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Kenneth M. Wormwood

THE "CLIENTS' SECURITY FUND" IDEA

By KENNETH M. WORMWOOD

Kenneth M. Wormwood received his LL.B. degree from the University of Denver College of Law in 1926. He is a member of the Denver, Colorado and American Bar Associations and served as president of the Denver Bar in 1953-1954. He is a member of the firm of Wormwood, O'Dell and Wolvington.

At the 1959 midwinter meeting of the American Bar Association the House of Delegates adopted a resolution to the effect that the "Clients' Security Fund" deserved the support of the legal profession and should be studied by the various state bar associations throughout the country. In accordance with this recommendation President Douglas McHendrie of the Colorado Bar Association appointed a committee to investigate this matter and report to the Board of Governors at its September meeting.

The committee appointed by President McHendrie is composed of Charles Corlett from Monte Vista; Robert Christensen, Loveland; Lyle Miller, Golden; Ralph E. Waldo, Jr., Greeley; Ira Rothgerber, Jr. and David Knowlton, both from Denver; and the writer of this article. While the members of the committee have been furnished with material to study this proposed fund, there has not yet been a committee meeting. Consequently this article should not be considered in any manner a report from the committee. It is written simply to advise the members of the Colorado bar what such a fund is, the desirability of such a fund, and how such a fund would work. I hasten to state that the opinions of the writer are not necessarily those of the committee. Its opinions and recommendations will come at a later date, after due consideration.

I am sure that the first question that enters an attorney's mind is: "Just what is a 'Clients' Security Fund'?" And the second question is: "Why the necessity for such a fund?"

The legal profession is an honored profession. We who are attorneys are proud of our profession. Unfortunately, there are many members of the public who do not share our faith and belief in our profession. In many instances this disregard, even disrespect, of attorneys has been brought about by various paper-backed "whodunits," television shows and the like. So, too, the newspapers, unfortunately, have added to this opinion of the attorney. The hard-working, honest attorney who labors hard and long for his clients and scrupulously accounts to them for all of their funds which pass through his hands, is not "news." It is the occasional unscrupulous attorney who embezzles his clients' funds that the public hears of. Fortunately, this number is small, but it is the "bad apple that spoils the bushel" as far as the general public is concerned.

True, the embezzling attorney may be disbarred, but that is small satisfaction to the client who may have lost his life's savings. Attorneys in general owe a duty to see that no member of the public loses by reason of misplacing confidence in a legal "rotten apple."

In 1953 Dean Griswold of the Harvard Law School gave an address to the Cleveland Bar Association in which he said: "Would it not be a fine thing if bar associations . . . established an insurance fund which would guarantee, as a professional and association matter, that no client would suffer loss through the defalcation of his lawyer?"

Chief Justice Vanderbilt in 1955 said:

> "It is in the public interest that the legal profession which includes the judges and the law teachers as well as the practicing lawyers should control legal education and admissions to the bar.
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> "It is in the public interest that the legal profession should control the discipline and disbarment of lawyers.
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> "The public holds the organized bar responsible for the conduct of all members of the legal profession so long as they are members of the legal profession."[1]

This is a responsibility that we as attorneys, individually and as an association, should not shirk. The "Clients' Security Fund" is an answer to the problem of the defaulting attorney. While the establishment of such a fund would tend to create better public relations, the main reason for such a fund is that the public looks to the profession to include only men of honesty and integrity. When a member has broken the faith placed in him, the profession as a whole, and not the victimized client, should pay.

Only in this way can we hold our heads high and say to the public: "We will not countenance a thief who has been admitted to our honored profession; we will see that he is disbarred and that no client shall suffer financial loss by reason of our having allowed him to practice in the first place."

While the idea of a "Clients' Security Fund" is rather new in this country, such funds have been in existence among the bars of other countries for some time. The first such fund originated in New Zealand in 1929. This was followed by similar funds in New South Wales and the State of Victoria, both in Australia, in 1946. Most Canadian provinces now have such funds. Other countries in which such funds have been adopted in one form or another are England, Union of South Africa, Scotland, Ireland and Denmark.

Here in the United States, Vermont and Oregon are the only two states to have established such funds. In Vermont this is taken care of through an insurance policy, while in Oregon, which has an integrated bar, the fund is maintained by the association. At this time I do not believe it advisable to go into the merits of the two systems. That will come later with the report of our committee.

As an example, however, I wish to call attention to the Vermont plan. Vermont does not have an integrated bar—all members of the Vermont Bar Association are voluntary members, just as we are in Colorado. At a cost of two dollars per member an insurance company has issued a policy covering defalcations of attorneys in that state. The maximum coverage for any one attorney is $10,000 and

[1] 80 A.B.A. Rep. 328 (1955).

there is a maximum coverage of $100,000 for the entire bar in any one year. Before the insurance company is liable, after proper proof of the defalcation, the defaulting attorney must have either died or been disbarred.

