Addendum

A Newsletter for Law Client Protection Funds

The Client Protection Webb

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For the Record: NCPO Speaks to Professionalism

Safeguarding Client and Escrow Property

The National Client Protection Organization was organized in mid-1998 to support and encourage the legal profession's efforts to protect legal consumers from dishonest conduct in the practice of law. In a sense, NCPO filled a vacuum; and its independence from legal, government, and professional organizations has provided the opportunity to speak freely on issues of legal ethics and professionalism which impact on the field of law client protection.

This Addendum issue of *The Client Protection Webb* documents NCPO's involvement with important issues of legal ethics and professionalism: amendments to the American Bar Association's Model Rules of Professional Conduct, and proposals to liberalize the licensing of lawyers ("multi-jurisdictional practice"). Both statements were drafted by NCPO officers William D. Ricker, Kenneth J. Bossong, and Frederick Miller.

The ABA's House of Delegates is considering amendments to its Model Rules that have been proposed by its Commission on the Evaluation of the Rules of Professional Conduct, or "Ethics 2000". The debate began early in August at the ABA's annual meeting in Chicago, and will continue at ABA meetings next year in Philadelphia and possibly Washington, D.C.

Ethics 2000 solicited comments from NCPO on its draft proposals to amend Model Rules 1.15 and 1.16, which deal with the safeguarding of client and escrow money and property. What follows is NCPO's formal written statement to Ethics 2000, and the response of Ethics 2000 in the form of revisions to its original proposals to amend the Model Rules of Professional Conduct.

Clearly, Ethics 2000 was responsive to NCPO's concerns. Its endorsement of NCPO's proposal that Model Rule 1.15 be amended to require that advance legal fees be deposited in attorney trust accounts, to be withdrawn as earned, is a major step in protecting law clients and legal consumers nationwide. Moreover, a lawyer's violation of that requirement – with economic loss to a law client – would, of course, constitute "professional misconduct" and enable the appropriate law client protection fund to reimburse the client's loss. The bulk of claims to the nation's client protection funds involve legal fees and expenses paid in advance.

Re: Amending Model Rules 1.15 and 1.16

The National Client Protection Organization, Inc. (NCPO) is a nonprofit educational organization that was established in 1998 to assist and support law client protection funds throughout the United States and Canada. Its members consist of state law client protection funds and individual administrators, trustees and lawyers who have an interest in protecting law clients from dishonest conduct in the practice of law and protecting the good name of the legal profession for its integrity and honesty.

The NCPO's educational activities include regional workshops for fund administrators and trustees, a speaker's bureau, and a quarterly newsletter called *The Client Protection Webb*. The NCPO works closely with the American Bar Association's Center for Professional Responsibility, the ABA's Standing Committee on Client Protection, and the Conference of Chief Justices.

Due largely to the efforts of the American Bar Association, there are now law client protection funds in every state of the United States, and the District of Columbia. They exist as well in all the Canadian provinces. These funds are financed by lawyers by direct assessment through licensing and registration fees, or by budget appropriations from state bar associations. Law client protection funds restore millions of dollars annually in reimbursement to law clients and escrow beneficiaries whose funds were misused in the practice of law. Reimbursement is available when the dishonest attorney is unable to make restitution. In most cases, law client protection funds are the only sources of reimbursement available for victimized law clients.

The Model Rules of Professional Conduct should acknowledge the importance of these lawyer programs. The NCPO believes the proposed Model Rules of Professional Conduct should be revised as follows:

Model Rule 1.15 should express, in black letters, a lawyer's obligation to support the efforts of the bar to protect clients and legal consumers from dishonest conduct in the practice of law. Law client protection funds should not be relegated to a Comment.

The NCPO urges that Rule 1.15 be amended by adding the following subdivision:

"Every lawyer has a professional obligation to participate in the collective efforts of the bar to reimburse clients and escrow beneficiaries who have lost money or property as the result of dishonest conduct in the practice of law. A lawyer's financial contribution to a lawyers' fund for client protection is an acceptable method of fulfilling this obligation."

We also recommend that proposed Comment 6 be amended to delete the references to "mandatory"and "voluntary" law client protection funds. That is not a meaningful classification. It is settled policy of the American Bar Association that the highest court in every jurisdiction should establish and supervise a lawyers' fund for client protection. Those policies are expressed in the ABA's Model Rules for Lawyers' Funds for Client Protection. The language we propose is taken from Rule 1(B) of those Model Rules. A lawyer's duty to support a client protection fund is not a goal or aspiration, but an accepted obligation of every member of the profession.

Further support for the mandatory nature of law client protection programs was provided by the Conference of Chief Justices in its 1999 **National Action Plan on Lawyer Conduct and Professionalism**. The Action Plan calls for every jurisdiction's lawyer regulatory system to include a state-wide law client protection fund, supervised by the supreme court, and financed by, the legal profession.

The NCPO urges that Rule 1.15 be further amended to provide that legal fees and costs that are paid in advance be deposited in the client trust account, and be withdrawn only as the fee is earned and costs are paid, unless the lawyer and client agree otherwise in writing.

