



NCPO Sponsors Boston Workshop

Upcoming Events

February 6, 1999

Regional Roundtable for client protection funds at the ABA's Mid-Year Meeting in *Los Angeles*.

March 13, 1999

Regional Workshop for Southeast States. *Atlanta, Georgia*.

June 4-5, 1999

ABA's 15th Annual Forum for Client Protection Funds. *La Jolla, California*.

June 6, 1999

Annual Meeting, National Client Protection Organization, Inc. *La Jolla, California*.

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NCPO's first regional workshop, beginning with the Northeast territories, was held in Boston on October 30, 1998. The workshop attracted 40 fund trustees, administrators, court and bar leaders from 13 jurisdictions, including the District of Columbia, Maryland, and the Barrister's Society of Nova Scotia.

The agenda focused on practical topics that are important to both established and emerging protection funds: restricting eligible claims to a fund; processing unearned retainer losses and claims which involve creditor liens; standards for evaluating investment losses; dealing with the media; applying burdens of proof and presumptions in processing claims; creating an Internet website; and subrogation and collection techniques.

The Workshop was held at the historic Charleston Naval Yard on Boston Harbor. It was hosted by the Massachusetts Client Security Board, and chaired by NCPO's President, Ken Bossong. Morning sessions focused on the standards, policies and procedures used in various jurisdictions in evaluating claims resulting from investment transactions with lawyers, unearned legal fees, and claims in which a client's creditors have an interest or lien. Leading these discussions were Fred Miller and Tim O'Sullivan of New York, Isaac Hecht, and Art Littleton and Kathy Peifer of Pennsylvania.

These discussions included lively analyses of the famed "but for" standard applicable to investment claims; the

"larceny by false pretense" standard in unearned retainer claims; whether a fund should bar claims by banking institutions and corporations; the concept of a protection fund as a "last resort"; and the bar's historic interest in protecting "widows and orphans".

Karen D. O'Toole of Massachusetts and Victoria Rees of Nova Scotia led an after-lunch discussion of publicity issues, which featured practical expert advice from Brian Leary, a journalist with a law degree, who is co-anchor of a news program on Boston's TV Channel 5. Mike Knight supplemented this panel with an overview of creating an Internet website, drawn from personal experience at the New York fund.

There followed a provocative discussion of various burdens of proof and presumptions that are used by funds in evaluating claims led by Mark Berman of Massachusetts and Ken Bossong. Mike McCormick, Dan Hendi, and Bill Thomas of New Jersey rounded off the program by sharing their expertise and experience in the enforcement of a fund's subrogation claims.

This sharing of information continued during the midday lunch and the reception at day's close. Participants generously donated copies of their work papers and their local fund rules. NCPO has posted the roster of workshop attendees, and the written materials supplied by the panelists, on its Internet site: www.nylawfund.org/ncpo. ■

Thanks to Karen O'Toole for this report, and to Karen and her colleagues Lucia Cheng-Yee and Lorraine Luongo for their generous hospitality.

A Call to Action

Welcome to the first Annual Meeting of the National Client Protection Organization, Inc. (That felt good to say!) It's gratifying to see such a gathering of talent and to know how many who could not be here are nevertheless with us.

We know why we are here. We know the value and worth of a client protection fund. We know that it's the best single thing the legal profession does — and all the more so when it's done, not because the profession *has* to, but because the profession *wants* to.

We know what it feels like to restore a hapless victim's life savings — and what that victim's gratitude means.

We know what it takes to be a good fund. We know that a fund must have an appropriate, independent, organizational structure. We know that a fund must have adequate funding and resources. We know that a fund must be accessible to those who need it. We know that a fund must be responsive to that need.

We know all these things and we know them better when we talk to one another.

If *we know* better, we'll *do* better.

If we *can* do better, we *must* do better.

The public *needs* our best; the honorable profession on whose behalf we act *deserves* our best.

But one more thing we know: there are people who exist who *don't* know any of this. There are those "back home" who just don't get it; and even a few who are avowed enemies of client protection funds. Some are in positions of power and influence that dwarf our own. Our only advantage is the best advantage: *we* are right. If the truth is fairly presented, funds win. On the merits. Most will get it.

What this means is: excellence in handling client protection funds is not enough. (It's necessary, of course, but not sufficient.) We must educate and we must advocate — and we must be effective.

NCPO cannot be just a think tank; it must be a call to action.

We must be there for each other and we must start now. ■

Thanks to Kenneth J. Bossong, President of NCPO. These were Ken's welcoming remarks at the organizational meeting of the NCPO in Montreal, Canada in June 1998.

