seeking independent counsel and must be given the opportunity to do so. And the client must give informed consent in a writing signed by the client to both the essential terms of the transaction and the lawyer's role in it, including whether the lawyer is representing the client in the transaction.

Would the failure to provide any of these constitute a false representation?

In *Riebesell*, the attorney failed to give the client any of the disclosures required by RPC 1.8(a). At the same time, Riebesell's financial position was in a shambles. He had buried himself under a mountain of unsecured debt, transferred his home to his wife, and lacked security to provide his creditors. The transaction was not fair and reasonable to the client.

One might argue that Riebesell's failure to give Rule 1.8 (a) disclosures under the circumstances is evidence that he didn't intend to repay the debt or that he disregarded his inability to repay it. But that is a bit of a stretch. The failure to give the disclosures is evidence of Riebesell's intent to get the money, not evidence that he wouldn't repay if he had the ability to do so, or that he didn't believe he would have the ability when the debt came due.

Riebesell failed to disclose, or concealed, material facts. He acquired the money through deception.

The *Riebesell* case drives home the point: the failure to give Rule 1.8(a) disclosures may be tantamount to a concealment of material facts, or a fraud. Under such circumstances, it is fair to say that the loss was caused by dishonesty, regardless of the attorney's intentions with respect to repayment at the time the deal was struck.

When fund trustees are faced with claims for losses arising out of business transaction conflicts, they should ask whether the disclosures that were given, if any, were sufficient to advise the client of all facts and risks that were material to the transaction, including the attorney's adverse interest in it. If such disclosures were not made, then a strong argument should be made that the attorney's conduct was dishonest, in the nature of an act of concealment or deception, and that the claim should therefore be paid.

Charles Mortimier, Jr. is First Assistant RegulationCounsel, Colorado Office of Attorney Regulation.

1 Of course, not all business transactions are loans.

Ohio Fund Mourns Loss Even as it Marks 25th Year

By Janet Green Marbley

Even as it celebrated 25 years of protecting the public in 2010, the Clients' Security Fund of Ohio mourned the passing in April of its long-time champion, Chief Justice Thomas J. Moyer. Chief Justice Moyer was the 2008 recipient of NCPO's Isaac Hecht Award for Excellence in Client Protection for his unwavering support of adequate funding, loss prevention, and increased maximums for Fund awards.

Chief Justice Moyer was remembered at the ceremony marking the Fund's Silver Anniversary in a tribute by former Fund chairman William S. Newcomb Jr. Among other distinguished presenters at the ceremony moderated by Chief Justice Eric Brown was keynote speaker H. Thomas Wells Jr., immediate past president of the American Bar Association, who stressed the importance of client security funds in maintaining and restoring the integrity of the legal profession in the eyes of citizens.

The Fund was established in 1985 by the Supreme Court of Ohio. Since 1985, the Supreme Court has actively promoted and supported the mission and goals of the Clients' Security Fund by providing adequate and consistent funding. In FY2010, the Fund reimbursed a total of $925,266 to 145 eligible claimants. In the past quarter-century, more than $15 million has been reimbursed to 1,950 Ohioans.

Janet Green Marbley is Administrator of the Ohio Fund and a Director-At-Large for the NCPO.

Thirty Years of Random Audits in New Jersey

by Robert J. Prihoda.

History

New Jersey's Random Audit Program has been conducting compliance audits of New Jersey trust and business accounts since July 1981. The program was initially conceived as a result of an idea by the trustees of the New Jersey "Client Security Fund", the predecessor of the current NJ Lawyers' Fund for Client Protection. The Fund had recently paid out significant claims on just a few dishonest attorneys. The thought was that if just a few attorneys could be discovered before taking so much money, not only would fewer clients be harmed, but also the Fund would be spared large payments. The Fund even partially funded the Random Audit Program for the first five years of its existence.