We propose that Rule 1.15 be amended to add the following:

A lawyer shall deposit into the client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned and expenses are paid, unless the lawyer and client agree otherwise in writing.

This proposal reflects the majority view of courts and bar associations in the United States. *See, e.g., 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, 650 n. 29 (1989); In Re Sather ___ P.2d ___ (Colo. 2000), Iowa Supreme Court Board of Ethics v. Apland, 577 N.W.2d 50 (Iowa 1998) and In re Disciplinary Action Against Lochow, 469 N.W.2d 91 (Minn. 1991).* It would provide needed practical guidance to lawyers on how to handle advance deposits of fees and expenses. The proposal is also consistent with the requirement of Rule 1.16 that a lawyer refund unearned legal fees to a client upon the termination of a legal engagement.

Our third proposal involves proposed subdivision (b) of Rule 1.15. That provision permits commingling of the lawyers personal funds in the client trust account "for the limited purpose of minimizing bank charges". We are concerned that there is no monetary limit in the proposal, and that thousands of dollars could be commingled in a client trust account for the sake of "minimizing" bank charges while the account is being used as an operating account for the lawyer. This construction of the rule should not be permitted. We propose that subdivision (b) be amended to read as follows:

A lawyer may deposit the minimum amount necessary of the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account.

We recognize the practical difficulties of establishing trust accounts, but believe the proposed rule and proposed comment do not adequately advise and warn the lawyer of the limited intent of this exception to the normal prohibition to commingling personal funds with client funds. We believe the comment needs to clearly state the dangers inherent in commingling and the prohibition to the lawyer of using the client trust account for operating purposes or savings purposes.

Our final recommendation would amend Rule 1.16 (d) to read as follows (language underscored to be added):

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or expended. The lawyer may retain papers relating to the client to the extent permitted by other law.

These two minor language additions make no change in accepted fiduciary practice and would conform subdivision 1.16 (d) to the language proposed by the NCPO for the deposit and safeguarding of advance legal fees and expenses.

The following is the text of proposed amendments to Rules 1.15 and 1.16 of the Model Rules of Professional Conduct. The text was approved by Ethics 2000 following consideration of NCPO's suggestions for changes in its earlier draft. These amendments have been recommended to the House of Delegates of the American Bar Association, and will likely be considered by that body at the ABA's Midyear Meeting in Philadelphia early in 2002.

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
~~(b)~~ (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
(e) When in the course of representation a lawyer is in possession of property in which ~~both~~ two or more persons (one of whom may be the lawyer ~~and another person~~) claim interests, the property shall be kept separate by the lawyer until ~~there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until~~ the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Commentary
[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons ~~should~~, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law or court order. See, e.g., ABA Model Financial Record keeping Rule.
[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.
~~[2]~~ [3] Lawyers often receive funds from ~~third parties from~~ which the lawyer's fee will be paid. ~~If there is risk that the client may divert the funds without paying the fee, the~~ The lawyer is not required to remit ~~the portion from which the fee is to be paid~~ to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds ~~should~~ must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.
~~[3]~~ [4] ~~Third~~ Paragraph (e) also recognizes that third parties~~, such as a client's creditors,~~ may have ~~just~~ lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client~~, and accordingly may~~. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. ~~However, a~~ A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.
~~[4]~~ [5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.
~~[5]~~ [6] A ~~"clients' security~~ lawyers' fund~~"~~ for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

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(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Re: Multi-jurisdictional Practice

What follows is NCPO's formal presentation to the American Bar Association's Commission on Multi-jurisdictional Practice, submitted as the Commission deliberates policy recommendations in this area of legal practice and professionalism for the ABA's House of Delegates.

The National Client Protection Organization, Inc. (NCPO) is a nonprofit educational organization that was established in 1998 to assist and support law client protection funds throughout the United States and Canada. Its members consist of state law client protection funds, as organizational members, and administrators, trustees and lawyers who have an interest in protecting law clients from dishonest conduct in the practice of law, as individual members.

NCPO's educational activities include regional workshops for fund administrators and trustees, a speaker's bureau, and a periodic newsletter called *The Client Protection Webb*. NCPO works closely with the American Bar Association's Center for Professional Responsibility, the ABA's Standing Committee on Client Protection, and the Conference of Chief Justices.

Due largely to the efforts of the American Bar Association, there are now law client protection funds in every state of the United States, and the District of Columbia. They exist as well in all of the Canadian provinces. Law client protection funds are financed by lawyers by direct assessment through licensing and registration fees, or by budget appropriations from state bar associations.

Law client protection funds reimburse millions of dollars annually to law clients and escrow beneficiaries whose funds were misused in the practice of law. Reimbursement is available when the dishonest attorney is unable to make restitution. Because the funds only reimburse theft, in most cases law client protection funds are the only source of reimbursement available for victimized law clients. According to the ABA Surveys of Lawyers Funds for Client Protection, for the nine year period 1990 through 1998 more than $160,000,000 was reimbursed to clients by the various funds in the United States.

