

**T**wo recent appellate court decisions which construe difficult provisions of the Uniform Commercial Code provide important help in the enforcement of the creditor rights of law client protection funds and, indeed, of law clients.

The scenario is a familiar one to protection funds. A dishonest law firm settles a personal

interest it collects on the \$75,000 recovery? These are issues that should be addressed in the fund's agreement with the client when the fund makes an award. Indeed, every fund should review the provisions of its boilerplate "subrogation agreement". Some rights arise from the laws of subrogation, and distinct rights arise from the laws of assignment.

Check out the Court of Appeals' decision in *Lawyers' Fund v. Bank Leumi, et al*, \_\_ N.Y.2d \_\_ decided February 22, 2000, and the decision of the intermediate appellate court, 286 A.D.2d 836 (3<sup>rd</sup> Dept. 1998). Both are on NCPO's Web site: [www.ncpo.org](http://www.ncpo.org)

There are other practical implications in these decisions. Now that the law tilts in favor of payees and law clients, a similarly situated law client might choose to bypass the client protection fund and sue the banks directly for the face amount.

There's also the possibility that a protection fund might decide to require similarly situated claimants to pursue their UCC claims. If the face amount of a check is available, that client will surely be able to find an attorney to represent her on a contingency-fee basis. In that case, it's not too cruel to invoke a variant of the "last resort" standard. ■

## Making Money on Forged Instruments

By Frederick Miller

injury claim for a client. The firm arranges for the check to be mailed to its offices, with no notice to the client. The check is drawn on the insurance company's bank, and made payable to the client and to the law firm. The firm forges the client's endorsement on the check and collects the proceeds from its bank.

Assume that the check, dated January 2, 1998, is for \$75,000, and that the dishonest law firm is insolvent. Assume, as well, that the trustees of your client protection fund award the client \$50,000, which is two-thirds of the total settlement. As a condition of the award, paid on December 31, 2000, the client transfers all her rights in the transaction to the protection fund.

Here's how the fund might recover \$75,000 on its \$50,000 award, plus interest, on the client's cause of action for conversion: It sues the insurance company's bank (the drawee) and the law firm's bank (the depository). The drawee bank will be absolutely liable to the fund for the face amount of the check (not the amount of the award), and the depository bank will be absolutely liable to the drawee bank (and the protection fund) for that amount. The banks are not entitled to reduce their liability by the \$25,000 that the claimant expected to pay as legal fees to her law firm. And interest will be calculated from the date of the forgery, not the date of the fund's award.

What does the client protection fund do with the \$25,000 above the amount of its \$50,000 award? What does the fund do with the

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## Annual Meeting 2000

NCPO's annual meeting will be held in New Orleans on Sunday, June 3, 2000, following the ABA's 16th National Forum for Client Protection. The breakfast meeting will begin at 8:30am and conclude by 11am. The agenda will include the election of officers and directors, staffing of committees, and plans for NCPO's activities 2000-2001. Watch for details on NCPO's Web site: [www.ncpo.org](http://www.ncpo.org) ■

# Helping Lawyers Help Clients

By Thomas K. Byerley

Protecting the public is a primary goal of the legal profession. When a lawyer dies or becomes disabled, the legal profession has a continuing obligation to ensure that the client's interests are protected even if the lawyer can no longer represent that client.

In larger firms, other members can assume representation of the deceased or disabled lawyer's clients. However, if the lawyer was a solo practitioner, it is often difficult to quickly address the needs of the client. Surviving spouses or other family members who are dealing with the death or major disability of a lawyer are thrust into the doubly unfortunate situation of trying to deal with the closure of a law office and making sure the clients have continued representation.

In Michigan, there is guidance in MCR 9.119(G), which provides in part:

*If an attorney is transferred to inactive status or is disbarred or suspended and fails to give notice under the rule, or disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the [grievance] administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to inventory the attorney's files and to take any action necessary to protect the interests of the attorney and the attorney's clients. The person appointed may not disclose any information contained in any inventoried file without the client's written consent. The person appointed is analogous to a receiver operating under the direction of the circuit court.*

In many cases, local bar associations will step forward to help wind up the practice when a solo practitioner dies or becomes disabled. Without publicity or fanfare, local bar associations and volunteer lawyers have donated countless hours and other resources to assist clients in making the transition to new counsel. In those instances where no one is available to assist the closing of the practice the grievance administrator and his staff have done an excellent job in fulfilling the duties of MCR 9.119 (G).