The Random Audit Program originally started with two auditors in 1981. Due to the positive results of the program, the New Jersey State Bar Association recommended that the program be expanded in 1984. Following that recommendation, the program was expanded to a total staff of five random auditors. The Random Audit Program has conducted over 11,000 audits to date.

Purpose

There are three major purposes of the Random Audit Program. First and foremost is the education of attorneys in complying with the New Jersey Court Rule 1:21-6 which details the proper method of keeping records to safeguard client funds. The second purpose of the program is to act as a deterrent to attorneys who may be tempted to "borrow" or otherwise use client funds. The final purpose of the Random Audit program is to detect those attorneys who are in fact misappropriating client funds. The Random Audit Program has succeeded in all three areas.

Regarding the education of attorneys to comply with recordkeeping requirements, every year numerous attorneys who were audited provide unsolicited opinions summarizing the positive experience of their own random compliance audit. A couple of examples follow.

"Like many attorneys in the state, I had expected a monster to visit my office and then be put through hell. Instead, the audit was conducted by a very intelligent young auditor who conducted herself in a very professional manner during the stay. During the final interview she explained the problems with my books and/or ledgers, and gave me some guidance on how to take corrective steps to help myself. She is to be commended." [A sole practitioner from Hudson County]

"The Random Compliance Audit Program assisted me in improving my recordkeeping. The Program provides a safeguard against intentional wrongdoing and unintentional lapses in meeting Record Keeping requirements. I can now personally attest to the benefits of the Random Compliance Program to the Bar of the State of New Jersey. Thank you for your assistance." [A sole practitioner and CPA from Bergen County]

Simply having a random compliance program provides a deterrent effect to some attorneys who may be tempted to misuse client funds, thought the effect is not easily quantifiable. However, it is known that the attorneys who were discovered misusing client funds were absolutely deterred from taking any additional client funds. The New Jersey Fund has paid millions of dollars in claims against attorneys who were discovered misappropriating client funds as a result of the Random Audit Program. There is no way of telling how many more millions of dollars these attorneys would have continued to misappropriate if they had not been detected.

Finally, the Random Audit Program has been successful in detecting attorneys who have misappropriated or otherwise misused client funds. More that seventy (70) attorneys have been disbarred since the program began in 1981. Among those attorneys disbarred were several high profile matters.

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Thirty Years of Random Audits in New Jersey *(cont'd from Page 3)*

Procedure

The number one question continually asked regarding the Random Audit Program is, "Are the Audits really random?" The answer is a resounding, yes! Law firms are selected for audit based on a random selection made on a statewide basis of all law firms' "Main Law Office Telephone Number". The idea of the telephone number is that large law firms have one main law office telephone number and the solo practitioner also has one main law office telephone number. Therefore, the large law firm and the solo practitioner each have an equal chance of being selected.

Random Audits are not surprise audits. They are usually scheduled at least two weeks in advance. When the auditor arrives at the law firm, the audit is begun with an initial interview with the attorney consisting of various questions regarding the nature and scope of the law practice to be audited. Next, the auditor conducts the review of the law firm's books and records regarding both the business and trust accounts. All financial records are reviewed, including bank statements, cancelled checks, client ledger cards, journals, checkbooks etc. A trust bank reconciliation is prepared, including a schedule of client balances, that identifies all client funds currently on deposit in the law firm's trust account. Finally, the auditor conducts an exit interview with the attorney in which all recordkeeping deficiencies are discussed. Following the audit, the attorney receives a letter from the Office of Attorney Ethics detailing the audit deficiencies previously discussed, and requesting that the Office of Attorney Ethics be notified in writing of the corrective action taken within 45 days. More than 98 percent of the random audits are closed in that manner without any disciplinary action required. All information and results regarding random audits remain confidential.

The Random Audit Program may need to grow by adding additional auditors to compensate for the growth in both attorney and law firm population in New Jersey. The staff has had five auditors since 1984. An adequate number of audits must continue to be performed to ensure acceptable deterrent effect and detection of misappropriations.

