

NCPO Leadership Changes

Looking Ahead....

Look for NCPO at the ABA's midyear meeting in San Diego. Representatives of NCPO will be available for informal consultations, courtesy of the ABA's Center for Professional Responsibility. Date: February 17, 2001. Location to be announced in the meeting program.

The members of NCPO, at their June 2000 annual meeting in New Orleans, approved amendments to the corporate By-Laws which restructure the administrative leadership of the organization. William D. Ricker, Jr. of Ft. Lauderdale (Fla), a Trustee of the Florida client protection fund was elected President, to serve a two-year term. Janet Green Marbley, administrator of Ohio's client protection fund, fills the new office of President-Elect, also with a two-year term. Georgia Taylor,

administrator of the Nevada fund was elected NCPO's Secretary. Isaac Hecht, Trustee of the Maryland fund, was reelected Treasurer. At-large Directors are Betsy Brandborg of the Montana fund; Martin Cole of the Minnesota fund; and Charles Goldberg, a Trustee of the new client protection fund in Colorado. The Directors appointed Frederick Miller of New York to serve as NCPO's Counsel. Kenneth J. Bossong of the New Jersey fund will serve as a Director in the new office of Past President. ■

Message From The (New) President Remembering San Francisco

By William D. Ricker, Jr.

Sixteen years ago, the American Bar Association held its inaugural annual national forum for client protection funds in San Francisco. That forum turned out to be the dawning of a new age for law client protection. Coincidentally, the forum shared conference space with a symposium about the fledgling cell phone industry. Both groups have seen significant changes during the intervening years. Cell phones are now ubiquitous, and client protection funds have spread to every jurisdiction in the United States and Canada, although, unlike cell phones, they are sometimes difficult to find.

I had just become chair of the Florida fund at the time of the San Francisco meeting and was not about to miss the chance to visit one of the world's most beautiful cities. My knowledge of client security funds, as they were then named, was limited to the internal operations of the Florida program and I was not even aware of how many other funds existed.

Because I met real fund enthusiasts in San Francisco, I remember returning to Florida with a greater sense of the breadth of the fund movement; but more important, with a changed attitude about the purpose of a client protection fund.

Like many funds sixteen years ago—and still too many today—Florida's client security fund committee searched for reasons to deny claims in order to "protect the integrity" of the fund. Sixteen years ago, that struck me as a wrongheaded attitude. It remains a wrongheaded attitude today. The trustees of client protection funds everywhere should search for ways to reimburse wronged clients. If a fund's assets dwindle, it is not because the need is not there, but because funding resources are inadequate. Trustees need to work on ways of securing adequate funds to reimburse eligible claimants, and not be forced to take actions which only underscore the shortcomings of the legal profession. Fortunately, since the turning point of

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San Francisco, resources to help client protection trustees improve their funds have grown almost as exponentially as cell phone technology.

We are justifiably proud of *The Client Protection Webb*, NCPO's website (www.ncpo.org), NCPO's regional workshops, the ABA's annual national forums, and the wide network of volunteers and professionals who have made protection funds an integral part of our profession. There are no more excuses for continuing to engage in wrongheaded attitudes or to accept woefully inadequate funding as a permanent reality. Members of NCPO "have brief cases, will travel" and are available to any jurisdiction to evaluate its program and recommend improvements.

One of the benefits of our federal system is that there is no "right" system for a fund, although there certainly are wrong attitudes which will weaken a fund, as I learned in San Francisco. There are excellent model rules and funds that can be role models for others. It was important to work towards establishing a fund in each jurisdiction, but that was only a first step. We must now raise the bar and meet the challenge of the Conference of Chief Justices' 1999 National Action Plan on Lawyer Conduct and Professionalism which calls for each state to have a fund which "substantially reimburse(s) losses resulting from dishonest conduct in the practice of law." (My emphasis.)

