



BOARD OF EDITORS

- CO-CHAIR:** Robert F. Drinan
Washington, D.C.
- CO-CHAIR:** Micalyn S. Harris
Ridgewood, New Jersey
- MEMBERS:** Timothy W. Bouch
Charleston, South Carolina
- Harold G. Clarke
Atlanta, Georgia
- Linda D. Donnelly
Denver, Colorado
- William B. Dunn
Detroit, Michigan
- Ralph G. Elliot
Hartford, Connecticut
- Ellen Mercer Fallon
Middlebury, Vermont
- Barbara Kerr Howe
Townson, Maryland
- Richard G. Johnson
Cleveland, Ohio
- Nancy Byerly Jones
Chapel Hill, North Carolina
- Diane L. Karpman
Los Angeles, California
- Ronald D. Rotunda
Champaign, Illinois
- William K. Slate, II
New York, New York
- Ann Yvonne Walker
Palo Alto, California
- Seth P. Waxman
Washington, D.C.
- William I. Weston
Jacksonville, Florida

THE PROFESSIONAL LAWYER

- EDITORIAL DIRECTOR:** Jeanne P. Gray
- EDITOR :** Arthur Garwin
- ASSISTANT EDITOR:** Carole L. Mostow
- PRODUCTION COORDINATOR:** Laurie Crane

Subscriptions are \$20.00 per year for ABA members and \$25.00 per year for non-members. Subscription inquiries should be directed to the ABA Service Center at 1-800-285-2221. *The Professional Lawyer*, (ISSN: 1042:5675) a quarterly magazine covering professionalism and ethical issues and efforts of bar associations, law schools and the judiciary to increase professionalism within the legal profession, is published quarterly by the ABA Center for Professional Responsibility and the Standing Committee on Professionalism. Suggestions for articles and Letters to the Editor should be sent to *The Professional Lawyer*, American Bar Association, 541 N. Fairbanks Court, Chicago, IL 60611-3314, or call (312) 988-5294 or FAX (312) 988-5280. *The Professional Lawyer* reserves the right to select, edit and excerpt letters for publication. Visit the Center's World Wide Web site at <http://www.abanet.org/cpr>.

FEATURES

Phillips, IOLTA, and the Lawyer's Duty to Communicate
BY RALPH GREGORY ELLIOT 1


Controversial No More - The Perjury Trilemma Revisited
BY MONROE H. FREEDMAN..... 2


Truth, Justice, and the Criminal Defense Lawyer
BY RICHARD ZITRIN 10


Journals of an Heresiarch: Nothing Lost Save Honor
BY FRANK DUDLEY BERRY, JR. 14


Client Protection Forum Compares American and Canadian Systems
BY SHELDON D. POLLACK..... 18


DEPARTMENTS


 Book Review 9

 Around the ABA..... 16

 Around the Nation 20

 Center Update 21

 Case Summaries 22

 Ask ETHICSeach 25

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing policy of the American Bar Association.

© 1998 by the American Bar Association  *The Professional Lawyer* is printed on recycled paper.

Client Protection Forum Compares American and Canadian Systems

Sheldon D. Pollack

The 14th National Forum on Client Protection was held in Montreal, Canada on May 29-30, 1998. The Forum is organized by the American Bar Association's Standing Committee on Client Protection and its Advisory Commission on Lawyers' Funds for Client Protection. This year, the Forum was co-sponsored by the College of Business and Economics of the University of Delaware, and by all accounts was the most successful ever. Enjoying the panels and participating in the lively discussions were some 95 lawyers, judges, academics, and representatives of various lawyers' funds for client protection, fee arbitration programs, and bar associations. The Forum had a distinctive international perspective this year, with participants from the Canadian legal community, representing six different provinces, joining the proceedings. Representatives from thirty-four United States jurisdictions were at the Forum. Also in attendance was then ABA President Jerome J. Shestack—in town for the ABA's 24th National Conference on Professional Responsibility. In brief comments to the Forum participants, Shestack reiterated the ABA's recognition and support for the work of client protection programs across the United States and Canada.