Robert J. Prihoda, Esq., CPA, is Chief, Random Audit Program, New Jersey Office of Attorney Ethics

NCPO's Fall Workshop *- By Michael Miyahira*

The State Bar of New Mexico will be our hosts for our 2011 Fall Workshop. It will be held on **October 4 & 5, 2011** at the Hilton Buffalo Thunder Resort and Casino in beautiful Santa Fe, New Mexico.

The hotel has set aside a block of rooms at $124.00 per night with free valet parking. The registration fee will be $150.00 per person and a guest fee of $85.00 will enable your spouse or significant other to join us for the reception and dinner. For those flying in via Albuquerque, there is a shuttle service that makes regular runs between the airport and Santa Fe. More info will be coming your way as we get closer to the event.

As if Santa Fe's thriving arts community (one of the nation's best) were not attractive enough to visitors, the workshop coincides with Albuquerque's annual International Balloon Fiesta that runs from October 1st through the 11th. This remarkable event draws balloonists from around the country and guests from around the world. Plan to spend a few days before or after the workshop to take in the sights, sounds and food featured at this event.

Jorge Jimenez and his crew at the New Mexico Bar are hard at work putting the workshop together. NCPO extends its thanks to the New Mexico Bar for being our hosts. As always, suggestions for agenda topics are welcome!

Michael D. Miyahira is President-Elect of the NCPO and a Trustee of the Hawaii Lawyers' Fund for Client Protection.

president's Perspective

By Robert Welden

In 1996, there was a proposal to merge the ABA Standing Committee on Professional Discipline with the Standing Committee on Lawyers' Responsibility for Client Protection. That didn't happen, but while it was pending it was seen by some in the client protection world to be a diminishment of the ABA's leadership in client protection.

During the 1996 ABA National Forum, a meeting was organized by Isaac Hecht, Fred Miller and Ken Bossong to propose the establishment of a new organization dedicated to client protection. There was debate. Notably, Jim Towery, who was then the chair of the ABA Client Protection Committee, argued that the importance of the ABA should not be overlooked.

As a result of that meeting, NCPO was formed and I became a member of both NCPO and the ABA. I served on the ABA Standing Committee on Client Protection (its current name) and was chair for two years.

The Standing Committee and NCPO work well together.

At the annual Forum, NCPO conducts the popular difficult claims workshop, and organizes a social event on Friday night. We also hold the NCPO annual meeting in conjunction with the Forum. When the Standing Committee is invited to consult with a jurisdiction about their fund, a member of NCPO is customarily included in the consultation team. It is a healthy working relationship that benefits us all as well as the public.

Like many of you, I view client protection broadly. It includes

- Client protection funds
- Lawyer discipline and restitution
- Malpractice insurance
- Lawyers assistance programs
- Law office assistance
- Fee arbitration
- Mediation of lawyer/client disputes
- Random audits
- Trust account overdraft notices
- Payee notification rules

This is not an exhaustive list, and it does not include one of the most important aspects of client protection, character and fitness review at bar admission. Some jurisdictions allow conditional admission of persons with a history of chemical dependency, mental illness or other problems, if they can demonstrate recent rehabilitation. In 2007, the ABA adopted a model rule on conditional admission.

Some of you may have attended the 2007 meeting of the National Organization of Bar Counsel where I participated in a debate on the issue. I was fervently against the adoption of a model rule. I am pleased to say that NOBC voted to oppose it, as did the ABA Law Student Division (the very group that the drafters contended they drafted the rule for). NCPO took no position on it. The House of Delegates voted to adopt it.

One of the worst features of the Model Rule is that it provides that the fact that the lawyer has been conditionally admitted is confidential, which means that the public has no way of knowing that the admission authority had sufficient doubt about this lawyer's character and fitness that they only conditionally admitted him or her. I think this poses a threat to client protection.

In closing, it is an honor to be President of this wonderful organization. We have a terrific, hard working board. President-elect Mike Miyahira is creative, energetic and hard working, and will do a bang-up job as my successor in 2012.