NCPO is up to the task. Together we can meet the challenges ahead, and we can insure that the lessons of San Francisco are not forgotten. We will recognize those states with responsible funds and we will encourage those who want to improve their funds. Join us in this exciting effort of public service. ■

William D. Ricker is a Trustee of the Florida client protection fund, and a member of the Ft. Lauderdale law firm of Akerman Senterfitt.

Leadership Changes at the New York Lawyers Fund

Frederick Miller, Executive Director and Counsel to the New York Lawyers Fund for Client Protection since the fund's creation in 1982, resigned his post, effective July 1, 2000. The fund's Board of Trustees tapped Timothy J. O'Sullivan, Miller's deputy, to serve as the fund's chief administrative officer. The staff reorganization was completed with the promotion of Michael J. Knight to serve as the fund's deputy counsel.

Miller was instrumental in the creation of a "Clients' Security Fund" by the New York Legislature in 1981. The fund began business with a \$25 biennial assessment on active practitioners, and a \$25,000 maximum limit on its awards. The current assessment is now \$100, and the fund provides each eligible victim with \$300,000 in coverage. It budgets \$8 million annually for reimbursement; and 99 percent of all eligible claimants receive 100 percent reimbursement. Reimbursement awards since 1982 are fast approaching the \$100 million mark.

The New York Lawyers Fund has been a leading voice in using the state's lawyer regulation system, and innovative consumer education programs, to reduce client losses. A marked and steady

National Law Journal Looks at Client Protection Funds

By Martin Cole

NCPO would doubtless list "public information" as an important goal of the client protection fund community. Well, as the Rolling Stones once warbled, "You can't always get what you want, but you just might get what you need."

In a special report dated August 28, 2000, the *National Law Journal* (NLJ) provided client protection funds nationwide with more publicity than anyone could have hoped for. But it was not all pretty. The NLJ headlined its survey: **AN EMPTY PROMISE . . . How client protection funds betray those they were designed to protect.**

decrease in reimbursement claims since 1998 suggests that these programs are bearing fruit in the Empire State.

Miller confessed that dropping dead at his desk was never a burning career goal, and that he hopes to pursue a host of personal and professional interests in this new chapter of life. High on that list is a statewide treatment and education effort, now on the drawing board, to help lawyers, judges and law students who have alcohol and drug problems.

"The New York Lawyers Fund is in the best shape it's ever been in, so it's the ideal time to plan ahead and pass the baton to Tim and Mike, who have been colleagues since their student days at the Albany Law School. They are family." Miller will keep his hand in the law, part-time, as special counsel at the Albany firm of Chamberlain, Kaufman & Jones. As one of the founders of NCPO, Miller will continue as NCPOs pro bono Counsel, and Editor of *The Client Protection Webb*. ■

American Bar Association Contacts

For information in the client protection field, and access to information maintained by the American Bar Association, contact John A. Holtaway. Tel: (312) 988-5298; or jholtaway@staff.abanet.org Also at the ABA is the always helpful Debra (Debi) D. Taylor. (312) 988-5325; or debrataylor@staff.abanet.org

There followed nine pages of the weekly publication, written by NLJ staff reporter Elizabeth Amon, which chronicled a series of victims of lawyer dishonesty from several states, whose claims to their local client protection funds were met with indifference or payments of only pennies on the dollar. Although the efforts of a few funds were applauded, the overall tone of the articles was negative. The special report's summed up its findings: "[Client protection funds] are poorly endowed, stingy about payouts and virtually a secret, even to many lawyers whose bar dues help finance them." Dramatic photographs of six victims accompa-

Getting the Question Right

By Kenneth J. Bossong

In confronting an issue or problem, it's frequently tempting to grasp impatiently and immediately at potential answers. To do so without first ensuring that the right or correct question is being addressed is, however, a mistake.

When lawyers err in citing cases that do not support their positions, it's usually because they have seized upon some helpful-sounding dicta in a judicial decision, without considering the actual issue before the court. Similarly, lawyers are often confronted with arguments that are both elegant and eloquent, but off the point. Sometimes this is deliberate, as when adversaries realize that the real issue cannot be won. Clever arguments on the wrong question can even be effective, particularly if no one is paying attention.