The Forum opened with welcoming remarks by Victor F. Battaglia, Chair of the Standing Committee on Client Protection. A long-time advocate of client protection funds, Battaglia (a former president of the Delaware Bar Association) stressed the importance of opening the debate on client protection funds to include more than just the small group of those immediately involved in administering the programs. In pursuit of this goal, he welcomed the contribution of the College of Business and Economics in co-sponsoring the Forum. He also welcomed the participation of members of the Canadian legal community and invited the audience to compare and learn from the Canadian experience. With that, he introduced the Forum's guest speaker, Jacques Fournier, President-Elect of the Barreau du Quebec—the bar association of lawyers in Quebec Province.

In his remarks, Fournier outlined the Canadian approach to client protection. The Quebec bar is governed by two statutes—the Bar Act and the Code of Professions—both

Sheldon D. Pollack, J.D., Ph.D., is Associate Professor in the Department of Accounting in the College of Business and Economics at the University of Delaware.

expressly designed to protect the public. Under the Quebec regulatory model, the legal profession has established a client protection fund to indemnify victims of fraud and misappropriation of trust funds, and lawyers are subject to a compulsory system for resolving disputes over fees ("conciliation"). Disputes over fees are brought before an arbitration committee, the decisions of which are enforceable through the regular court system. In addition, lawyers are subject to professional inspection and mandatory continuing legal education, both paid for by members of the bar. The Barreau du Quebec also operates a compulsory "entrance" fund, presently celebrating its 10th anniversary. The entrance fund (which provides malpractice insurance to bar members) is funded by a \$500 a year assessment on members of the Quebec bar and provides protection of \$5 million per claim, with no franchise and no limits on the number of claims. The fund has enjoyed a \$70 million surplus over the 10-

year period. Fournier noted that the compulsory nature of the insurance allows lawyers (rather than insurance companies) to retain control over entry into the profession and also results in more constant premiums, insulating the members from fluctuations in the market. Fournier concluded by noting that the practice of law is rapidly becoming an international enterprise. Because of this, he suggested that lawyers in the United States would do well to study the Canadian system of self-regulation to better serve and protect the public—as well as strengthen the public's confidence in the legal profession.

The first afternoon session was the annual Town Meeting moderated by Lynda C. Shely, Special Services Counsel for the State Bar of Arizona. As the microphone passed around the room, representatives of the various jurisdictions in attendance summarized the activities, innovations, and problems facing their respective programs during the past year. The Town Meeting provides an important function in allowing representatives of the individual client protection programs to learn how their sister jurisdictions are dealing with similar issues. One thing was clear from the discussion—the smaller jurisdictions have a considerably harder time administering and raising assessments for their client protection funds than the larger jurisdictions. For example, James S. Hill of North Dakota (and a member of the ABA Standing Committee of Client Protection) pointed out that with only 1,200 dues-paying members, that jurisdiction's lawyers' fund for client pro-

[Fournier] suggested that lawyers in the United States would do well to study the Canadian system of self-regulation.

tection has limited capacity to raise assessments. This means that the fund is often unable to cover even a relatively small claim brought against a dishonest North Dakota lawyer. Indeed, the very existence of the North Dakota fund is precarious, with the North Dakota legislature actually terminating the fund several years ago. While now back in business, the fund faces constant challenges because of the small number of lawyers standing behind the program. On the other hand, large states such as New York and California have well-established and highly active client protection programs. Frederick Miller, Executive Director and Counsel for the New York Lawyers' Fund for Client Protection, noted that their fund faced 1,100 claims in the past year (alleging over \$40 million of losses), with 650 claims reimbursed a total of \$7 million (slightly less than the \$8 million that is budgeted annually). Since its inception in 1982, the New York fund (administered by a full-time staff of seven, including 3 secretaries, 3 lawyers and a paralegal—as opposed to the part-time voluntary programs of many smaller jurisdictions) has reimbursed over \$70 million to the victims of 550 dishonest lawyers. That's more than North Dakota will handle throughout the new millennium!