Usually, the first task is to provide notice to the existing clients of the death or disability of the lawyer. See MRPC 1.16(d).

Courts are also given notice and a formal substitution of counsel document is presented to the court when substitute counsel is found. MCR 2.117(B).

Ethics Opinion RI-100 provides some sound guidance to individuals who are left with the task of closing a law practice. Suggestions cover: assisting the client in obtaining new counsel; protecting confidences and secrets of clients; fulfilling fiduciary duties regarding safekeeping client property; and satisfying record-keeping obligations.

Receivers must be careful to prioritize the open files of the deceased or disabled lawyer. Open litigation files may have court dates set and other open files may have time-sensitive issues, such as the statute of limitations. These matters should be immediately referred to new counsel for action.

Receivers must also preserve the confidences and secrets of the clients of the deceased or disabled lawyer. This applies equally to the "closed" files in the possession of the lawyer. It is common for a receiver to "inherit" a large number of closed files and not know what to do with those files. If the deceased or disabled lawyer did not have a file retention plan (even though such a plan is required in Michigan), the receiver may be faced with the prospect of establishing a file retention policy, reviewing all closed files and confidentially destroying old files after notice to the former client. Many times this process takes longer than all other duties of the receivership.

Although no lawyer likes to actively plan for the day when he or she is unable to practice law, some advance planning by solo practitioners can prevent many of the "horrors" involved in picking up the pieces of an abandoned practice. Solo practitioners can help to minimize the work of a future receiver by adopting and enforcing a sound record retention policy; developing a cordial relationship with another lawyer who could quickly come to the lawyers aid; and training the lawyer's staff on the proper procedures to wind up the law practice, if that becomes necessary.

Without adequate planning, clients find themselves with the stress of suddenly being without legal representation in addition to the stress that took the client to the lawyer in

the first place. With adequate planning, however, the lawyer's obligation to protect clients can be preserved, despite death or disability. ■

*— Many thanks to Thomas K. Byerley, Regulation Counsel for the State Bar of Michigan. This article is adapted from Mr. Byerley's essay in the Michigan Bar Journal (10/99).*

## Advance Legal Fees Within the Beltway

*Advances of unearned fees and unincurred costs shall be treated as property of the client ... unless the client consents to a different arrangement. Regardless of whether such consent is provided, [these rules] require the return to the client of any unearned portion of advanced legal fees and unincurred costs as the termination of the lawyer's services.*

So says the District of Columbia Court of Appeals in an amendment to the D.C. Rules of Professional Conduct, effective January 1, 2000. The amendment overturned a long-standing policy that provided that advance legal fees and costs become the property of the lawyer upon payment.

Most American jurisdictions require that advance fees be deposited in a client's trust account, to be withdrawn as the fee is earned. See, Brickman, *The Advance Fee Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account?*, 10 Cardozo L. Rev. 647 (1989). ■



*Bob Welden and Lynda Shely at NCPO's Midwest Regional Workshop*

# A Report from Oklahoma

To the Editor:

Our Committee found Kenneth Bossong’s article entitled “*Exhaustion*” in the Fall issue of **The Webb** highly informative and beneficial. Like others, we have struggled with the concept of being a “fund of last resort”, while still maintaining our fiduciary responsibility to the Fund, tempered with our desire to serve the victimized client.

A particularly disturbing situation is the Fund’s need to await a much-delayed estate settlement before claims can be paid. We experienced the death of an attorney three years ago, who subsequently had a half dozen claims filed against him, all awaiting estate settlement.

Mr. Bossong’s article had a profound impact on our Committee, with the October 1999 Meeting Minutes reading, in part, “...The article discusses the negative aspects of being a “fund of last resort”, in that requiring claimants to exhaust every other possible source of recovery sometimes just aggravates the claimants and delays restitution by a fund, thereby taking away any good will the fund may have engendered for its state’s institutions of justice. The article aided in the Committee’s decision to make restitution to the claimants of Robert Wolf. Mr. Wolf died December 1, 1996, and his estate is still not settled.”

Thanks to Mr. Bossong’s article, we will now prepare Subrogation Agreements and issue checks to these patient claimants who have waited three long years for restitution.

