

A Newsletter for Law Client Protection Funds

# e-Webb News from NCPO

Published by the National Client Protection Organization, Inc.



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**Have a story?** Please send it on. Copy us on press releases, difficult claims, even job postings. Let us know when important events are happening in your jurisdiction, such as appointments, retirements, anniversaries, or seminars. Letters to the editor on any topic of concern in the field of client protection are always welcome.

## Message from the President

I am so honored to serve as the ninth President of the National Client Protection Organization. As a charter member, I understand and appreciate the goals and purpose of NCPO and share its core mission to be a resource for the exchange of information among law client protection funds throughout the United States and Canada.



Mike Knight

I must acknowledge the dedicated service of my immediate predecessor, Mike Miyahira of Hawaii, who did an outstanding job in his 2-1/2 year tenure. With the creation of our Speakers' Bureau and securing an *imprimatur* from the National Conference of Chief Justices for the NCPO Standards for Client Protection Funds, Mike has certainly left some very large shoes to fill.

With the help of our new President-elect, Kathy Peifer of Pennsylvania, we hope to continue to increase the roles of our Regional Vice Presidents. Building on this talented network, NCPO will renew its efforts to inform and engage all state client protection funds, especially non-member states and provinces. It's our hope that increased outreach will yield increased membership and participation from non-member states thus broadening the

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Please also keep us informed of any changes in your e-mail address.

discussion for NCPO and our ability to deliver our mission.

A suggestion proposed by membership at our 2014 Annual Meeting is the review of NCPO's 2011 Strategic Plan. Such a review will serve to recalibrate NCPO's efforts and resources to best benefit membership.

I would also like to introduce and thank our new e-Newsletter editor, Michael McCormick of New Jersey! Mike's e-mail address is: [michael.mccormick@judiciary.state.nj.us](mailto:michael.mccormick@judiciary.state.nj.us). A newsletter is only as strong as the content it receives. I strongly urge each of you to regularly forward to Mike any news items, special claim experiences, court determinations, or staff changes you may have. You are also welcome to submit any articles you have authored for legal publications relevant to client protection.

There are many more projects on the horizon, including our 2014 Fall Workshop. Details are being finalized and will soon be announced - so stay tuned!

In closing, I would like to thank you for your membership in NCPO! We always welcome ideas and suggestions from membership and encourage your active participation! Please do not hesitate to let me or any of the officers know how NCPO can better help you. Thank you!

## **2014 ABA National Forum on Client Protection**

Client Protection Fund staff and trustees representing 35 jurisdictions across the United States and Canada attended the 30th Annual ABA National Forum on Client Protection in Long Beach, California on May 30th and 31st. From the newest Fund -- in the Virgin Islands -- to older funds on the East Coast, attendees shared news of the fiscal, political, and personnel challenges they faced while working to strengthen their client protection programs.

Texas is dealing with a respondent who stole \$4 million through a television show on which he solicited clients. So far, they've paid \$670,000 on 31 claims, and are experiencing a record year with awards of \$921,000 to date. Maine is a bit



quieter, having paid 8 of the 12 claims received this year, but Bar members are struggling to deal with an aging population of lawyers whose practices must be wound down when they die. A suggestion has been made to tap into Fund reserves to pay for the costs of receiverships, but this could negatively impact the Fund's ability to pay claims.

In Massachusetts one respondent suffering from a drug addiction accepted retainers from over 100 clients, but never filed a single bankruptcy petition on their behalf. So far, 61 of 83 claims filed against the respondent have been paid. California has docketed an astounding 7,800 claims this year, and has paid \$11 million on 3,600 of them so far. Their surplus is gone, and an assessment increase is needed. Many of the claims stem from loan modification schemes gone bad.

Colorado is seeing a lot of immigration issues in its claims, where respondents take retainers from unsophisticated immigrant clients and then vanish. After studying their Fund's financial needs over the first 15 years of its existence, the unusual request was made to actually reduce the annual assessment.

Pennsylvania reported that, for the first time in its 32 year history, it now has an aggregate maximum of \$1 million per respondent, even though they have an \$8.5 million reserve. Hawaii is concerned that, even though their assessment was restored this year, they may run out of money in 2015, at least in part because the Fund has already paid \$64,000 during the first quarter of 2014.

North Dakota and Washington State welcomed new Fund counsels, while Delaware has a new chief justice. New York finished a compilation of 31 years of Fund precedents, during the same time as Maryland and Ontario implemented rule revisions. Kansas saw its request to increase its \$125,000 per claimant cap rejected, but Michigan is continuing its push to increase its per claimant maximum from \$100,000 to \$125,000.

