

An Editorial

Assessing Without Apology

By Kenneth J. Bossong

There is no truer truism in the field of client protection than this: without funding, there can be no client protection fund. Yet there is always someone who feels that he or she should not have to pay the freight. It's easy to forget that such malcontents are in a distinct minority. But whether numerous or few, loud or quiet, they deserve to be answered.

For trustees and staff alike, fund advocacy is an important part of the job. Whatever advantages fund critics may seem to have, advocates have one huge advantage in the merits of inherent worth: a client protection fund, when properly presented, is a very difficult program to oppose publicly.

Occasionally, however, there will be those who ask, "Why should I be my brother's keeper?" Amazingly, this is offered without irony, as if to imply that Cain was role model. Perhaps the best answer is to point out that the fund is not there to benefit dishonest brethren, but their victims.

Most opponents, though, take a different tack: they praise the fund, but indicate that there are unique circumstances that should exempt them. Typically they are lawyers who are not engaged in the "private" practice of law. They include government lawyers, judges, law professors, legislators, and court employees. Maybe they live and work out-of-state. Should they be expected to contribute to the fund? Yes, and without apology.

Among their arguments: "I should be exempt because I do not contribute to the risk

that the client protection fund covers". This insurance analogy is fatally flawed.

The fund is not about lawyers banding together to spread economic risk. Lawyers are not a band of thieves. In the real world, there will be relatively few dishonest lawyers and victims whose misfortune it was to trust them.

To their credit, lawyers know that it's intolerable to leave these victims without a remedy. In addition, they finance these protection funds from their own pockets. This is directly related to the trust that is reposed in the profession by the public. When a lawyer steals, it besmirches all lawyers; when the protection fund makes good, it benefits them all.

Assessments can and should be reasonable. Almost all jurisdictions should find \$50 per year (\$.96 per week) to be entirely adequate; and many can do a good job with even less. That's true, however, only if all lawyers participate, in good years as well as bad.

It's not a crime for a fund to be financially healthy. Building a reserve generates interest income to help care for victimized clients. On the other hand, an arbitrary cap on a fund's reserve dares fate to disprove the adequacy of the cap. Few funds have reduced their assessments without an eventual regret for the decision. Fewer still are the lawyers who express appreciation when an assessment is reduced.

The best advice: refuse to go defensive for doing what is right and intelligent.

Inside

- 2 THE STEPS TO COLLECTION
- 3 ARTICLES OF INCORPORATION
- 3 BYLAWS
- 5 JUDICIAL DECISIONS TO NOTE
- 6 NEWS IN BRIEF

The Steps To Collection

By Michael T. McCormick

Law client protection funds exist to serve the victimized clients of dishonest lawyers. Once a client's loss is reimbursed, however, a protection fund needs to look back to the dishonest lawyer — at a minimum — to establish that “crime does not pay”. In many cases, a protection fund can expect to recover at least part of what's been have paid on a respondent's behalf, thus providing much needed dollars for future reimbursement awards. The collection process need not be cumbersome or time-consuming. In this first of a series of articles, I hope to show that every client protection fund can have an effective collection effort and, in fact, that it cannot afford not to.

Recouping money from a respondent actually begins long before a claim is paid. The investigation that's necessary to process a claim can also provide information important to the collection process. Here are some questions to keep in mind when that first call is received on a potential claim.

What does the claimant know?

- Where is the respondent now?
- What, if anything, is going on at the respondent's office?
- Is the claimant aware of the respondent's lifestyle and/or assets: *i.e.* house, car, travel, family (spouse/divorces/children & children's schooling), bad habits (drugs, alcohol, casino gambling, etc.), consumer spending habits.

Once a claim is filed, a protection fund can protect its interests in both settling the claim and recovering any awards made.

The respondents themselves can be the first source of recovery.

Is there anything left?

- Should the fund petition for an appointment of a custodial receiver, or has the court appointed a trustee? A

receiver or trustee could act on the fund's behalf to marshal assets, take control of the respondent's practice and other assets, and intercept practice-related mail and fee payments. If no such mechanism exists, can it be proposed?

— Is there any litigation pending in which the respondent is involved? A respondent may be entitled to fees from pending cases or may be a party to a suit. Call the court clerk's office to have the respondent's name checked against pending cases.

