

CLIENT SECURITY: HINDSIGHT AND FORESIGHT ...

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"Somehow the money thing got out of whack." After five years of pondering why he stole over \$430,000, Mark Sampson offered this banality. As the saying *should* go, "Even hindsight is not always 20-20."

Sampson has been arrested and is being prosecuted. Is there any doubt that \$404,672 was well-spent to compensate Sampson's victims and to forestall bad publicity and possible legislative incursions? Reflections on Sampson make it a good time for a retrospective on the Minnesota Client Security Fund.

A retrospective is also timely because the Fund's board is nearing its fifth anniversary and has developed some common law for applying its basic claim payment criterion: Was "the loss caused by the intentional dishonesty of the lawyer" toward a client?

A prospective look at client security is also in order, for two reasons. An MSBA committee, chaired by Merritt Marquardt, is studying the Minnesota client security system, with a view to reporting by the end of 1992. Systems in several other states are experiencing great difficulties.

Illinois has stopped paying claims for lack of funds. The North Dakota fund has ceased to exist. After finding \$28 million in claims valid for 1991 alone, the New York fund cut the maximum it pays most claimants from \$100,000 to \$50,000. For similar reasons, Florida has imposed a temporary \$10,000 limit.

In comparison, the Minnesota fund is healthy. Minnesota has paid out claims of \$1.35 million through March 1992, but retains a fund balance of about \$800,000. There are only a couple of substantial pending claims which appear to have merit. The fund has actually made subrogation recoveries against several disbarred lawyers — though projected income does not take account of Sampson's reported promise, "I'm going to try to pay back \$450,000 plus interest."

Several recurrent issues have developed in the board's assessment of the validity of claims. Snapshots of these issues show how challenging it has been to apply the basic rules governing claims fairly and consistently.

Lost interest. The rules exclude payment of claims of lost interest. What if an attorney steals \$10,000 of client funds, and then for five years falsely tells the client that the funds are held, earning ten percent simple interest? Should the fund pay the client \$10,000 that was stolen, or \$15,000? Assume that accounting documents are insufficient to identify the actual date of theft, and whether the interest was actually earned and received by the attorney or merely stated to the client. The board has declined to pay interest in such situations. A dissatisfied claimant has publicly and repeatedly expressed discontent over such decisions.

Investment claims. If a nonclient gives a lawyer money to invest, and the lawyer instead steals the funds, the loss will not be paid by the fund, because there is no attorney-client relationship. (Close

fiduciary relationships, such involving as a guardian-ward relationship involving an attorney, are covered by the fund.) If, however, a client entrusts personal injury proceeds to a lawyer for investment, the claim may well be paid.

Unearned retainers. A lawyer who spends an unearned retainer, and is unable to repay, may or may not have acted dishonestly. If the lawyer apparently had no reasonable expectation or intention to perform the services covered by the retainer, the claim ordinarily will be paid.

\$50,000 maximum. The board's rules contemplate recommending to the Supreme Court limits on the amounts payable per claim. Rather than make such a recommendation, the board has adopted as a general guideline a limit of \$50,000 per claim. (No limit on total reimbursement related to one lawyer's misconduct has yet been adopted.) However, the board may exceed this guideline in cases of particular hardship to claimants.

Collateral source. The board will not pay claims if there is a "reasonably available collateral source for reimbursement." How much civil litigation should a claimant have to undertake to determine whether the other source is available? An answer in the form of general principle is difficult to state, but the board has not required complainants to undertake fruitless litigation, such as obtaining judgments against Mark Sampson. The board instead, through subrogation, will obtain its own judgment.

Criminal justice system. Should the board report attorney thieves to prosecutors, in part with the hope of a restitution order being part of a sentence? Or would that be unfair to attorneys under investigation by the Lawyers Board, who must answer reasonable investigative inquiries? The balance between these competing considerations has been struck generally in favor of not reporting lawyer thefts to prosecutors, believing that such reports might unduly inhibit Lawyers Board investigations.

What lies ahead for the client security system? There will be attention to attorney theft prevention and detection programs. The overdraft notice program is modest in scope but is working well. Random trust account audit programs have been questioned on cost-benefit grounds but appear to be gaining ABA backing. In New York insurers are now required to notify insureds of checks over a certain amount sent to their attorneys. The Director's Office is reviewing attorney thefts in 1990-91 to ascertain which preventative programs might be effective. Withal, it must be remembered that preventing and detecting theft are difficult at best; and that predicting thefts for budgeting purposes is impossible. The future in client security is never secured.

Alternate or additional funding sources for client security are again being considered by the MSBA committee. Insurance and bonding have not been available but a new look is being taken at these sources. Questions have been posed about the availability of IOLTA funds, but those funds have been devoted to needy legal services projects.

The press accounts of Sampson's arrest and misdeeds have not congratulated lawyers for financing the Client Security Fund nor board members for their volunteer service. Instead, the media repeatedly inquired whether Sampson has not given the profession a black eye. The answer is that every profession has its miscreants; but in judging a profession, the important question is what it does about them. Perhaps congratulations are not in order over anything related to Mark Sampson, but there should be satisfaction in knowing that the Minnesota system paid nearly 100 percent of his victims' losses and that the Minnesota system is alive and in good health, while others are foundering.