Public opinion polls have demonstrated the point for years. An increasingly skeptical public is told that a new poll was conducted with scientific rigor and is left to ponder what appear to be diametrically opposite results from some other pollster. That so many groups hire their own pollsters acknowledges the importance of determining which questions are asked and how they are asked.

Those who frame the issue take a major step toward winning the argument.

It's no different in law client protection. One of the greatest benefits that come from conversation, whether at an NCPO workshop, the ABA's national forum, over the phone or through *The Client Protection Webb*, is that we help one another get the questions right. A good example is when the discussion of a difficult claim yields the realization that the claim in question is rejected not because it lacks merit, but because a client protection fund lacks the money to pay it. "We don't pay those kinds of claims" seldom means that, "We believe that it's inappropriate, as a matter of policy, to reimburse those kinds of losses".

If a client protection fund finds itself automatically rejecting most unearned

retainer claims as so-called "fee disputes", or most thefts involving business transactions as "investments", it's appropriate to analyze whether the right questions are being asked. There are more opportunities to waste time and energy on the wrong questions. Here are a few:

It's not:

Can we pay these claims?
Do we have staff to investigate these claims?
Can we borrow an investigator or secretary?
Has the claimant exhausted her remedies?
Will the bar fund us again this year?
Should we meet more than once a year?
Should we raise our claim limits?
Won't lawyers object to a fee increase?

But rather:

Do these claims deserve to be paid?
We need the facts. How do we get them?
Isn't the fund entitled to adequate staffing?
Have our subrogation rights been impaired?
Doesn't the fund deserve adequate revenues?
Who benefits from delaying reimbursement?
Are we reasonably meeting victims' needs?
How do we get the support of lawyers?

None of this is to suggest that answers to the right questions are always easy. Many problems in law client protection are financial problems in disguise, and financing problems are seldom easy. Effective advocacy for client protection funds requires vigilance and insistence in getting the question right, however. NCPO can help, not only in bringing clarity to the discussion, but also in proving a form for sharing what works in the real world.

Here's a final question: it's not, "Can our profession afford to pay valid claims to deserving victims?" No, the right question is, "Can our profession afford not to?" ■

Kenneth J. Bossong is the Executive Director of the New Jersey Lawyers Fund for Client Protection and a Director of NCPO, Inc.

First or Last Resort: Does It Really Matter?

By Victoria Rees

(Editor's note: This article was adapted from a paper presented at the International Bar Association Conference 2000 in Amsterdam, the Netherlands.)

Legal professions in most developed countries have recognized that if they are to retain public confidence, trust and the independence of the bar, all lawyers have a duty, to one extent or another, to "pay for the misdeeds of a few". This is a duty conscientiously adhered to in North America, where all of the United States and every Province has a functioning client protection fund. All recognize that these funds also serve to protect the good name of the legal profession in terms of our honesty and integrity, and provide a means to obtain "good will" from the public. Significantly, these funds also stand as a means of protection which is preferable to universal bonding in the practice of law.

Since their inception, however, numerous funds have struggled with insolvency and instability. This is attributable to various factors: high claims at a point when a fund had not yet built adequate reserves; the inadequacy of revenues from assessments or bar association appropriations; or in circumstances where a fund lacked the capacity to effectively process large numbers of claims. Some observers suggest that many funds did not begin by making a conscious decision to be a fund of last resort, but rather reached that point in order to protect the protection fund's assets.