— Conduct real estate and judgment searches to further determine respondent's status.

Funds can also benefit in both collection efforts and claim investigation by establishing working relationships with agencies having their own interests in the respondent's activities.

Confer with other agencies.

— Ethics. Information developed during the disciplinary investigation should be available and helpful.

— Call the prosecutor's office. What is the status of its investigation? Arrange for sharing of subpoenaed bank account and file records. Make sure that restitution is a part of any plea agreement or sought in any sentence.

— Stay in contact with any probation officer assigned to the respondent. When probation is about to expire,

have the remainder of outstanding restitution converted to a civil judgment in the fund's favor.

— Complete basic investigation. Confirm addresses with a post office search and motor vehicle registration and driver's license information through the state Division of Motor Vehicles.

— Monitor the respondent's status in bankruptcy court. If a petition is filed, it may be the clients (and not the fund) who are notified. If the respondent files for Chapter 7 protection, file a complaint to have the debt held nondischargeable. If the respondent files for Chapter 13 protection, argue that the petition was not filed in good faith (assuming there is factual support for the argument). This is where court-ordered restitution is particularly helpful to a fund.

Of course, a client protection fund cannot stop at the respondent when trying to recover restitution for reimbursement awards. In my next installment, we'll look at other information sources that can help funds rediscover their lost respondents and their new lives — and their assets.

Mr. McCormick is Deputy Counsel & Secretary of the New Jersey Lawyers' Fund for Client Protection

Visit NCPO on the Internet

The NCPO's Website, like the NCPO, is under construction. Visit it at www.nylawfund.org/ncpo. Resources available at the site include the NCPO's Articles of Incorporation and Bylaws; a USA roster of client protection funds; the ABA's Model Rules for Client Protection Funds; recent judicial decisions; and a bibliography of writings and judicial decisions in the field of law client protection. Contributions of materials and comments welcome!



ARTICLES OF INCORPORATION
The National Client Protection
Organization, Inc.
 (A Nonstock Corporation)

FIRST: The undersigned, Isaac Hecht, whose post office address is 210 N. Charles Street, Suite 1317, Baltimore, MD 21201-4002, being at least twenty-one (21) years of age, does hereby form a Corporation under the general laws of the State of Maryland.

SECOND: The name of the Corporation (which is hereinafter called the "Corporation") is: National Client Protection Organization, Inc.

THIRD: The purposes for which the Corporation is formed are as follows:

(a) To exchange information between and among administrators, counsel, trustees, board and committee members of organizations established within all of the States of the United States and elsewhere for the protection, security and indemnification of the clients of attorneys, and also among other supporters of such client protection organizations.

(b) To render assistance and support in the creation, maintenance and enhancement of protection, security and indemnity funds established throughout the United States and elsewhere for the benefit of clients of attorneys.

(c) To conduct, participate in, and support seminars and forums for the education of and exchange of information between administrators, counsel, trustees, board and committee members of organizations established for the protection, security and indemnification of clients of attorneys and for other supporters of such client protection organizations.

(d) To engage in any other educational activity not inconsistent with the specific purposes hereinabove set forth.

FOURTH: The post office address of the principal office of the Corporation in Maryland is 210 N. Charles Street, Suite 1317, Baltimore, MU 21201-4002. The name and post office address of the resident agent of the Corporation in Maryland is Bruce R. Chapper, 210 N. Charles Street, Suite 1317, Baltimore, MD 21201-4002. Said resident agent is a citizen of Maryland and actually resides therein.

FIFTH: The Corporation is not organized for profit; it shall have no capital stock and shall not be authorized to issue capital stock.

SIXTH: Upon dissolution of the Corporation, the Board of Directors shall, after paying or making provision for the payment of all liabilities of the Corporation, distribute all assets of the Corporation exclusively to such organizations organized and operated exclusively for educational, charitable or such other purposes as shall at the time qualify as an exempt organization; or organizations under Section 501(c)(3) of the Internal Revenue Code as now exists or as shall hereafter be amended.