The Town Meeting was followed by an informative session on Client Protection in Canada. The panel was moderated by William I. Weston, member of the ABA Standing Committee on Client Protection and Associate Dean at Florida Coastal School of Law. Mary Ann Cummings of the Law Society of British Columbia gave an overview of client protection mechanisms in that Canadian province, while David J. Turner of the Law Society of Alberta described how problems are handled there. Under the scheme in place in Alberta and British Columbia, client protection funds are funded and administered by the Law Societies (membership in which is mandatory for lawyers practicing in those provinces). The Canadian programs are well-funded and administered compared to many of the programs operating in the United States.

Saturday morning began with attendees breaking out into two separate workshops. The first, on Difficult Claims, was moderated by Janet Green Marbley, Chair of the ABA Advisory Commission on Lawyers' Funds for Client Protection, while the second, on Fee Arbitration, was moderated by James E. Towery, a member of the ABA Standing Committee of Client Protection and the former Presiding Arbitrator of the State Bar of California Mandatory Fee Arbitration Program. The Difficult Claims workshop, a tradition at the Forum, was led by a distinguished panel comprised of members of the ABA Advisory Commission on Lawyers' Funds for Client Protection (Susan C. Busch, Eileen W. Donahue, and Helen Desmond McDonald), as well as David J. Turner, Deputy Secretary of the Law Society of Alberta. The panel considered some of the diffi-

cult claims for reimbursement that are faced by administrators of all client protection funds in the United States and Canada, such as: claims against suspended lawyers, claims against lawyers who were acting only as fiduciaries, and claims based upon little or no service provided by a lawyer.

The workshop on Fee Arbitration was a roundtable discussion by representatives of four fee arbitration programs (Rita L. Payne of Georgia, Linda L. Harrington of California, David E. Johnson, Jr. of New Jersey, and Carla J. Freudenberg of Washington, D.C. Topics ranged from arbitrator training and quality control to the enforcement of arbitration awards. Before breaking for lunch, attendees came together again for a panel, "Update on Fee Arbitration Programs," moderated by James E. Towery. The panel provided an overview of emerging trends in fee arbitration. Panelists Linda L. Harrington, Director of the State Bar of California Mandatory Fee Arbitration Program, and David E. Johnson, Jr., Director of the Office of Attorney Ethics of the Supreme Court of New Jersey, offered their observations

on such topics as funding for fee arbitration programs, voluntary versus mandatory programs, and the relationship between fee arbitration and lawyer disciplinary programs. Victor Battaglia pointed out that, based on his experiences in Delaware, the mandatory fee arbitration program is most readily accepted by lawyers in small firms. Towery acknowledged that the concept of mandatory fee arbitration takes some getting used to. It is most readily accepted in jurisdictions where alternative dispute resolution is already entrenched.

The Saturday afternoon program kicked off with a panel appropriately entitled "Theft Prevention Canadian Style." The moderator for the panel was Barbara S. Rea, member of the ABA Standing Committee of Client Protection and Chief Bar Counsel of the Kentucky Bar Association. James N. Yakimovich, Director of the Department of Audit and Investigations, Law Society of Upper Canada (Ontario), provided an overview of the Canadian approach to preventing and detecting lawyer misconduct. Ontario prescribes specific accounting and recordkeeping rules for trust and general account monies, and lawyers are required to make an annual financial report to the Department of Audit and Investigations (which also engages in spot audits). These programs (along with client compensation funds) are supported by lawyer assessments that are fairly heavy by the standards of U.S. jurisdictions. Lawyers in Ontario Province paid a \$1,600 assessment this past year for the overall program of audits, professional insurance, fee arbitration, and the client protection fund. Similar amounts are paid by lawyers practicing in the other Canadian provinces. Bruno E. DeMolli, auditor for the North Carolina State Bar, discussed his state's approach to the detection of lawyer

The Canadian programs are well-funded and administered compared to many of the programs operating in the United States.

theft—most particularly, random audit and over-draft notification programs. Based upon conversations at this panel, one might very well conclude that lawyers in both countries commonly fail to follow the accounting rules incumbent upon those who hold funds on behalf of clients.

