

**Editorial**

## May It Please the Court

Hats off to the Conference of Chief Justices!

The Chief Justices' new National Action Plan on Lawyer Conduct and Professionalism squarely assigns responsibility for the administration of client protection programs to the high courts of each state as an essential component of their authority to regulate the legal profession and promote public respect for our legal institutions.

That would be good news in itself, but the Action Plan goes further. It defines in black letters the essential features of a functional client protection program, beginning with the standard that a protection fund must "substantially reimburse" losses resulting from a lawyer's misuse of client and escrow property. No window dressing permitted.

The Chief Justices build on this foundation with four additional standards: that client protection funds be financed by mandatory assessments on the lawyers in each jurisdiction; that fund assets be declared to constitute a trust; that protection funds be administered by boards of trustees composed of lawyers and lay persons; and that trustees be required to publicize the existence and activities of their protection funds.

In their succinct commentary to the standards, the Chief Justices observe: "An effective client protection fund provides a state court system and the legal profession with a unique opportunity to promote public confidence in the administration of justice and the integrity of the legal profession."

Clearly the Conference of Chief Justices is one group that "gets it" when it comes to client protection funds. One reason, perhaps, is that an effective protection fund is a proven source of pride—deserved pride—for a high court that accepts its responsibility for maintaining public respect for the institutions of justice that it influences and guides, including the practice of law.

Now that objective standards for client protection funds have been articulated by the judicial leaders of the United States, it's possible to evaluate (and re-invigorate) client protection programs nationwide. The inquiry to be pursued is a simple one: how does each state's client protection fund measure up to the Chief Justices' plain-English standards of financing and administration?

It's time to take this essential next step. State by state. Let's do it together. ■

### NCPO's Midwest Regional Workshop In Chicago

NCPO's next regional workshop will be held in Chicago on October 15, 1999. The workshop will be hosted by the Illinois Client Protection Program at the offices of the Attorney Registration and Disciplinary Commission: 1 Prudential Plaza, 130 E. Randolph Drive, Suite 1100. Organizing the program is Eileen W. Donahue, NCPO's Vice-President for the Midwest Region.

The workshop's tentative one-day program calls for sessions on difficult claims (investments, loans to lawyers, unearned fees, etc.); dealing with third-party liens against awards of reimbursement; dealing with the media; the intelligent application of burdens of proof, periods of limitations, and exhaustion of remedies; loss prevention techniques; and the enforcement of a fund's subrogation rights against dishonest attorneys and collateral sources. Experienced fund administrators and trustees will lead these informal and wide-ranging discussions. The \$45 registration fee provides a continental breakfast, lunch, and workshop materials.

This will be the NCPO's third regional workshop, following highly successful programs in Boston and Nashville. Every fund in the United States and Canada is welcome to participate in this workshop. Membership in the NCPO is not required. Call Eileen W. Donahue to register and for hotel and other information (312) 565-2600. ■

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# NCPO's Second Annual Meeting

President Ken Bossong presided at the NCPO's Second Annual Meeting, which was held on Sunday morning, June 6, 1999, in La Jolla, California, following the conclusion of the ABA's 15<sup>th</sup> Annual Forum for Client Protection Funds.



*Ken Bossong*

Eighteen members of the NCPO attended. (As of the meeting, NCPO had 15 organizational members, and 45 individual members.)

In addition to routine association matters, the members expressed strong support for the development of standards to evaluate the effectiveness of client protection funds nationwide. Indeed, the members indicated that this appeared to be the

most pressing problem facing the law client protection movement in the United States.

They also discussed and approved proposals to help the ABA's Standing Committee to conduct its 16<sup>th</sup> Annual Forum in New Orleans; to develop materials and programs for new fund trustees; to draft a mission statement and brochure for the NCPO; to establish communications with national judicial conferences and law school communities; to institute a speaker's program; and to work jointly with the Standing Committee to develop model rules and procedures for protecting law clients when a lawyer abandons a law practice.