SEVENTH: The number of Directors of the Corporation shall be three, which number may be increased pursuant to the By-Laws of the Corporation, but shall never be more than fifteen, and the names of the Directors who shall act until the first annual meeting or until their successors are duly chosen are Kenneth J. Bossong, Isaac Hecht and Frederick Miller.

EIGHTH: The duration of the Corporation shall be perpetual.

I HEREBY CERTIFY that, in signing these Articles of Incorporation, the same, according to the best of my knowledge, information and belief, are true in all material respects and I sign these Articles of Incorporation under the penalties of perjury.

IN WITNESS WHEREOF, I have signed these Articles of Incorporation and acknowledge the same to be my act on the 24th day of July, 1997.

WITNESS:

/s/ Isaac Hecht

BYLAWS

of

The National Client Protection
Organization, Inc.

ARTICLE I - Name of the Corporation

The name of the Corporation is the National Client Protection Organization, Inc.

ARTICLE II - Purposes of the Corporation

Section 1. The Corporation is not organized, nor will it be operated, for pecuniary profit and shall not declare or make dividends or other financial distributions to its members, directors, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in this article.

Section 2. The purposes for which the Corporation is formed are as follows:

A. To encourage the creation and maintenance of effective law client protection and security funds throughout the United States and elsewhere.

B. To exchange information among administrators, trustees and other personnel of law client protection and security funds and professional organizations that are involved with, and who support, programs to protect law clients from losses resulting from dishonest conduct in the practice of law.

C. To provide practical and technical assistance to law client protection and security funds as regards the administration and financing of such funds.

D. To conduct and participate in professional educational seminars and forums for the exchange of information among persons and organizations who are engaged in programs to protect law clients from losses resulting from dishonest conduct in the practice of law and related programs.

E. To study and promote court rules, statutes and regulations to protect law clients from losses resulting from dishonest conduct in the practice of law.

F. To engage in any other educational activity not inconsistent with the foregoing purposes.

ARTICLE III - Offices

The registered corporate office of the Corporation shall be in the State of Maryland. Executive headquarters and business offices may be established in such city or cities of the United States and elsewhere as the Board of Directors may from time to time determine.

ARTICLE IV - Membership

Section 1. Boards of trustees, commissions, committees and other similar organizations operating under the authorization of the government of any state or territory, or of any bar association or law society are eligible to become Organizational Members.

Section 2. Any person actively involved in any Organizational Member, either as an employee, or as a trustee, commission member, etc., or otherwise involved or interested in law client protection, may become an Individual Member.

Section 3. The membership year shall be from May 1 to April 30 inclusive. All memberships shall date from May 1.

Section 4. Organizational Members and Individual Members shall have the obligation to pay annual dues to the Corporation as provided in Article VI. The obligation to pay dues shall continue from year to year unless a written resignation is received by the secretary prior to the end of the membership year for which dues have been paid. Any member who is in arrears for dues for six months shall cease to be a member of the Corporation. A member who has failed to retain membership pursuant to this section may be reinstated upon payment of dues for the current year.

Section 5. Organizational Members shall designate at the time of membership an official voting representative. That representative, should he or she not be able to be in attendance at the meeting of the Corporation, may designate a substitute to represent the Organizational Member. Organizational and Individual Members may vote, with the Organizational Members having ten (10) votes which may be split as desired by the Organizational Member and Individual Members having one (1) vote.

Section 6. The Secretary shall maintain a membership list of the names and addresses of all Organizational Members, the official voting representative of each Organizational Member, and Individual Members.

ARTICLE V - Membership Meetings

Section 1. The Corporation shall conduct an Annual Meeting at a time and place fixed by the Board of Directors. The Secretary of the Corporation shall mail a notice of the time and place of the Annual Meeting to each member at least thirty (30) days prior to each meeting.

Section 2. Special meetings may be called by the President, and shall be called by the President at the request of any three (3) Directors by directing the Secretary to mail notice of the time and place of such meeting, the purpose of such meeting and the subjects to be considered, to all members at least fourteen (14) days in advance of such Special Meeting, unless the Board of Directors provides otherwise.

Section 3. The presence of a majority of the Organizational Members of the Corporation at any meeting of the Corporation shall constitute a quorum.

Section 4. The membership may, by majority vote of those present at a meeting, close any session at any meeting to persons who are not members of the Corporation.