NCPO believes that any changes affecting the multi-jurisdictional practice of law which liberalize the admission to practice, in whatever form, and the consequent movement of lawyers among jurisdictions will have a significant effect on client protection funds. Accordingly, client protection issues must be addressed in the Commission's report. Appendix 6, *Uniform Guidelines for the Payment of Inter-Provincial Defalcation Claims*, of the Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada is an excellent starting place for understanding the nuances of multi-jurisdictional client protection claims.

The 51 U.S. jurisdictions with client protection funds have a variety of administrative structures and an even greater variety of claim reimbursement limits and attorney annual assessments. Currently, an assessment by or on behalf of a lawyers' client protection fund is required in almost every jurisdiction as part of the lawyer licensing process.

Rule Two of the ABA Model Rules for Lawyers' Funds for Client Protection calls for reimbursements by a client protection fund to clients for thefts by lawyers admitted to practice in a jurisdiction adopting the Rules. Even jurisdictions which have not adopted the specific Model Rules, however, will not reimburse a claimant unless the dishonest lawyer was licensed in that jurisdiction, and the theft arose out of legal services connected with the jurisdiction. In other words, the reimbursement is not based on the residency of the claimant but the licensing jurisdiction of the attorney. Funds generally deny claims where a lawyer is practicing in a foreign jurisdiction, the theft occurs in the foreign jurisdiction and there is insufficient connection with the practice of law in the licensing jurisdiction. Moreover, the jurisdiction where the theft occurs will likely deny the claim if the lawyer is not licensed in that jurisdiction.

The prospect of funds denying claims arising out of its licensed lawyers operating in foreign jurisdictions can only be expected to increase with a formal, approved multi jurisdictional practice system if client protection considerations are not taken into account in designing the program. While the NCPO takes no position on the multi-jurisdictional practice concept, it strongly recommends that the Commission consider the effect of its ultimate proposal on client protection.

NCPO's concern about new multi-jurisdictional practice rules is centered on lawyers who will be practicing in jurisdictions where they are not licensed and, therefore, have not contributed to that jurisdiction's client protection fund. NCPO's concern is that funds may use strict interpretations of their rules to place the claimant in a Catch 22 situation, with each involved jurisdiction denying the claim. For instance, the jurisdiction where the lawyer is licensed may maintain that the theft occurred outside its borders and therefore will not cover the claim - especially since, under the multi-jurisdictional practice rules, the lawyer would be legally and ethically practicing in the other jurisdiction. On the other hand, the second jurisdiction may contend that because the lawyer is not licensed in its jurisdiction and does not contribute to its client protection fund, the claim will not be honored. Unfortunately, if that occurs, the profession, as well as the claimant, loses.

One solution to the multi-jurisdictional practice effect on client protection, for instance, is to require a lawyer practicing under multi-jurisdictional practice rules to pay into the law client protection fund of each state where the lawyer is legally practicing. A claimant would then first look to the jurisdiction where the theft arose and, if the claimant were not reimbursed in full by that jurisdiction, claimant would next look to the lawyers home jurisdiction for any short fall up to the amount of his claim and within the maximum reimbursement limits of each of the two jurisdictions. The second jurisdiction would not be permitted to use the other's reimbursement as a set off until the claimant was reimbursed in full for her claim.

NCPO realizes that this simple rule would not solve all problems, especially since different jurisdictions have wildly varying reimbursement limits. See ABA Survey of Lawyers' Funds for Client Protection, 1996-1998, Chart II--Part 2. Nonetheless, the claimant would at least be assured that some fund would respond to the theft of her property. And, at least one jurisdiction – New Jersey which requires lawyers admitted *pro hac vice* to contribute to its fund – has experimented with this concept. A review of its program by the Commission could be instructive in developing client protection principles to include in the Commission's report.

The Canadian experience in developing Appendix 6 of the Inter-Provincial Protocol can also be helpful in addressing the multi-jurisdictional practice concerns on client protection in general and on the inequality of jurisdictional limits problem specifically. Essentially, the Canadian program requires a claimant to look to the lawyer's home province first and then, if the claimant is not reimbursed an amount by the lawyer's home province as the claimant would be by the lawyer's host province, a national excess fund pays the difference. While a similar plan is conceivable for the U.S., its establishment any time soon seems highly unlikely.

As noted, NCPO does not take a position on the concept of multi-jurisdictional practice. It believes, however, that the Commission's report must address the issues surrounding a multi-jurisdictional practice program on client protection. NCPO also recognizes that the Commission cannot establish binding rules regarding client protection, but, nonetheless, urges the Commission to fully explore the issues and to adequately addressed them in its report so that ABA and jurisdictional entities responsible for client protection will be placed on notice of the Commission's concerns and can profit from its discussions.

NCPO assumes that it will have an opportunity to comment on any draft reports or proposals by the Commission, and it looks forward to the opportunity to do so and to assist the Commission in its important work.

The Client Protection Webb is a public-interest publication of
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