Robert Welden is President of NCPO and General Counsel to the Washington State Bar Association.

2011 NCPO Fall Workshop
October 4-5, 2011
Santa Fe, New Mexico!!
SAVE THE DATE
Go to www.NCPO.org for details!!

An ABA List Serve To Serve Your Needs

By Selina Thomas

The American Bar Association's Standing Committee on Client Protection ("the Committee") manages a list serve for administrators, trustees, investigators, and others interested in issues related to the operation and funding of lawyers' funds for client protection. A list serve is an e-mail discussion and distribution list that allows subscribers to openly communicate and interact on specific topics. The lists are administered by trained ABA staff members.

List serves provide for the mass dissemination of information in a timely and cost-efficient manner to a targeted group of recipients. The Committee uses its list serves to keep those in the larger client protection community abreast of what's happening in the ABA's Center for Professional Responsibility and the Committee.

For example, list serve members are sent early "save the date" announcements for upcoming programming, like the National Forum on Client Protection. The list serves also allow the Committee to quickly inform participants of program changes, remind participants of deadlines, and easily provide general programming and logistical information.

Subscribers to the list serve receive regular updates on news, current events and recent court decisions related to professional responsibility and client protection. Through the list serve, fund administrators, trustees and investigators can monitor changes in fund policy and claim trends around the country.

The most important function of the list serve, however, is as a professional resource. Subscribers can seek advice and input from client protection colleagues from across the United States and Canada on any number of issues. Some recent inquiries have included: what to do when a claimant disappears; real estate escrow thefts; applicability of trust account overdraft notification rules to bankruptcy trustees; catastrophic coverage for large claims; the duty of federal judges and judicial officers to pay into their licensing jurisdictions' fund; the scope of covered claims – moving beyond dishonesty as a basis for reimbursement; and what percentage a bank should pay to the client when it honors a forged endorsement.

Subscribers can post to the list serve in one of two ways: they may post a comment or inquiry directly to the list serve by sending an e-mail to cpr_lawyersfund@mail.americanbar.org or they may forward their inquiry to an ABA staff administrator – currently Selina Thomas (selina.thomas@americanbar.org) and John Holtaway (john.holtaway@americanbar.org) for posting.

The Committee also maintains list serves for fee arbitration administrators and trustees (cprfeearb@mail.americanbar.org), and for members and staff of unlicensed practice of law committees: (cpr-upl@mail.americanbar.org).

You do not have to be a member of the ABA to subscribe and joining is easy! To join the list serve for lawyers' funds for client protection or any of the list serves that are maintained by the Committee, send your request via e-mail to Selina.thomas@americanbar.org.

Selina Thomas is Associate Client Protection Counsel for the ABA.

2011 Strategic Plan Adopted

By Michael Miyahira

The NCPO Board of Directors adopted its 2011 Strategic Plan in March of this year. This seven point plan includes the following:

- Develop strategies to increase membership.

- NCPO is a dynamic organization that has much to offer. We need to approach our mission with a sense of urgency to get the job done.

- Support staff functions are vital to every Fund's effectiveness. NCPO is in a position to help fund staffs investigate different ways to manage their work flow, consider different office procedures, look into new opportunities to put information on-line, and use electronic media, forms, software, etc. We should learn more about the challenges and issues that they face.

- In recent years, several Funds have had their fund balances threatened by bureaucratic interference. NCPO should develop strategies that will help Funds address this sort of potential threat.

- Like other organizations, we would benefit by having new members step up and be involved in leadership.

- Our organization provides a formal structure that enables various client protection organizations to connect with others. We should help ourselves by making it easier for member organizations to do so, and by finding the means to share our knowledge base beyond our Annual Workshop and the ABA Forum.