Comparing notes on what's happening places challenges into context and may even help identify solutions to problems facing multiple funds at the same time. If you didn't make it to Long Beach, plan on attending the next forum to bring us up to date on what's going on with your Fund.

## **Aging Lawyers, Restitution & Loss Prevention**

"Hot Topics" covered by Forum sessions included a discussion of whether Fund jurisdiction should extend to disabled or deceased attorneys. The question of whether becoming impaired or dying is dishonest conduct has been posed by

many claims. In Hawaii, the conclusion was that covering deceased and impaired lawyers would be "a huge policy shift" that would make the Fund more of an insurance company. North Dakota agreed, noting that embezzlement is the baseline for a successful Fund claim.

Illinois, however, has amended its rules to specifically cover "losses arising from the death or permanent disability of an attorney." New Jersey suggested that the Trustees' "equitable discretion" can address the needs of specific situations.

Restitution is also always a hot topic for cash-strapped Funds. New York reminded us of its long-standing practice of paying the salary of an assistant deputy attorney general, who is then assigned to recovery monies for the Fund. It has been a profitable relationship. Many states have outside firms that handle collection efforts, but this may get expensive, particularly where judgments are uncollectible. In California, the state bar is responsible for Fund collections, although collection agencies have also been used. California noted that it has enjoyed success by being authorized to intercept respondent tax refunds.

It was the consensus that every jurisdiction should have a rule requiring that the Fund must be repaid in full before a respondent may seek readmission to practice. Most wished that Fund awards could be automatically converted to judgments in the same way that restitution orders are, but had to agree that even dishonest lawyers are entitled to due process.

Different means of loss prevention were also discussed. In Virginia, respondent Steven Conrad stole \$5 million in personal injury settlements. Even after this huge theft, many were opposed to requiring payee notification on settlement checks sent to attorneys. The provision was finally approved and continued in effect. California is trying a different type of notification, by sending Bar representatives to consulates, churches and even into Mexico to get the word out about changes in immigration laws and the potential pitfalls of hiring an immigration attorney.

Nova Scotia employs a unique, annual attorney survey of its 2,000 practitioners. The survey collects data about practice areas, a lawyer's knowledge of court rules and other topics which, when analyzed, develops a profile of lawyers most likely to steal client monies. Attorney audits are then targeted to attorneys believed to be most likely to have trust account problems. So far, Nova Scotia reports that 100% of these audits revealed accounting irregularities. In many instances, assistance can be provided before problems get out of hand.

## Alabama Recognized with 2014 Isaac Hecht Award



*Michael E. Ballard, Chair of the Alabama State Bar Client Security Fund Committee (far right) holds the 2014 Isaac Hecht Award presented to him by Mr. Hecht's daughter, Elly Yuspa (2nd from right) and NCPO President Michael Knight. Also pictured are Mr. Hecht's granddaughters, Catherine Yuspa Goldsmith (far left) and Margaret Yuspa (2nd from left).*

The Alabama State Bar Client Security Fund Committee was honored with the 2014 Isaac Hecht Law Client Protection Award to recognize the success of a task force it created to study ways to improve their Fund. Because of the task force, significant changes were made to Fund rules for the first time in 30 years.

Changes included the abandonment in 2013 of a \$100 lifetime assessment per newly admitted attorneys in favor of a \$25 annual assessment from all members of the bar, including attorneys admitted *pro hac vice*. The Fund also increased caps on reimbursement awards from \$10,000 per claim and a maximum of \$20,000 per attorney to a \$70,000 per claim cap and \$200,000 per attorney maximum. In presenting the award, NCPO President Mike Knight said that the transformation of the Alabama Fund gives it a greater ability to assist law client victims who have suffered a loss through no fault of their own. He also noted the changes were supported by three separate Alabama State Bar Presidents and the board of bar commissioners.

The award memorializes Isaac Hecht, who practiced law in Maryland for 64 years before his death at the age of 89 in 2003. Mr. Hecht served as Treasurer of Maryland's law client protection fund since its creation in 1967. He also served 18 years as a member of the American Bar Association's Standing Committees dealing with the support of law client protection funds in the United States and Canada. Mr. Hecht was committed to the belief that the trust of law clients is the essential linchpin in every lawyer-client relationship, and that the reimbursement of innocent victims of lawyer dishonesty represents the legal profession at its best. To Mr. Hecht's credit and because of his labors, there are now client protection funds in every State and the District of Columbia, and in each Province of Canada.