Steven V. Novacek, Chair  
Clients’ Security Fund,  
State Bar of Nevada

Oklahoma, with a lawyer population of 14,000, has a unified bar. The Oklahoma Client Security Fund was created by rule of the Supreme Court in 1964. It was funded with a \$100,000 budget item on a yearly basis to pay claims up to \$100,000. The Supreme Court’s rules also prohibited publicity about the Fund’s existence or its payment of claims.

Melissa DeLacerda, now a member of the ABA’s Standing Committee on Client Protection, was appointed to the Fund’s committee in 1985 as the representative of the bar association’s Young Lawyer Division. She later received a regular appointment to the committee and, in 1990, was named Committee Chairman.

DeLacerda became a familiar face at the annual ABA forums for protection funds: in Scottsdale, Naples, and Palm Beach. By the mid-1990’s, the Oklahoma fund was eager to overhaul the structure of its programs. But its efforts were seriously hampered by the fund’s ban on publicity. The Fund’s existence, importance and service to the bar were unknown to most of its members, including the leaders of the bar and judiciary.

In 1995, DeLacerda was elected to the Board of Governors of the Oklahoma Bar Association where

she began an informal education to familiarize her colleagues to the existence and functions of the Fund.

Soon thereafter, the Fund would receive approval for a limited publicity effort: a brochure for public dissemination and routine press releases concerning the payment of claims. Both efforts required a rule change which allowed for publicity as approved by the Board of Governors.

In 1998, an article authored by DeLacerda was published in the **Oklahoma Bar Journal** to inform the profession as to the existence and operations of the Fund.

Also that year, she successfully petitioned the Supreme Court, on behalf of the Board of Governors, for rule changes to permit publicity and to establish the Fund as a permanent trust.

As a consequence, Oklahoma’s client protection fund now receives \$100,000 annually, with surplus receipts remaining with the Fund in the hope that they will serve to create an endowment to assure payments of claims in the future. ■

*— Many thanks to Melissa DeLacerda of Stillwater, Oklahoma for this progress report, as well as her tenacious efforts to reform her bar’s client protection programs.*

## Helpful Verbs

Misappropriate, misapply, embezzle, defraud, deceive, convert, defalcate, mislead, misuse, swindle, dupe, overreach, poach, pocket, take, swipe, snitch, snatch, steal, purloin, filch, pilfer, peculate, thieve, lift, pirate, shanghai, skulk, rustle, trick, bamboozle, bilk, loot, sack, strip, ravage, dupe, con, cheat, cozen, trick, plunder, victimize, mislead, hoodwink, entrap, rob, manipulate, beguile, heist, corrupt, manipulate, maraud, plunder, crook, hustle, betray, fleece, fool, gyp, hook ...(to be continued)

## NCPO’s Speakers Bureau

The NCPO is creating a volunteer “Speakers Bureau” as a resource for client protection funds which could benefit from a visit by a seasoned fund administrator or trustee. These folks have seen thousands of claim and loss situations, and are familiar with the policies and practical concerns of protection funds large and small. Volunteers to date include Kenneth J. Bossong of New Jersey, Isaac Hecht of Maryland, Karen O’Toole of Massachusetts, Arthur Littleton of Pennsylvania, William Ricker of Florida, Frederick Miller of New York, and Robert Welden of Washington State. Please contact any one of the volunteers to plan a visit to your jurisdiction.





# Professionalism in Montana

By John Grassy

A few times in our lives, we find ourselves in a law office, mildly anxious or deeply terrified, and all we can do is listen; to a doctor, a lawyer or maybe a real estate broker. These are uneasy relationships, and the stakes are frequently high. The worst possible thing that can happen is that we are led astray by a breach of trust.

Lawyers are enduring targets for much carping and ill will. "What do you call 10,000 lawyers at the bottom of the ocean?" "A good start." And so on. What's more interesting, and not well known, is that lawyers take an active role in righting the wrongs of its members who knowingly violate the public trust. And Montana's legal community was among the first states to establish a program for doing so.

Beginning in 1976, the State Bar of Montana earmarked \$20 of every practicing attorney's annual membership dues for the Client Security Fund, a program conceived by a group of Montana lawyers. The fund later received the blessings of the Montana Supreme Court, and its name changed to the Lawyers' Fund for Client Protection.