Join the NCPO

Enroll as a charter member of NCPO. Annual Organization dues are \$200; individual dues \$25. Send checks to NCPO's Treasurer: Isaac Hecht, Esq., 315 North Charles St., Baltimore, MD 21201-4325. The IRS has approved NCPO's tax-exempt status. Contributions are tax deductible.

15th Annual Client Protection Forum

The American Bar Association's 15th Annual Forum will be held on June 4-5, 1999 at the Sheraton Grande Torrey Pines in La Jolla, California. As in previous years, the Forum will be sponsored by the Standing Committee on Client Protection and the Advisory Commission. The Forum will be held in conjunction with the ABA's National Conference on Professionalism.

Topics for the Forum include: *Mandatory Malpractice Insurance: Is It Time?*; *FAQs About Fee Arbitration*; *Should a Client Protection Fund be a Fund of Last Resort?*; *The Role of a Trustee in the Operation of a Lawyer's Fund*; and *Shall We Mediate or Arbitrate?* There will also be workshops on difficult claims and fee arbitration.

The Forum will also offer a program on mediation of client-lawyer disputes, and will include a discussion of the ABA's new Model Rules for Mediation of Client-Lawyer Disputes.

Questions and requests for additional information can be addressed to John Holtaway, ABA's Client Protection Counsel at (312) 988-5298. jholtaway@staff.abanet.org ■

Judicial Decisions to Note

A lawyer's bankruptcy filing does not stay enforcement of a \$5,000 monetary sanction which was imposed by a trial judge for engaging in frivolous conduct in civil litigation. Court rules in New York provide that judicial sanctions (comparable to Rule 11 sanctions in the federal courts) are payable to the New Lawyers Fund. *Janis v. Janis*, ___ Misc.2d ___ (Sup.Ct., Westchester Co., 1998).

Dishonest law firm forged law client's endorsement on \$47,500 settlement draft from insurance company, and cashed the check at its depository bank. Check was "payable through" insurer's bank. New York Lawyers Fund reimbursed law client \$31,750, and sued insurer as client's subrogee. Held: Lawyers Fund entitled to summary judgment against insurer, and insurer entitled to indemnity against depository bank. Court limited the subrogation recovery to the amount of the fund's award, rather than the face amount of the client's check pursuant to UCC 3-419(2). *NY Lawyers Fund v. Bank Leumi Trust Co. et al.*, ___ AD2d ___ (3rd Dept. 1998). ■

The Steps to Collection (Part III)

Once all of the claims filed against a respondent have been considered, the “nuts and bolts” of collection work can begin. For client protection funds with limited resources, collection efforts can be an effective way to recoup monies paid on claims without taxing the time and energies of staff.

The key is organization - developing a collection system, and then sticking to it. Let your calendar and list of respondents with collection potential guide you through a series of steps to recovery.

An initial goal is to obtain a judgment against each respondent for the full amount of awards attributable to each. While cooperative respondents are rare, some will consent to judgment; some may need some encouragement. Try the following:

—*“Voluntary” letter:* Write your respondents to advise them of awards against them, and to invite them to call or write to volunteer repayment.

—*Notice of impending litigation:* Write with a copy of the complaint that will be filed if the respondent does not cooperate in repayment. Complaints need not be complicated pleadings. In most cases, one or two paragraphs will cover all claims against a respondent: one for unearned retainer claims, the other for outright misappropriations.

—*Commence litigation:* If the respondent fails to cooperate, file suit, and seek a default judgment if an answer is not filed. If an answer is filed, evaluate your case. Often, you will be able to move for summary judgment immediately, based on your claim forms and supporting documentation.

The *prima facie* case is usually straightforward and there are seldom any material facts truly in dispute. A request for admissions can be useful in filling in gaps, and interrogatories can always be served, if needed. Summary judgment motions need not be complicated or cumbersome. Use a criminal conviction to preclude a respondent from disputing the losses in your complaint. Rely on your own claim forms as statements, under oath, with supporting documents in support of your request for judgment.

Once judgment has been entered against a respondent, the formal means of

supplemental proceedings to gather information is a deposition. Check, however, to see if your state is one of those which makes available less cumbersome and time-consuming methods to help you determine if the respondent has any assets or income with which to begin to repay the fund, such as the following:

—*Supplemental proceedings questionnaire:* This questionnaire solicits a host of details about the respondent’s financial situation, but the respondent cannot be forced to answer it.

—*Information subpoena:* In some states, court rules provide for a set series of questions which can be served by regular and certified mail on a defendant after judgment has been entered. If the defendant fails to answer, the plaintiff can move that a court find the respondent in contempt. Ultimately, the court will issue a warrant for the defendant’s arrest. After an arrest, a respondent generally becomes more cooperative.

If neither of the above is effective, schedule a deposition of the respondent.