Many problems regarding this fund will be confronted by your committee. Some of these are: The limit to be paid on any one claim. Who shall have power to decide, if it is a fund separate and apart from an insurance policy, as to whether a claim should be paid in full, or in part, or rejected entirely? Should the fund be limited to a strictly attorney-client relationship and exclude losses arising from business transactions with an attorney? How should each attorney be assessed annually for this fund?

One of the most vexing problems will be whether or not the fund should apply only to defaulting attorneys who are members of the bar association. I am sure that many attorneys will ask: "Why should we carry the freight for attorneys who are not members of the association?" While there is logic to such a question, there is some argument in favor of the fund covering all defaulting attorneys admitted to practice in Colorado.

A survey by *Martindale-Hubbell* disclosed that in 1958, fifty-two attorneys were disbarred for embezzlement in the United States. Only five of these were members of the American Bar Association. I assume that some of the others were members of state bar associations, but I have no figures as to this. This indicates, however, that it may be the clients of some non-members of the association who may need the protection. To these clients and to the public in general the fact that the embezzler is a non-member of the association makes no difference. He is still an attorney who has broken his oath and has stolen from his client.

As will be seen, the number of attorneys who have been disbarred for embezzlement is small when considering the membership as a whole. Reginald Heber Smith, in a recent article,[2] estimated that the number of attorneys disbarred for embezzlement in the years 1956-57 amounted to only .002 per cent of the bar. This speaks well for the bar as a whole. But the remaining members of the bar will be spoken of more highly if we see that the clients of that .002 per cent do not suffer financial loss. Disbarment is not enough.

As stated by Theodore Voorhees, Chairman of the American Bar Association's Special Committee on Clients' Security Fund:

"[T]he clients' security fund should not be regarded merely as a matter of charity: it is the discharge of a professional debt and a debt we should recognize as one of honor. . . ."

The Special Committee on Clients' Security Fund of the American Bar Association has published a guide for the establishment of such a fund. In this guide the Committee has set forth some arguments against such a fund and some of the answers to such arguments. I take the liberty to quote therefrom:

2 R. Smith, *The Clients' Security Fund: "A Debt of Honor Owed by the Profession,"* 44 A.B.A.J. 125 (1958).

3 Voorhees, *The Case for the Client's Security Fund,* 42 J. Am. Jud. Soc'y 155, 158 (1959).

"(1) Why should lawyers who are not guilty of embezzlement pay the debts of those who are?

"The fact is that whether or not a fund is adopted, the overwhelming majority of honorable lawyers will in fact pay for the defalcations made by their erring brothers, since they will pay in terms of loss of respect and honor to the profession as a whole. The public will hold us accountable for the guilty few and while the loss to the other members of the Bar may not be immediate, it will be certain and it will be great in the long run. The Clients' Security Fund is a debt of honor of our profession.

"(2) Is the Fund really needed? Are there enough cases of embezzlement to warrant its adoption?

"The figures for the past three years indicate that disbarments in the whole country average a little more than one lawyer for each state each year. While this amounts to .002% of the total membership of the bar, it does indicate a need for the fund which is country wide. The damage which is done to the good name of the profession whenever an embezzlement by a lawyer occurs is out of all proportion to the size or frequency of the event.

"(3) Would the establishment of a fund be considered by the public to be an admission of guilt by the legal profession?

"The experience of the banking profession with F.D.I.C. should show the lack of basis for this fear. It has also been pointed out that the airlines advertise that planes are equipped with radar and do not fear that the public will take panic with the thought of blind landings.

"(4) Would a fund be too expensive?

"That of Vermont requires financial support at the rate of two dollars per member of the bar. Studies which have been made indicate that a five dollar annual contribution should prove large enough to provide for the establishment of the fund, although experience will, of course, differ from state to state.

"(5) Would a limitation on the amount paid to a claimant out of the fund offset the benefits to be derived

from it because of disappointment that the claim was not paid in full?

"Obviously, the best public relations will be achieved when all legitimate claims are paid in full. However, there is no reason to suppose that the public would be resentful over part payments, particularly in the early years of a fund. Statistics from every part of the country show that the vast majority of embezzlements by lawyers do not involve large amounts, and the main purpose of the fund should be to protect people of modest means whose losses, though relatively small, are often disastrous to them. Their claims would be paid in full.

"(6) Is the fund idea socialistic?

"This argument has been made against virtually every worthwhile co-operative effort that the Bar has made in the past twenty-five years. The same assertion has been made against Legal Aid and the Lawyer Referral Service. The idea of the fund is no more socialistic than workmen's compensation or any other group indemnification plan."

As has been stated, this is a debt of honor. Now is the time for us to meet this debt of honor. Let us show to the people of Colorado the Colorado attorney in his true light—honest, responsible, generous and a man of his word.