NCPO President Bossong was re-elected to a one-year term, as were Secretary Miriam Freilicher; Treasurer Isaac Hecht; and Counsel Frederick Miller. Betsy Brandborg was elected to a 3-year term as a Director. Incumbent regional Vice-Presidents Karen O'Toole; A. Root Edmonson; Eileen W. Donahue, Lynda C. Shely; and Robert Welden were re-elected. Victoria Rees of Nova Scotia was elected Vice-President for the Canadian Provinces.



*(Left to right) Isaac Hecht (MD); Janet Green Marbley (OH); Lynda Shely (AZ); Bob Welden (WA); and Brenda Catlett (DC) Veterans of the nation's client protection movement, from sea to shining sea.*



*(Left to right) Ray Wood (NY); Chuck Goldberg (CO); and Bill Ricker (FL) Chuck chairs the recently revived client protection fund in Colorado.*



*(Left to right) Bill Thomas (NJ); Marty Cole (MN); Carole Richelieu (HI); Mike Micjahira (HI); and Tom Summers (NJ). Mike is a new trustee of the Hawaii fund, and Tom chairs the New Jersey fund.*

## 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, Client Protection Counsel, ABA Center for Professional Responsibility, 541 North Fairbanks Court, Chicago, IL 60611. Tel: 312/988-5298; Fax: 312/988-5491; E-mail: [jholtaway@staff.abanet.org](mailto:jholtaway@staff.abanet.org). At the same address is the always helpful Debra (Debi) D. Taylor. Tel: 312/988-5325. Fax: 312/988-5280. E-mail: [debrataylor@staff.abanet.org](mailto:debrataylor@staff.abanet.org)

# Y2K Challenges and Opportunities

William D. Ricker

The approach of the Millennium is no time to sit on our laurels. At the ABA's 15th Annual Forum on Client Protection (June 1999), we heard the good news that all the United States now have operating client protection funds; 40 years after the nation's first fund was created in Vermont. This is not to say, of course, that all 51 funds are healthy, or vigorous; but we can nonetheless celebrate the fact that there's a national acceptance in the American legal profession that law clients deserve protection from dishonest practitioners.

Now that we have reached that step, it's time to ask why we are not doing more. Since no state can honestly claim that all legitimate client losses are being reimbursed fully without arbitrary payment limits or the categorization of claimants, it is appropriate to seek ways to measure our progress and effectiveness. That effort can serve both as a tool and as an impetus to expand the coverage provided by client protection funds nationwide.

It is a little-discussed fact that funding restraints in many states do affect trustees' decisions on whether to provide reimbursement to victims of lawyer dishonesty, and how much reimbursement to provide. Some funds do it by restricting the type of claim, or type of claimant, which is eligible for reimbursement. Other states impose arbitrary restrictions on the total amount that will be reimbursed the victims of a single lawyer. Almost all funds restrict the total amount of reimbursement that can be paid to any one claimant.

Notwithstanding these restrictions, there are funds that provide nearly all eligible claimants with full reimbursement. But they are few in number. Clearly funds need to broaden the types of legitimate losses that qualify for reimbursement. They must abandon per-lawyer limits that doubly punish victims of dishonest lawyers. Funds must raise and, better yet, eliminate per-claim limits on reimbursement.

It's easy to say that the legal profession ought to expand the coverage provided by client protection funds; the difficult task is determining how to do it. Several years ago, the ABA's Standing Committee on Client Protection discussed the development of standards for client protection funds, both aspirational and quantitative. Unfortunately, the committee, for many reasons, abandoned the effort. One reason was the lack of meaningful analyses of client protection fund data.

Aspirational goals and standards have an appealing "feel-good" effect, but they fail to provide bar and judicial leaders with the influence they need to over-

## We need to take a closer look at the nation's funds . . . .

come the inertia that perpetuates self-restricting payment limitations. Remember, those limits, more often than not, were likely imposed in the first place to conceal an inadequate revenue structure for the client protection program. It's a Hobson's Choice of sorts: a fund adopts rules which allow it to spend the money it has, which proves that the fund has all the money it needs to comply with its rules.