Section 5. All meetings authorized under this article shall be administered consistent with Roberts' Rules of Order.

ARTICLE VI - Membership Dues

Section 1. An annual dues assessment, payable to the Treasurer of the Corporation, in the amount of \$200 for Organizational Members and \$25 for Individual Members, will be due and payable on or before May 1 of each year.

Section 2. The Board of Directors may increase or decrease the amount of either the Organizational Member dues or the Individual Member dues for any given year by action announced not later than November 1.

Section 3. The Board of Directors is authorized and empowered on behalf of the Corporation to receive by gift, donation, devise, bequest or otherwise, either real or personal property; to hold

the same absolutely or in trust; to invest, reinvest, and manage the same; and to apply said property and the income arising therefrom to the purposes of the Corporation.

ARTICLE VII — Board of Directors

Section 1. The business and affairs of the Corporation shall be managed by a Board of Directors. The initial Board of Directors shall consist of three (3) persons, whose terms shall expire at the first Annual Meeting of the Corporation. Thereafter the Board of Directors shall consist of seven (7) persons: the President, Treasurer, Secretary, Counsel and three members to be elected at large. Each term of office shall run concurrently with a Director's term as an officer of the Corporation, and the three (3) at-large Directors shall be elected at the Annual Meeting. The initial at-large Directors shall be elected for one, two and three-year terms, and each succeeding term of the at-large Directors shall be for three years. Directors shall be eligible for re-election to successive terms. Vacancies shall be filled temporarily by the Board of Directors until the next Annual Meeting.

Section 2. At each Annual Meeting, the Board of Directors shall appoint an Executive Committee which shall be authorized to act for the whole Board of Directors between meetings thereof. The Executive Committee shall consist of at least three (3) and not more than five (5) Directors.

Section 3. The Board of Directors shall meet at the call of the President. Two members of the initial Board of Directors shall constitute a quorum, and four members of each successive Board of Directors shall constitute a quorum. Meetings may be conducted by telephone conference. The President shall provide reasonable notice of all meetings.

ARTICLE VIII — Officers of the Corporation

Section 1. The officers of the Corporation shall consist of a President, five (5) Vice Presidents, a Treasurer, a Secretary and a Counsel.

Section 2. All officers shall be elected at the Annual Meeting of the Corporation. At each Annual Meeting, the Nominating Committee shall submit the names of candidates for the offices of President, Vice President, Secretary, Treasurer and Counsel. Candidates may be added to the Nominating Committee's ballot at the Annual Meeting by the nomination by any member of the Corporation. All officers shall be elected for a term of one year and shall be eligible for re-election.

Section 3. The President shall be the chief executive officer of the Corporation and shall preside at all meetings of the Corporation and the Board of Directors. The President shall be responsible for implementing the policies of the Board of Directors, and fulfill such other responsibilities as may be assigned or delegated by the Board of Directors.

Section 4. The Vice Presidents shall assist the President and the Board of Directors in the formulation and implementation of policy. One Vice President shall be selected from each of the following geographic regions of the United States: New England, Middle Atlantic, South, Midwest and West. In the absence or disability of the President, the Board of Directors shall select a Vice President to discharge the duties of President.

Section 5. The Treasurer shall be the chief financial officer of the Corporation and be responsible for the receipt, custody, safekeeping and disbursement of the Corporation's assets. Unless the Board of Directors provide otherwise, no fidelity bond shall be required of the Treasurer.

Section 6. The Secretary shall be responsible for the recording of all minutes of meetings of the Corporation and the Board of Directors, the custody of corporate records, and the communication of all notices required by the Articles of Incorporation or these Bylaws.

Section 7. Counsel shall assist the President and the Board of Directors in reviewing the affairs of the Corporation, and such other responsibilities as may be assigned by the President or the Board of Directors.

Section 8. None of the officers of the Corporation shall be compensated for their services, but the Board of Directors may authorize that they be reimbursed reasonable expenses which are necessarily incurred by them in the performance of their offices.