"When we started we had very little to go on," said Jim Murphy, a Billings attorney who has been involved with the program since its inception and who currently chairs the Lawyers' Fund for Client Protection Board. "There were only a few other states doing it. We had to define things like dishonest conduct, normal prudence, theft. Then in 1982 we rewrote the rules all over again."

The easiest way to understand the workings of the Lawyers' Fund is to see what its Board members see once or twice a year: the aftermath of a catastrophe involving average people who thought they'd hired a lawyer who would help them.

Take the case of Catherine Sapp-LeClaire, a young lawyer with a mounting level of chaos in her personal life, which spilled into her professional career. Following her suspension, disbarment and disappearance, bar authorities found 30 open and unresolved client files.

All 30 clients filed applications with the Lawyers' Fund, which ranged from \$200 to \$2,000. The Fund has a 12-member Board of Trustees from across the state,

including one lay citizen. Like funds everywhere, the Trustees draw an immediate distinction between negligence and dishonest conduct. From there, the issues are frequently less clear. "One of the issues we struggle with most is unearned legal fees," said Carl Mendenhall, a Missoula attorney and Trustee. "There were several of these in the Sapp-LeClaire claims. A lawyer accepts a fee retainer, does nothing and refuses to return the retainer. Is that theft or a fee dispute?" A related issue involves the partial performance of a legal engagement. "Deciding how much to reimburse a claimant in those cases is never easy", Murphy explained.

Murphy said the deliberation process is "diligent, academic, thoughtful. These are motivated and highly interested people. There's a balance of liberal and conservative viewpoints. We recognize our own biases. There's argument and things sometimes get heated. Unanimous votes for reimbursing a claim are rare." In the case of the Sapp-LeClaire case, nearly all of her clients received reimbursement. Over the past three years, the Trustees have processed 42 claims involving eight lawyers.

The Montana Supreme Court recently instituted an bounced check rule. Mendenhall said the rule should end trust-fund problems before they spiral out of control. "I've found that overdrafts usually mean an attorney is having much bigger problems than just balancing the account," he said.

Through 23 years of volunteer association with the Lawyers' Fund, Murphy has been a witness to all manner of cases, from the tragic to the bizarre. The Fund deals exclusively with the financial aftermath of lawyer theft, but longtime Trustees are skilled at reading between the lines. One of the common scenarios surprises no one: a decent and hard-working individual succumbs to drug or alcohol problems, and in the process begins doing things he or she would never otherwise do.

The only real constant, Murphy said, is the surprise and relief of people who experienced the worst, and then the best, of the legal profession. "There was a businessman from Bozeman awhile back. When the board was willing to consider his case, this guy was shocked. He said, 'you mean you take care of your own bad

apples?' When lawyers get a bad rap I'm tempted to ask if they can name another profession where the people involved take care of their problems."

Most everyone involved with the Lawyers' Fund believes the program deserves more recognition. The general public knows little about the program, said Murphy; and even many attorneys are unaware of the fund, though it exists by virtue of their membership dues. He concluded: "Is public awareness of the fund comparable to the good it does?" "No" ■

*— Many thanks to Mr. Grassy, who is a freelance writer from Three Forks, Montana. This commentary was adapted from the April 1999 issue of **The Montana Lawyer**.*

## New NCPO Web Site

NCPO's Executive Committee has approved a free-standing Web site and address for NCPO. Implementation is being handled by NCPO's volunteer Webmaster, Michael Knight, Deputy Counsel of the New York Lawyers' Fund. Effective April 1, 2000, the Website can be accessed at [www.ncpo.org](http://www.ncpo.org)

Resources on NCPO's web site include NCPO's by-laws; rosters of officers, directors and members; all issues of **The Client Protection Webb**, a national directory of client protection funds; the text of NCPO's **Bibliography** of client protection cases and writings; summaries of important judicial decisions; current and recent news about NCPO events; and the ABA's Model Rules for Client Protection Funds. ■

## ABA's 16<sup>th</sup> National Forum

The ABA's Standing Committee on Client Protection will host its 16<sup>th</sup> national forum on Friday and Saturday, June 1 and 2, at The Fairmont Hotel in New Orleans.