Following the panel on theft prevention was a discussion of the problems created by lawyers who continue to “practice law” after being suspended or disbarred. Kenneth J. Bossong, Director of the New Jersey Lawyers’ Fund for Client Protection, served as moderator. Panelist Linda A. Acevedo, Assistant General Counsel of the State Bar of Texas, gave a lively account of what Texas is doing about lawyers who continue to practice—and steal from their “clients”—even after suspension or disbarment, while David McKillop, Assistant Secretary of the Lawyers’ Fund for Compensation, Law Society of Upper Canada, gave an overview of the Canadian approach. It was clear from comments from members of the audience that different jurisdictions deal with this problem in quite different ways. Most jurisdictions will not recognize claims to compensate clients who have been the victim of thefts by those whose licenses have been revoked (whether suspended or disbarred). However, some jurisdictions (most notably Massachusetts and Ontario, and to a lesser extent Minnesota) will compensate those injured by someone who once was licensed to practice law, even if no longer licensed at the time of the defalcation. Apparently, no jurisdiction recognizes a claim against a person who holds himself out as a lawyer, but who never was actually licensed to practice law. Compounding the problem is the fact that few jurisdictions have the administrative capacity to monitor the activities of those who are disbarred or suspended.

Prior to the last panel, Victor Battaglia awarded a certificate of appreciation to Brenda P. Catlett. Since 1984, Catlett has been the Administrator of the Clients’ Security Fund for the District of Columbia Bar. From 1992 through 1997, she served as a member of the ABA Advisory Commission on

Lawyers’ Funds for Client Protection; three of those years she served as Chair of the Advisory Commission. During the three years that she served as Chair, Catlett was responsible for organizing the Difficult Claims Workshop at the Forum and has made it the success it is today.

The Forum closed with a panel on investing the reserves held in a lawyers’ fund for client protection. Obviously, this topic is of greater concern to those programs that actually have reserves in their funds to invest. Victor Battaglia introduced the panel, predicting that the topic would be the most controversial of the Forum and of increasing importance in years to come. Isaac Hecht, Treasurer of the Clients’ Security Trust Fund of the Bar of Maryland, moderated the discussion. Hecht was joined by panelists Jim Yakimovich, Director of the Department of Audit and Investigations, Law Society of Upper Canada, and Frederick Miller, Executive Director and Counsel for the New York Lawyers’ Fund for Client Protection. The panelists discussed alternative strategies for investing reserves held by client protection funds. It is clear that when the stock market is soaring, client protection funds earn only relatively modest returns on their investments. This is disconcerting to some—especially those who would like to see the funds earn enough from their investments to leave the law-abiding lawyers alone for a while. On the other hand, when the market suffers its next major downturn, the overly conservative policies of fund administrators will look a whole lot wiser in retrospect.

With closing remarks from Victor Battaglia, the Forum was adjourned. Everyone is already marking their calendars to remember the 15th National Forum on Client Protection, which will be held at the Sheraton Grand Torrey Pines near San Diego on June 4-5, 1999. The French cuisine may not be quite up to Montreal standards, but the golf course is first-class and world renowned. For more details about next year’s Forum, please contact Brad Hoffman at (312) 988-5305 or bradhoffman@staff.abanet.org.

AROUND THE NATION



The Conference of Chief Justices (CCJ) has released for public comment a draft of its “National Action Plan on Lawyer Conduct and Professionalism” which was prepared under the direction of the CCJ Standing Committee on Professionalism and Lawyer Competence.

The report was prepared in response to concerns about the perceived decline in lawyer professionalism and its effect on public confidence in the legal profession and the justice system. The report contains a detailed description of the

institutional and individual responsibilities of the Bench, the Bar, and the Law Schools in promoting lawyer ethics and professionalism. Following that discussion are recommendations to the state supreme courts of specific measures to be implemented to fulfill these responsibilities. The recommendations address a variety of topics including lawyer discipline, lawyer support programs, continuing legal education, law school education and bar admission, public outreach, and litigation reform.

The report also includes a series of briefing papers that summarize the responses to a survey conducted in conjunction with this project concerning the efforts that state courts and the bar have made to promote professionalism and legal ethics.

The report is available to interested persons on the Internet at www.ncsc.dni.us/ccj/natlplan.htm or by e-mail request to phannaford@ncsc.dni.us. The CCJ welcomes comments on the draft.