ARTICLE IX — Mail Vote

Whenever, in the judgment of the Board of Directors, any question shall arise which should be put to a vote of the membership and when the directors deem it inexpedient to call a Special Meeting for such purpose, the directors may, unless otherwise required by statute, the Articles of Incorporation or these Bylaws, submit such matter in writing by mail for vote and decision, and the question thus presented shall be determined according to a simple majority (or a higher percentage if required by statute, the Articles of incorporation or these Bylaws) of the votes received by mail within three (3) weeks after such submission for vote, provided that, in each case, votes of at least one-half of the total number of votes entitled to be cast shall be received.

ARTICLE X — Committees

The Board of Directors may create one or more committees and appoint members of the Corporation and the Board of Directors to serve on them. Each committee may have one or more members, who shall serve at the pleasure of the Board of Directors. At the first Annual Meeting of the Corporation, the Directors shall create and organize a Nominating Committee, a Finance Committee and a Publications Committee.

ARTICLE XI — Publications

Section 1. The Board of Directors shall authorize publications which in the judgment of the Board of Directors are consistent with the purposes of the Corporation.

Section 2. The Corporation shall own the copyright for the original and any renewal term thereof in any writing of an author whose work is specifically commissioned by the Corporation. The Corporation may publish, with permission of the author, any writing which is consistent with the purposes and objectives of the Corporation.

Section 3. Publications of the Corporation shall be made available to all members in good standing. Subscription rates for the Corporation's periodical and non-periodical publications shall be fixed by the Board of Directors.

ARTICLE XII — Representations and Endorsements

Section 1. No member of the Corporation shall express as policy of the Corporation any matter which has not been determined by action or resolution of the Board of Directors or the membership.

Section 2. Any member who, when making a public utterance, permits himself or herself to be identified as an officer or director, or member of the Corporation shall clearly identify, as personal or otherwise, any views at variance with policy of the Corporation known to that member.

Section 3. The name of the Corporation shall not be used in any way which tends to indicate official endorsement of commercial products, services or publications, which implies an endorsement of any business or which suggests that membership in the Corporation is available to any organization, except as otherwise provided in Article IV.

ARTICLE XIII — Insignia

The Corporation shall have an insignia or corporate seal which shall have the inscription, National Client Protection Organization, Inc.

ARTICLE XIV — Amendments to the Bylaws

These Bylaws may be amended by a two-thirds affirmative vote of the Board of Directors at any Annual or Special Meeting of the Board of Directors. Any amendment of these Bylaws shall be reported to the Members at the next Annual Meeting or Special Meeting of the Corporation.

ARTICLE XV — Indemnification of Directors and Officers

Section 1. As used in this Article, any word or words that are defined in section 2-418 of the Corporations and Associations article of the Annotated Code of Maryland (the "Indemnification Section"), as amended from time to time, shall have the same meaning as provided in such Indemnification Section.

Section 2. The Corporation shall indemnify a present or former director or officer of the Corporation in connection with a proceeding to the fullest extent permitted by and in accordance with the Indemnification Section of the aforementioned Annotated Code of Maryland.

Section 3. With respect to any corporate representative other than a present or former director or officer, the Corporation may indemnify such corporate representative in connection with the Indemnification Section; provided, however, that to the extent a corporate representative other than a present or former director or officer successfully defends on the merits or otherwise any proceeding referred to in subsections (b) or (c) of the Indemnification Section or any claim, issue or matter raised in such proceedings, the Corporation shall not indemnify such corporate representative other than a present or former director or officer under the Indemnification Section unless and until it shall have been determined and authorized in the specific case by (i) an affirmative vote at a duly constituted meeting of a majority of the Board of Directors who were not parties to the proceeding; or (ii) an affirmative vote, at a duly constituted meeting of a majority of all the votes cast by Members who were not parties to the proceeding, that indemnification of such corporate representative other than a present or former director or officer is proper in the circumstances.

The NY Lawyers' Fund restored \$69,154 to an infant's trust. The infant's father had murdered her mother, and the \$69,154 represented the proceeds of the mother's life insurance. The trustee's attorney forged the trustee's indorsement on the insurer's check and misappropriated the proceeds.