Mr. Hecht was a co-founder of the National Client Protection Organization in 1998, and served as a Director and its Treasurer. A frequent lecturer and writer on issues dealing with legal ethics, professional responsibility and the management of client protection funds, Mr. Hecht showed up at nearly every professional forum to contribute and help. He was especially focused on the financial foundations of protection funds, the initiatives of fund leaders, and their receptivity to techniques to deter, and detect, dishonest conduct in the practice of law.

The National Client Protection Organization has created the Isaac Hecht law Client Protection Award to honor the memory of this national treasure, his professional and civic life, and his lifetime of public service. The award is intended to recognize an individual, law client protection fund, or other professional organization that has demonstrated excellence in the field of law client protection. "Excellence" includes achievements in promoting public confidence in the administration of justice and the integrity of the legal profession; the substantial reimbursement of law clients for eligible losses; the development of programs to prevent or detect professional misconduct in the practice of law; and meaningful public information programs for client protection funds, attorneys and legal consumers.

## ***Funds in the News:***

### **Reimbursements for Lawyer's Thefts Hit \$4.5 Million, a N.J. Record High**

*Reprinted from the June 12, 2014 N.J. Law Journal*

*By David Gialanella*

A New Jersey lawyer who bilked his clients out of millions has generated the highest total of reimbursement claims in the history of the New Jersey Lawyers' Fund for Client Protection, necessitating a state Supreme Court order lifting the cap on repayments.

The court has approved payment of \$4.5 million in claims against Michael Kwasnik of Cherry Hill, who was criminally convicted of stealing clients funds and money laundering after being arrested trying to flee the country.

There have been 67 claims against Kwasnik, and total claims paid could climb as high as \$12.1 million, according to the Fund.

Because payments are capped at \$1.5 million per attorney, the fund had to ask the Supreme Court to waive those limits, which it granted last year.

"We've requested waivers in the past, but nothing like this," said fund director and counsel Daniel Hendi. "This is monumental."

Despite the relaxing of the \$1.5 million cap, recoveries still are limited to \$400,000 per claimant. The fund is presently is paying out two to four claims per month, Hendi said.

The fund spent much of 2012 and 2013 investigating and didn't make any promises as to how much would be reimbursed. "If you tell people they'll get 10 cents on the dollar, I think you'll upset them more than help them, Hendi said.

The claims totaled more than \$54 million, though the fund deemed many of them invalid - including those that were filed by bankrupt companies controlled by Kwasnik himself, Hendi said. About \$17 million worth of claims were deemed valid, though with the \$400,000 per-claimant cap, maximum liability for the fund is \$12.1 million.

For this year, the fund is capping payments at \$200,000 per claimant while waiting to see what the Pennsylvania Lawyers' Fund for Client Security will be able to disburse. Kwasnik, who maintained offices in Cherry Hill, Woodbury and Philadelphia, has generated claims from clients in both states. The fund also will pursue subrogation, Hendi said.

The fund's reserve, which currently sits at \$25 million, isn't in jeopardy, Hendi said, emphasizing the need to keep it healthy. "The reserve is there for the victims," he said. "This is proof that...you never know when you're going to need it."

Kwasnik was arrested by local police in Dothan, Ala., in November 2011, days after being charged in an indictment with stealing \$1.1 million from a 96-year-old Cherry Hill woman he represented in an estate matter and looting more than \$100,000 from a couple's personal injury settlement.

Carrying several thousand dollars in cash, prepaid cellphones and his passport, Kwasnik was taking a taxi to a bus station when the suspicious driver alerted local police. They stopped him at the bus station and arrested him upon discovering the outstanding warrant.

The week of the indictment, Kwasnik was named in a civil suit by the N.J. Attorney General's office, alleging that he helped sell \$8.5 million in bogus securities to elderly and retired investors and essentially executed a Ponzi scheme.

Not long before, Kwasnik settled for \$134,000 a 2009 civil suit by the Federal Trade Commission, alleging that he had an arrangement with a mortgage relief company to collect clients' fees and split them with the company in an effort to sidestep a state regulation requiring licensure as a debt adjuster to perform mortgage rescues.

In the criminal case, Kwasnik pleaded guilty in January 2013 to second- and third-degree counts of money laundering. A year ago he was sentenced to five months' jail time - already served after his 2011 arrest and prior to his release on \$1 million bail - and a five-year probationary term. He also was ordered to pay \$1.2 million in restitution.

In April, Kwasnik was indicted in Delaware on charges of theft and securities fraud, according to a report by The Philadelphia Inquirer. The charges stemmed from his involvement in Liberty State Financial, which allegedly defrauded elderly investors - the same misconduct that yielded the New Jersey attorney general's suit.