- NCPO's members collectively possess a huge body of knowledge and experience with client protection matters. NCPO should be more proactive about sharing this knowledge base. We need to do a better job of getting information out to members, members of the profession, Justices and Chief Justices of supreme courts, law schools, and others. We should target Funds that are struggling as well.

In the coming months our Board will be implementing our Strategic Plan.

The Board can't do this by itself, so it will be seeking help from NCPO's members. As an example, Maryland Fund Administrator Leo Ottey is already looking into the possibility of compiling a forms reference bank that all Funds could access to see how others do things. That will help a lot of us as we look into better "mouse traps" to help us get our work done efficiently.

Involvement by many of us will produce meaningful results for NCPO, for our members, and for Funds everywhere.

Michael D. Miyahira is President-Elect of the NCPO; he led the Strategic Plan efffort.

Membership Update

by Eileen Donohue

The NCPO 2011-2012 membership year commences as of May 1. We hope all current members will renew, and certainly hope to add new members this year.

For the 2010-2011 year, we had 31 Organizational and 76 Individual dues-paying members. New Individual members included Angela Parks of Alabama, Catherine Day Hult of Florida, Maria Sullivan of Hawaii, Lisa McGrane of Nevada, and Cora Tekach of the District of Columbia. We welcome these new members and hope they will be actively involved, and we look forward to seeing them at future NCPO events. Of course, we sincerely appreciate the loyalty and support of long-standing members as well.

Your membership dues help to support NCPO Workshops and NCPO-sponsored presentations at the ABA Client Protection Forum; participation by NCPO in Fund consultations; and publications and productions such as the Webb, the Standards for Evaluating Lawyers' Funds for Client Protection, the NCPO video, and the NCPO website.

If you or your Fund is not an NCPO member and you want to become involved or to help support the work of NCPO, please visit the website at www.NCPO.org and download a membership application.

Organizational membership is $200, and Individual membership is just $25. If you have any questions about membership, please feel free to contact me at edonahue@iardc.org.

Eileen Donahue is NCPO's Vice President for the Midwest and membership coordinator.

Client Protection In Hard Times

by Kenneth J. Bossong

Bar Associations, Law Societies, and Court Systems look everywhere for places to cut. Like others, some lawyers scrutinize their bills for ones that need not be paid. And when the pressure really mounts, a few lawyers, a very few, who would otherwise continue practicing honestly, turn dishonest.

Client protection funds are not exempt from the hard times caused by recession. Trying to get people to appreciate and understand client protection can be difficult in the best of times. For those who don't "get it", a bad economy adds impetus.

How can you justify having a reserve when other committees/ agencies are facing cutbacks?

I know it is only a few dollars a year, but you want to raise the assessment on lawyers? Are you crazy?

You want to raise the per claimant and aggregate maximums on fund awards? Aren't you afraid the fund will go broke?

I don't care how much the Fund needs to hire. Everyone must share the pain in this budget.

Sound familiar? Funds seem forever open to charges that they are both too rich to justify ther assessments and too poor to fully pay victims. That is why establishing a Fund as an independent trust with its own adequate and secure source of funding is among the first principles in both the NCPO Standards and the ABA Model Rule. Oddly enough, though, even Funds that are independent trusts may find themselves confronted with the same arguments.

The idea that a Fund should do *less* in economic hard times – when lawyers facing their own economic pressures are more likely to steal and when victimized clients are going to need the help more than ever – is especially perverse. Consider all that flows from the fact that lawyers pay for the Fund:

- A state budget crisis is completely irrelevant
- Clients must trust their lawyers in any economy
- Hurting law clients will not help a single taxpayer
- The vast majority of lawyers want their Fund to take care of deserving clients
- Any lawyer for whom cents per week one way or the other matters is in a precarious position for reasons well beyond the annual assessment
- Would anyone think it a good idea for any other trust or foundation to spend its last dime and operate without a reserve?

As always, and even more so in a bad economy, the challenge is to educate.

Ken Bossong is the soon-to-be former Director and Counsel to the New Jersey Fund.

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