In an action against the lawyer's bank on the forged indorsement, the Appellate Division of the Supreme Court has ruled that the fund (as subrogee of the trustee) has a contract cause of action against the lawyer's bank with a six-year statute of limitations. The court barred a recovery in the tort of conversion, holding that the three-year statute of limitations was not tolled because of the trust beneficiary's infancy. The court also held that the Staten Island bank could be sued by the fund in upstate Albany County. *Lawyers' Fund v. Gateway State Bank*, ___ A.D.2d ___, 658 N.Y.S.2d 705 (3rd Dept. 1997).

The NJ Lawyers' Fund paid awards of reimbursement to 15 former clients of a dishonest lawyer who settled tort claims without the clients' knowledge, indorsed their signatures on settlement drafts, and embezzled the proceeds. The fund obtained summary judgment against the lawyer's depository bank, and the bank appealed. In a decision which thoroughly reviews the law and policies affecting client protection funds, the Appellate Division of the Superior Court rejected the bank's argument that the pursuit of "innocent" collateral sources of restitution violates public policy and the goals of the NJ Lawyers' Fund.

New Jersey Lawyers' Fund v. First Fidelity Bank, et al., 303 N.J. Super. 208, 696 A.2d 728 (App. Div., 1997).

A bank's failure to notify the Lawyers' Fund of bounced checks on an attorney trust account (as required by court rule) is "evidence of negligence". Thus, a depository bank which dishonored 11 law firm checks

(totaling \$766,000) for insufficient funds (but failed to report them) can be held to answer to a claim of negligence by a client which, in this case, was a bank that had retained the firm to handle mortgage closings. So ruled the Appellate Division in reversing a trial court that dismissed the plaintiff's negligence claims. *Home Savings of America v. Amoros, et al.* ___ A.D.2d ___, 661 N.Y.S.2d 635 (1st Dept. 9/4/97).

Melville Fergang gave his daughter Jane a check for \$101,000 for the purchase of real estate. The check was drawn on Morgan Guaranty (the drawee bank) and was payable to the seller, Ronald Burk. Ms. Fergang's lawyer forged Burk's indorsement, collected the proceeds from Chemical Bank (his depository) and stole the proceeds. The Lawyers' Fund reimbursed Mr. Fergang \$100,000. In an subsequent action against Morgan Guaranty as subrogee, the fund was awarded summary judgment for the face amount of the stolen check. In a related action, Morgan Guaranty was awarded summary judgment against Chemical Bank, based upon Chemical's breach of its warranty of good title when it collected the check proceeds from Morgan. An excellent primer on the basic commercial laws that apply in forged indorsement litigation. *Fergang v. Flanagan*, ___ Misc.2d ___ (Sup. Ct., Nassau Co. 6/16/97).

A drawee bank that pays a check bearing the payee's forged indorsement is absolutely liable to the payee for the face amount of the check pursuant to UCC 3-419(2). This rule of absolute liability precludes inquiry into whether the payee benefitted from the proceeds of the check. And the defense of contributory negligence requires a showing by the drawee bank that it acted in accordance with reasonable commercial standards and that the payee substantially contributed to the forgery. *Mouradian v. Astoria Federal Savings and Loan, et al.*, ___ NY2d ___ (12/17/97).

NCPO Planning Continues

The National Client Protection Organization, Inc. has been incorporated in Maryland. Hats off to the Baltimore law firm of Hecht & Chapper for this pro bono gift of legal help. Bylaws have also been drafted and are being circulated nationwide by NCPO's temporary president Kenneth J. Bossong. All comments and suggestions are welcome.

NCPO's first Annual Meeting will be held during the ABA's 14th National Client Protection Forum in Montreal. The meeting is set for Sunday morning on May 31.

The ABA's Standing Committee on Client Protection, and its Center for Professional Responsibility, has been supportive of these networking efforts for the nation's client protection community. The ABA's help in the production and circulation of the *The Client Protection Webb* is especially helpful and appreciated.

Two Funds Reimburse Client's Loss

A law client's \$131,950 loss has been fully reimbursed by the joint efforts of the Lawyers' Funds of New Jersey and New York.

The Boards of Trustees each agreed to awards of \$65,975 to an estate of a New York decedent to reimburse thefts by the estate's attorney, a member of the New Jersey and New York bars who was retained at his New Jersey law office. This is the second time that the New Jersey and New York funds have shared their assets in reimbursing a loss involving both jurisdictions.