Kwasnik, whose license has been suspended pending ethics charges since December 2011, was managing partner of Kwasnik, Rodio, Kanowitz & Buckley and later practiced at Kwasnik Kanowitz and Associates. He could not be reached at a number in the judiciary's online attorney registry. Richard Klineburger III, of Klineburger & Nussey in Haddonfield, who represents Kwasnik in a former client's civil suit claiming he raided \$450,000 from a relative's life insurance policy, didn't return a call Thursday.

### **Ohio Clients' Security Fund reimburses 32 Victims of One Attorney More than \$37,000**

*Reprinted from June 10, 2014 edition of Court News Ohio  
by Bret Crow*

The Board of Commissioners of the Clients' Security Fund of Ohio voted to reimburse 32 former clients of former Cuyahoga County attorney James W. Westfall Jr. a total of \$37,184 at its quarterly meeting on Friday. In total, 45 victims of attorney theft were awarded \$57,611.33. The reimbursements involve eight former or suspended Ohio attorneys who were found to have misappropriated client funds. One deceased attorney was also involved in the claims presented to the board this quarter.

Created in 1985 by the Ohio Supreme Court to reimburse victims of attorney theft, embezzlement, or misappropriation, the fund is supported entirely by attorney registration fees. Ohio has nearly 44,000 attorneys engaged in the active practice of law. Less than one-tenth of 1 percent of those attorneys is involved in CSF claims.

The reimbursement involving Westfall occurred as a result of Westfall's failure to provide the services requested. He resigned from the practice of law in Ohio, with discipline pending, on August 30.

Here are the other awards determined by the board.

- Six former clients of deceased Greene County attorney Adrienne D. Brooks were reimbursed a total of \$6,525 as a result of Brooks' failure to complete the services requested before her death on March 12, 2013.
- A former client of former Allen County attorney Andrew J. Van Horn was reimbursed \$3,000 as a result of Van Horn's failure to provide the services requested. Van Horn resigned from the practice of law in Ohio, with discipline pending, on March 17.
- A former client (a husband and wife) of former Hamilton County attorney Geoffrey P. Damon was reimbursed \$3,000 as a result of Damon's failure to provide the services requested. Damon was suspended from the practice of law in Ohio on May 21, 2013, following his felony conviction.
- A former client (a husband and wife) of former Lawrence County attorney Marty J. Stillpass was reimbursed \$2,850 as a result of Stillpass' failure to provide the services requested. Stillpass resigned from the practice of law in Ohio, with discipline pending, on June 13, 2012.
- A former client (a husband and wife) of former Cuyahoga County attorney Kenneth J. Freeman was reimbursed \$2,500 as a result of Freeman's failure to provide the services requested. Freeman was permanently disbarred from the practice of law in Ohio on March 6, 2013.
- A former client of former Medina County attorney Maureen F. Gechter was reimbursed \$1,050 as a result of Gechter's failure to provide the services requested. Gechter was suspended from the practice of law in Ohio on April 18, 2013.

- A former client of suspended attorney April M. Bogdanski was reimbursed \$795 as a result of Bogdanski's failure to provide the services requested. Bogdanski's license to practice law in Ohio was suspended indefinitely on November 15.
- A former client of suspended Cuyahoga County attorney Charles W. Fonda was reimbursed \$707.33 as a result of Fonda's failure to complete the services requested. Fonda's license to practice law in Ohio was suspended for one year, with the suspension stayed, on March 12, 2014

## **When is Stealing a Client's Funds Malpractice?**

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### **An Issue to Contemplate**

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by R. W. Minto, Jr.

*Editor's Note: From time to time, we may reprint articles from past newsletters that address issues that still present issues in client protection. The following article appeared in the Summer, 2007 edition of the Client Protection Webb.*

There are many days when I just don't know what hat to put on in the morning when I get up. I am a lawyer, I am a member of the Board of the Montana Fund for Client Protection and I am the CEO of a lawyer's professional liability insurance company. This morning was one of those days. I had committed to writing another (hopefully) thought-provoking article for The Client Protection Webb. I also had to prepare for a meeting with a client that I accepted by referral from our local Legal Service Office (after all, even those of us in corporate law still have the obligation to do our part to provide access to justice for all). Lastly, I had a conference call scheduled with several of my company's reinsurers to discuss their concern with our industry's growing exposure to claims related to lawyer trust account theft.