Most supporters of client protection funds are unwilling to accept this illusion. What we do is too important and too right to settle for less than full reimbursement of all legitimate claims. To reach our goal of full reimbursement, I believe that the National Client Protection Organization should promote and support three goals into the new Millennium.

The first would be to develop quantitative studies of the effectiveness of current operational levels of the various funds. I can locate no recent academic quality studies of any state. There are many anecdotal articles, annual reports and short updates in bar journals, but no serious comparative studies. It would be challenging to have a law school or legal public-interest

program develop a symposium on the effectiveness of current fund programs, fueled by a series of articles reporting on these comparative studies.

Triennially, the ABA collects and publishes fairly detailed information on as many funds as respond to its request for information and it is the best, if not the only, compilation of such data. It makes no attempt, however, to analyze the data derived, nor to make recommendations thereon. That job has been left to others; but no one has accepted the challenge.

After preliminary cross-fund studies have been completed, it should be possible to begin developing quantitative standards by which to measure the success of a client protection fund with respect to the universe of funds in the United States. For instance, if a significant number of protections funds reimburse 90 percent of claimants in full, one can argue that all funds should move towards that standard, at a minimum.

These statistical analyses should be helpful to bar and judicial leaders in under-achieving states by giving them legitimate statistical support in their efforts to improve the effectiveness of their funds, rather than merely anecdotal or aspirational pleas. Likewise, if reasonable quantitative goals show that a given level of funding is necessary to achieve reimbursement standards, it becomes easier to convince policy makers of the need to increase fund revenues in order for a jurisdiction to count itself in the family of well-run, appropriately financed funds.

A third area needing analysis is the effectiveness of the various model rules on client protection that have been promulgated by the ABA in recent years, including model rules for insurance payee notification, trust account overdraft notification, financial record keeping, random audit of trust accounts, and fee arbitration.

While it is difficult to believe that these model rules can be anything but helpful, it's simply not known to what extent they have been successful. Again, there is anecdotal evidence supporting their implementation, but that is not the same as well-designed scientific studies addressing their effectiveness. Not every jurisdiction has adopted all



# NCPO Membership Soars

The Membership Committee reports that NCPO's membership grows apace. There are currently more than 70 individual members, and 27 organizations represented. NCPO's full membership roll, with addresses, can be found on its Internet site: [www.nylawfund.org/ncpo](http://www.nylawfund.org/ncpo)

According to current records, the following client protection funds and affiliated associations are members for the 1999-2000 year. If any fund has been omitted inadvertently from this listing, please notify NCPO's Treasurer: Isaac Hecht at (410) 752-1169.

- Alaska Bar Association
- Client Security Fund of California
- Clients' Security Fund of District of Columbia Bar
- Florida Bar Clients' Security Fund
- Lawyers' Fund for Client Protection of Hawaii
- Client Security Fund of Idaho
- Client Protection Program of Illinois
- Kansas City Client Protection Fund Commission
- Clients' Security Trust Fund of Maryland Bar
- Massachusetts Client Security Board
- Client Protection Fund of Michigan
- Minnesota Client Security Board
- State Bar of Montana
- New Hampshire Bar Association
- New Jersey Lawyers' Fund for Client Protection
- New York Lawyers' Fund for Client Protection
- State Bar of Nevada
- North Dakota State Bar
- Client Security Fund of Ohio
- Oregon State Bar
- Pennsylvania Lawyers Fund for Client Security
- Rhode Island Client Reimbursement
- South Carolina Bar
- Virgin Islands Bar Association
- Washington Lawyers Fund for Client Protection
- West Virginia State Bar
- Wyoming State Bar

## Memberships Available

Express your commitment to professional responsibility. Join NCPO. Membership contributions are tax deductible: organizations (\$200); individuals (\$25). New memberships (and renewals of charter memberships that expired on April 30, 1999) should be sent to NCPO's Treasurer: Isaac Hecht, c/o Hecht & Chapper, Esqs., 315 No. Charles St., Baltimore, MD 21201-4325.