What follows is an overview of the philosophy and rationale behind funds of "first" and "last" resort. That analysis concludes that the distinction between "first" and "last" resort client protection funds has become blurred to the point of non-existence. It is clear that most funds are moving toward the middle-ground – applying the concept of "reasonableness", as opposed to "ex-



Judicial Review in New Jersey

New Jersey's intermediate appellate court ruled on July 10, 2000 that the state's trial courts lack subject matter jurisdiction in disputes involving claims to the New Jersey Lawyers Fund for Client Protection. In dismissing an action brought by a mortgage company seeking reimbursement for an admitted theft of \$694,000 in a residential real estate sale, the Appellate Division observed that the fund's rules do not authorize judicial review, and that review in the state's trial courts would be inconsistent with the Supreme Court's constitutional authority to regulate the New Jersey bar. *GE Capital Mortgage Services, Inc. v. New Jersey Title Insurance Co., et al.*

Alcohol and Substance Abuse

In October 1999, Judith S. Kaye, Chief Judge of New York State, appointed a 21-member commission to produce a statewide action plan which addresses pressing public and professional concerns about alcohol and substance abuse within the legal profession, the judiciary, and among law students. The Trustees of New York's client protection fund urged the Chief Judge to authorize the project, which is near completion. The commission's action plan is expected to be released in January 2000, and recommend new and revised court rules in three areas: the establishment of a permanent statewide court agency to provide oversight and funding to local lawyer assistance programs; wide-ranging educational efforts; and modifications to the state's lawyer regulation and discipline process to help lawyers, judges and law students, as well as to protect the public from the consequences of alcohol and drug abuse.

Massachusetts Fund Gets New Chairman

Thomas G. Sitzmann of the Boston law firm of Goulston & Storrs, P.C. is the

new Chair of the client protection fund in Massachusetts. Mr. Sitzmann succeeds Mark I. Berson, a member of the Greenfield (MA) law firm of Levy Winer, P.C.

Maryland Fund Gets New Chairman

Attorney Richard Reid of Towson has been elected Chair of Maryland's Client Security Trust Fund. Mr. Reid succeeds the retiring Victor Laws, long-time Chair of the Maryland fund and a familiar face at the ABA's annual national forums.

Another Twist in Restitution

A Washington State attorney was convicted of grand larceny of client funds. One victim had lost \$143,000, which she had recovered in a civil action. But the client had to pay legal fees of \$50,000 to secure that recovery. At sentencing, the criminal court ordered the dishonest lawyer to pay \$50,000 in restitution to the victim. The dishonest lawyer appealed to the Washington State Court of Appeals, arguing that the so-called "American Rule" requires clients to foot their own legal fees. Held: the restitution order is correct. The American Rule does not apply to criminal sentencing proceedings. *State v. Christensen* (4/24/00).

Tough Love

The Colorado Supreme Court has reaffirmed its policy that disbarment is the presumptive penalty when a lawyer knowingly misappropriates law client money. The Court overturned a disciplinary panel's determination suspending a lawyer for three years upon proof of numerous financial misdeeds. *Matter of Cleland*, 5/22/00.

More Tough Love

The Kentucky Supreme Court has reprimanded a lawyer who billed her former lover \$73,000 for unspecified legal services which she claimed were provided during the last three years of a 15-year relationship. The lawyer was

unable to explain the basis for her bills. The Court also ordered her to pay all costs related to the disciplinary proceeding, which it calculated to be \$9.04. *Matter of Yeager* (6/15/200).

Money Matters

Membership dues for the California Bar Association next year has been fixed at \$395. California's Governor and Legislature reached agreement on the measure in July. California's client protection fund will receive \$40 from the annual assessment.

Know Your Escrow Agent

An attorney in Georgia arranged for a client to entrust \$200,000 from a real property transaction with an escrow agent for the purpose of avoiding a capital gains tax. The agent fled the country with the client's escrow, among others. The Georgia Court of Appeals holds that the client can sue her attorney for his failure to verify the escrow agent's identity, credentials and trustworthiness. *Williamson v. Abellera* (7/7/00).

Mental Illness and Client Protection

A divided Illinois Supreme Court holds that a lawyer's mental illness alone does not justify a disciplinary agency's recommendation that the lawyer be required to undergo medical treatment and monitoring. By the time of the disciplinary hearing, the lawyer was no longer incapacitated and was being treated for his disability. The Court noted also that the lawyer had practiced for more than 30 years without complaint. *Matter of Eckberg* (7/6/00).