Wait a minute-isn't trust account theft a Fund for Client Protection issue? Well yes, but the conundrum occurs when we ask the question differently. When is trust account theft a malpractice claim? The answer is quite simple-when the offending lawyer is a member of a firm with malpractice insurance. Ah yes, good old innocent-partner coverage-no wonder my reinsurers are unhappy. How can there be any innocent partners when the account is a commingled trust account? Aren't all partners, if not all lawyers, in the firm equally responsible for the ethical and proper maintenance of the trust account? How then can there be innocent partners? Are they not equally at fault for not minding the store? I see the reinsurers' concern, but wait: are we as insurers treating all our insured lawyers equally? If we will pay for trust fund defalcation for firms of two or more lawyers, why shouldn't we also pay for those who choose to practice alone?



Answer-well (with only a slightly straight face) if money disappears from the trust account of a lawyer in solo practice, it is theft (excluded as an intentional act), but if it happens in the firm setting only one of the lawyers is a thief (still excluded for that lawyer's liability). However, all the remaining firm members have coverage as they were just sloppy, inattentive, unobservant or negligent in the supervision of the theft (oops -I really meant maintenance of the firm's trust account-my mistake), and the firm's clients deserve to be protected from the innocent partners' negligence.

All kidding aside, this issue is coming up more frequently than you might imagine and the answers, regardless of which side of the question you come from, do not make much sense. Logically, we insurers could solve the problem by making a clear and fast exclusion from our policies that says "theft is theft; it is intentional and not covered by innocent-partner coverage." From the client protection fund side, that doesn't seem like a really good option as what will it do to the demand for reimbursement? With many of these claims amounting to millions of dollars, the picture is not pretty if that exclusion becomes the rule. From the Bar's perspective, is it fair to assess all lawyers for a fund that only benefits clients of solo practitioners? I suspect that a poll of Bar members would give a pretty clear answer-No!

So what is the answer? I'm not sure that there is a good one, but consider a form of comprehensive client protection where the role of the client protection fund is partially but fairly spread at the feet of the professional liability industry. Listen very carefully; if you are really quiet you can hear all of my insurance industry affiliations being revoked simultaneously). What would be wrong with asking the industry to create coverage as a sub-limit of liability under the common professional liability policy that would protect the clients of all insured lawyers-solos and firm members alike-against trust account theft (the risk can be rated-we already do for firms)? Really nothing, except that such a solution does not solve the problem for the profession. What about the uninsured? We would still need to have client protection funds for the socially irresponsible among us (I am speaking of those lawyers who don't care about protecting their clients and those that are perfect and never make mistakes). Well, perhaps there is a way to make it work in three easy steps:

State Bars mandate that lawyers must disclose on their annual license renewal whether or not they have LPLI coverage and if so the name of the company.

Insurers agree to create the sub-limit discussed above and to notify the Bar if a policy is canceled or non-renewed.



The Bar assesses (all uninsured lawyers) on behalf of its client protection fund (payment is a condition precedent to license renewal), an actuarially determined sum adequate to provide and administer theft protection for the clients of such uninsured lawyers in an amount equal to that provided by LPLI coverage.

It seems like "Big Brother" is at it again, but maybe we need a "Big Brother" to sort out this mess and provide fair and uniform client protection for victims of lawyers who steal from clients.

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*Robert W. Minto, Jr. is President and CEO of the ALPS*

### **New NCPO Officers Approved at National Forum**



*Outgoing NCPO President Mike Miyahira was presented with a plaque in appreciation for his service to the NCPO by incoming president Mike Knight during the National Forum.*

*All are one-year terms unless otherwise noted.*

President: Mike Knight, New York (term: 2014 - 2016)  
 President-elect: Kathryn Peifer, Pennsylvania (term: 2014 - 2016)  
 Treasurer: Tim O'Sullivan, New York  
 Secretary: Janet Moss, Maryland  
 Director at Large: Lindsey Draper, Wisconsin (term: 2014 - 2017)  
 VP: Northeast Karen O'Toole, Massachusetts  
 VP: Southeast A. Root Edmonson, North Carolina  
 VP: Midwest Danon D. Goodrum-Garland, Michigan  
 VP: Southwest Michael Harmon, Arkansas  
 VP: West Elizabeth Turner, Washington  
 VP: Canada Margrett George, BC

Officers who are continuing:

Director at Large: Daniel Hendi, New Jersey (term: 2012 - 2015)  
 Director at Large: Janet Green Marbley, Ohio (term: 2013 - 2015)

Appointed to serve FY 2014 - 2015:

Counsel: Ed Ehler, New Jersey  
 Membership Chair: Eileen Donahue, Illinois  
 Webb Editor: Michael McCormick



**Michael T. McCormick, e-Webb Editor**  
**Michael.McCormick@judiciary.state.nj.us**

*In Memorium*  
**Gilbert A. Webb, Esq.**

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