Topics and panels this year will address national trends and developments in the field of law client protection; dealing with abandoned law practices; the analysis and evaluation of difficult claims; a fee arbitration workshop; alcohol and drug abuse; unearned fee claims; and the financing of client protection funds. *(continued on page 7)*



## Treble Damages

Minnesota's treble damage statute resulted in the imposition of liability against a Minnesota law firm where an associate perpetrated a real estate fraud during regular office hours and his legal services were of the type he usually performed. *Baker v. Ploetz*, Minn. Ct. App. 7/27/99.

## More Treble Damages

A partner in a Wall Street law firm was convicted of fraud and perjury in a Colorado bankruptcy proceeding, and was disbarred in New York and New Jersey. The victims of the fraud sued the firm in New York. Held: New York's treble damage statute (for a lawyer's fraud and deceit) does not apply to fraud committed beyond the state's boundaries. *South Street Corporate Recovery v. Milbank, Tweed, Hadley & McCoy*, N.Y. Sup. Ct. 11/17/99.

## Get Tough

The New Jersey Supreme Court sticks to its "get tough" disciplinary policy for the misuse of client funds. Proof of intent to steal is not required to establish a knowing misappropriation of client property. So held the court in disbaring a lawyer who withdrew legal fees from his trust account without his client's consent. *Matter of Minisohn*, 12/2/99.

## More Get Tough

The Colorado Supreme Court returned to a "get tough" policy in disbaring a law firm associate who knowingly converted \$15,000 paid by the firm's clients. The court holds that disbarment is the presumed penalty for misappropriation, whether the victim is a client or a law firm. The court overruled a 1998 precedent that imposed a suspension in a similar case. *Matter of Thompson*, 12/13/99.

## Legal Fees

A law firm has the fiduciary obligation to explain the basis for its legal billings. According to the Washington State Court of Appeals, that means that a law firm cannot enforce an accord and satisfaction with a client without showing that the client entered into the arrangement with full knowledge of how the firm computed its legal fees. *Simburg, Ketter, et al. v. Olshan*, 11/15/99.

## More Legal Fees

A lawyer's common-law retaining lien is a shield in Illinois, not a sword. A retaining lien can be judicially enforced only where the client sues the lawyer to turn over the client's case files. Until then, the Illinois Appellate Court says that the lien serves as a type of collateral for the lawyer. *Twin Sewer and Water Inc. v. Midwest Bank and Trust Co.*, 10/29/99.

## More Get Tough

Blaming a law partner for the theft of client funds is not an effective defense to a disciplinary panel's effort to suspend a lawyer from practice as a threat to the public. His partner earlier resigned from bar after numerous complaints of theft of personal injury settlements. The "innocent" partner should have been aware of how the firm's client trust was being administered. *Matter of Wallman*, App.Div. 1<sup>st</sup> Dept. 10/21/99.

## Changes in the Bay State

Mark I. Berson of Greenfield, Massachusetts, has been appointed Chairman of the Massachusetts Clients' Security Board. Mark was first appointed to the Board in 1995 by the Supreme Judicial Court, and has held the positions of Secretary/Treasurer and Vice-Chairman. Thomas G. Sitzmann of Boston moves up as the fund's Vice-Chairman.

## New Maximum in New York

Trustees of the New York's Lawyers' Fund have increased the fund's maximum coverage on losses to \$300,000, up from \$200,000, effective January 1, 2000. The Trustees awarded \$3.4 million in reimbursement to 161 claimants in 1999, all but one of whom received 100 percent reimbursement of their losses.

## Client Records and Files

The Pennsylvania bar's Committee on Legal Ethics has formulated helpful standards to help law firms develop policies and procedures for the retention and destruction of client records and files pursuant to Rule 1.15(a) of the Model Rules of Professional Conduct. The standards are contained in Ethics Opinion 99-120 (10/6/99).

## Annual Report in Washington State

The Lawyers' Fund for Client Protection has published its 1999 Annual Report. The fund's trustees reviewed 95 claims for reimbursement last year, which involved 30 lawyers. Two lawyers accounted for 56 of the claims. Fifty-nine claims were approved. The Annual Report summarizes the facts in approved claims, and is available by calling the Lawyers' Fund at (206) 727-5954, or by e-mail request to [www.license@wsba.org](mailto:www.license@wsba.org)

### The Client Protection Webb

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*In Memorium*  
Gilbert A. Webb, Esquire