## How Would You Decide This Claim?

Mattie Mae Stormville, age 72, is a homemaker and the widow of a clergyman. Her twin granddaughters, ages 15, were arrested in the local Wal-Mart for shoplifting a tube of lipstick and a can of hair spray. Mrs. Stormville, her daughter (a single mother and nurse's aide) and her granddaughters live together in a small farming community.

Mrs. Stormville consults Norman Fishfield, Esq., a respected sole practitioner, age 72. Unknown to Mrs. Stormville, Fishfield is under investigation for embezzling funds from several estates of which he is executor. He does not disclose that to her.

Fishfield advises Mrs. Stormville that there is a local crackdown on shoplifting, and that her granddaughters could be sentenced to terms of imprisonment, and be incarcerated with hardened prostitutes and drug addicts in the county jail. Fishfield speaks of his experience and cordial relationships within the local criminal justice system. He assures her that he will represent her granddaughters zealously and competently.

Mr. Fishfield accepts advance payment of \$25,000 retainers for each granddaughter's complete defense, including all appeals. Mrs. Stormville obtains \$40,000 in cash by liquidating her U.S. savings bonds. Fishfield accepts Pastor Stormville's stamp collection in payment of the \$10,000 balance.

Fishfield appears with the girls at their arraignment where they enter pleas of not guilty. He obtains adjournments of their next three court appearances. He then negotiates pleas with the town attorney whereby the girls' criminal prosecutions will be dismissed in six months if they stay out of trouble.

A week later Fishfield resigns from the bar, and is indicted for grand larceny of estate assets. He pleads guilty. His restitution obligations render him insolvent. Mrs. Stormville is advised by the district attorney's office to file a claim with the client protection fund. Fishfield ignores all requests from the fund for information about the claim.

How would you decide this claim? Assume that you administer a protection fund that is adequately financed by the lawyers in your state. Post your answer on NCPO's Difficult Claim Bulletin Board on its Internet site: [www.nylawfund.org/ncpo](http://www.nylawfund.org/ncpo)

### *Last Edition's Challenge*

The "correct" determinations in the Claims of Rothchild ( see the Spring 1999 edition of *The Client Protection Webb*, at page 5) would result in substantial reimbursement to benefit Mrs. Rothchild and her children for the \$100,000 larceny of life insurance proceeds by the family lawyer.

The claim of the bankruptcy trustee for the insurance proceeds can be denied for the reason that the trustee was not a client or escrow beneficiary. A fund might also reject, as a matter of policy, all losses arising from the federal government's administration of bankruptcy laws. Should the bankruptcy trustee follow through on her threat to sue the fund, counsel should consider invoking the doctrine of sovereign immunity as a complete bar to any action in federal or state court. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and its progeny.

Congratulations to Bob Welden of Washington State for overnighting the correct answers to this difficult claim, as well as for an exceptionally cogent analysis of the policy and Eleventh-Amendment implications involved. A complimentary subscription to *The Webb* is on its way to Olympia. Enjoy!

## **New Orleans 2000!**

The ABA's 16<sup>th</sup> Annual Forum on Client Protection will be held in New Orleans on June 2 and 3, 2000 at the Ritz Carlton Hotel. Preliminary agenda plans are set. Look for the opening town meeting and sessions on impaired lawyers; the protection of clients when lawyers abandon their practices and custodial receivers; evaluating claims seeking refunds of legal fees; difficult claims; fee arbitration; in-depth discussions of "hot topics" raised by forum participants; and securing adequate funding.

## **Triennial ABA Survey in the Works**

The ABA's Center for Professional Responsibility continues its fact finding and compilation of statistics for its 1996-1998 Survey of Client Protection Funds in the United States and Canada. Several jurisdictions have not responded to the ABA's questionnaire, which is delaying the completion of the project. Please make sure that yours is not one of them!