Post-Disbarment Blues

A dishonest lawyer in Hawaii "settled", without his clients' consent, a personal injury action for \$25,000. Without returning the necessary settlement documents, he absconded with the \$25,000. He was disbarred by the Hawaii Supreme Court and a trustee was appointed to inventory his files. Mean-

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NCPO Meets in New Orleans

By Georgia Taylor

NCPO's Third Annual Meeting was held June 4, 2000 in New Orleans with 27 members attending. The two-hour meeting resulted in amendments to the By-Laws, the election of officers, and various Committee assignments. NCPO now has the following Committees: Nominating, Finance, Membership and Publications. We also have a Speaker's Bureau.

Several research projects were discussed, including an empirical study on the nation's funds, the development of minimum standards for client protection funds, and the drafting of a model rule for the appointment of custodial receivers.

Several outreach possibilities were also discussed, including a request to the National Conference of Chief Justices to make a presentation at one of their meetings, publishing articles about law client protection in the Georgetown Journal of Legal Ethics, and approaching the National Judicial College for a position in their curriculum.

The members also discussed NCPO's regional round tables, increasing NCPO's membership, and a liaison relationship with the National Organization of Bar Counsel. ■

Georgia Taylor is administrator of the law client protection fund in Nevada, and the Secretary of NCPO.

The Client Protection Webb

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while, the attorney for the defendant sought to enforce the settlement in the trial court. The clients objected, and the trial court ordered the trustee to arrange for the discontinuance of the action and the defendant's release. The trustee appealed to the Hawaii Supreme Court, which vacated the trial court's order. The Court explained that court-appointed trustees and custodians do not have authority to represent law clients in their litigation. *Matter of Cusmano* (8/1/00).

Massachusetts Fund Rewards Public Service

William J. LeDoux, deceased, served on the Board of the Bay State's fund for 10 years, seven years as Chair. To honor the excellence of Mr. LeDoux's contributions to professionalism and the protection of clients, the Chief Justice of the Massachusetts Supreme Judicial Court annually presents an award in his name to a lawyer who has provided outstanding legal representation to a claimant. According to fund officials, the public award ceremony provides an opportunity to promote public confidence in the integrity of the legal profession. ■

NCPO Lands in Nova Scotia

Added Canada to the growing list of NCPO workshop venues. Victoria Rees, administrator of Nova Scotia's client protection program, and NCPO's Vice-president for the Canadian Provinces, hosted the gathering on a golden October day in Halifax. Represented were protection fund trustees and administrators from Ontario, Newfoundland, Prince Edward Island, New Brunswick, Nova Scotia, Colorado, Florida, Massachusetts, New York, New Jersey, Maryland, the District of Columbia, and Minnesota.

The day-long event began with panel discussions on the mission and progress of NCPO, led by President Bill Ricker and Isaac Hecht; and a report by provincial law society administrators Heather Werry (Ontario), Peter Ringrose (Newfoundland), Michele Carrier (New Brunswick) and James Wyatt (Prince Edward Island) concerning developments in lawyer

regulation in the Canadian Provinces, particularly the rigorous auditing of lawyer trust accounts as a safeguard against lawyer theft.

Also, a survey by Ken Bossong of American and Canadian judicial decisions related to law client protection funds; a discussion led by Fred Miller focusing on policies and procedures ("hurdles") which impede the responsiveness of protection funds to victim needs; a provocative presentation by Darrel Pink of Nova Scotia's Barristers Society speculating on the impact of Internet technology on lawyer fiduciary practices; and a discussion featuring Victoria Rees and Eric Seiff of New York and dealing with the predictability and prevention of lawyer theft through the development of risk profiles. ■

www.ncpo.org

Visit NCPO's website.
Resources 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.

In Memorium
Gilbert A. Webb, Esquire