## **Misappropriation of Client and Escrow Funds Outlawed**

The New York Lawyer's Code of Professional Responsibility has been amended to expressly prohibit the misappropriation of law client and escrow funds. The fiduciary and record keeping rule in New York (DR 9-102) has long prohibited "commingling" in a lawyer's client trust account, but no other misuse of funds. The amendments also clarify permissible methods of maintaining copies of required law-office records.

## **Catastrophe in Illinois**

The fledgling client protection fund in Illinois is wrestling with \$10 million in losses discovered after the death of a well-known Chicago lawyer and undertaker. There are more than 130 defrauded law clients and investors, with an average loss of about \$75,000. Most of the lawyer's victims were initially funeral-home clients. A probate court has approved a \$1.7 million settlement to them from the proceeds of a life insurance policy and the sale of his residence. The victims' only other recourse is the Supreme Court's client protection fund, which has recently imposed a \$100,000 cap on all awards involving one lawyer. The fund's cap on individual awards is \$10,000.

## **ABA Regional Roundtable in Atlanta**

President Ken Bossong hosted a Regional Roundtable during the ABA's Annual Meeting in Atlanta. Topics discussed included the exercise of discretion by trustees; the payment of legal fees incurred by claimants who recoup losses from collateral sources; claims by prison inmates; and the importance of a lawyer's pattern of conduct in evaluating claims.

## **It's Only Money**

What is the measure of damages, in a subrogation action against a bank, when a protection fund reimburses for the theft of a personal-injury settlement check? Is it the face amount of the check, or the amount of the fund's award (which is generally 2/3 of the face amount)? And how do you calculate the fund's claim for interest: from the date of the check, or the date of the fund's award? The New York Lawyers Fund has petitioned the state's high court to allow an appeal from a lower-court's decision that limited the fund's recovery to the amount of its award, with interest from the date of the award. Petition to appeal has been granted. Stay tuned.

## **NCPO Regional Workshop – Winter 2000**

Through the good offices of Lynda C. Shely, the Arizona Bar has offered to host NCPO's Regional Workshop for the Southwestern United States. The likely site is Phoenix in March, 2000. Funds everywhere would be welcome participants. Let Linda know of your interest, both as a resource and as a participant. Linda can be reached at (602) 340-7284. E-mail: [lynda.shely@staff.azbar.org](mailto:lynda.shely@staff.azbar.org)

## **ABA Advisory Committee Reorganized**

Robert D. Welden of Washington has been appointed Chair of the ABA's Advisory Commission on Client Protection Funds for 1999-2000. Joining Bob are Susan C. Busch (VA); Martin A. Cole (MN); Eileen W. Donahue (IL); Miriam A. Freilicher (DC); David W. Jordan (NH); and Helen Desmond McDonald (RI). Marty Cole is a NCPO Director-at-Large, and Miriam Freilicher is NCPO's Secretary.

## **E-mail Directory Under Construction**

NCPO's membership directory on the Internet ([www.nylawfund.org/ncpo](http://www.nylawfund.org/ncpo)) has a roster of all members, organizations and individuals. Please make sure that your e-mail address is current. Test it out with an e-mail to NCPO's Webmaster, Michael Knight. Mike can be reached at [knight@nylawfund.org](mailto:knight@nylawfund.org)

## **Standing Committee Gets New Members**

The ABA's Standing Committee on Client Protection begins its new fiscal year with new appointments by the President of the ABA. James E. Towery of California has been re-appointed Chair. Joining veteran committee members Bernard F. Ashe (NY), James S. Hill (ND) Janet Green Marbley (OH) and Lynda C. Shely (AZ) for three-year terms are Melissa DeLacerda of Oklahoma and Sylvia E. Stevens of Oregon. Melissa is a former Chairman of the Oklahoma fund, 1991-1995; and Sylvia administers the  
*(cont'd. on page 8)*