An important “nut and bolt” in the collection process involves the securing of a repayment plan. The preferable plan results from an agreement with the respondent, who should be requested in a letter to propose a repayment plan. If the respondent declines to do so, subsequent letters from the fund should suggest a plan based upon the information that was gathered in discovery.

If the respondent doesn’t accept the proposal and refuses to pay, the fund’s collection arsenal includes the following:

—*Wage execution:* As a general rule, if a respondent replies after the papers are filed for the writ and offers to pay, the fund should obtain the wage execution order, and hold it for filing in the event the respondent misses a payment.

—*Writs of attachment:* These writs are used to obtain security on specific assets of the respondent, such as automobiles, air craft, bank accounts, and security deposits for rental obligations of a respondent.

Once a respondent has agreed to a repayment plan, internal office procedures insure that payments keep coming. The following are all intended as a means to maintain current information on respondents and prompt “you are late” letters when they are needed. In general, whatever works for you is the best organizational tool to keep track of your respondents, and to let them know they will not be forgotten.

—*Respondent biographies book:* This volume provides essential information on all of the fund’s respondents, including address, social security numbers, birth dates, judgment information, amount owed, employment and general case histories. In essence, the book condenses as much as possible the information contained in each master file.

—*Respondent subrogation update memo:* The memorandum lists the current status of collection efforts against each respondent indebted to the fund. It serves as a reminder to fund counsel and staff when action is needed against individual respondents.

—*Respondent list:* This lists all respondents in alphabetical order with their client protection fund master numbers and counsel assigned to each case.

—*Subrogation roster:* This roster allows a fund to keep track of the monthly payments of each respondent. A copy of each check is provided to counsel and the appropriate notation is made on the roster. The roster is reviewed periodically to determine tardy payments. The roster also details monthly payments owed, when payments are due, and judgments against each respondent.

—*Subrogation breakdown:* This list is prepared by the accounting staff at the end of every month, and reflects actual deposits made on behalf of individual respondents. It is useful in conjunction with the subrogation roster.

Good luck! And always feel free to call me at the New Jersey Lawyers’ Fund if we can help you in your collection efforts. (609-984-7179) ■

Many thanks to Michael T. McCormick, who is Deputy Counsel and Secretary of the New Jersey Lawyers’ Fund for Client Protection.

■ Standing Committee Gets New Members

ABA President Philip Anderson has appointed James E. Towery of California as Chair of the Standing Committee for FY 98-99; and three new members: Bernard F. Ashe, a Trustee of the New York Lawyers Fund since 1981; Lynda C. Shely, Ethics Counsel for the State Bar of Arizona; and Janet Green Marbley, Administrator of the Ohio Client's Security Fund.

■ Connecticut Has New Client Protection Fund

Connecticut's court system has created a client protection fund to replace the state bar association's client security fund. The new fund becomes operational on January 1, 1999. There are approximately 27,000 licensed lawyers in Connecticut. The new fund will be financed by an individual assessment of \$75 annually.

■ DC Fund Granted Civil Immunity

The District of Columbia Court of Appeals has approved a new immunity rule for the DC client security fund. The new rule grants the trustees, staff and agents of the fund immunity from civil liability and disciplinary complaint and from suit for any conduct in the discharge of their official duties.

■ New Rules for Client Trust Accounts

The Illinois Supreme Court has amended its Rules of Professional Conduct to allow attorneys to make immediate disbursement of funds at real estate title closings, notwithstanding that the payments involve uncollected funds. The Court's amendments to Rule 1.15 were proposed by the Illinois State Bar Association, which cited similar procedural safeguards adopted in Florida, Georgia and North Carolina.

■ ABA Adopts Model Rules on Mediation

The ABA House of Delegates, in August 1998, adopted the black letter provisions of the *Model Rules for Mediation of Client-Lawyer Disputes* that had been propounded by the Standing Committee on Client Protection. The *Model Rules* implement a key recommendation in the McKay Report on lawyer discipline enforcement, and are designed to assist bar and judicial leaders in establishing voluntary mediation programs in their jurisdictions.

■ Nebraska's Client Security Fund to Undergo Review

The Nebraska Supreme Court, by order dated October 7, 1998, approved increases in the dues structure of the Nebraska State Bar Association for 1999 and 2000, and ordered an 18-month review of the structure and functions of the Association, including the funding and structure of the Client Security Fund and the Office of the Counsel on Discipline.

■ Regional Roundtable at ABA's Mid-Year Meeting

The ABA has provided facilities for an informal roundtable gathering for client protection fund trustees and administrators during the ABA's Mid-Year Meeting in Los Angeles. The date is Saturday, February 6, 1999, beginning at 1:00 p.m., in the Senators Dining Room, Doubletree Hotel on Wilshire Boulevard.

■ Southeast Region Workshop in the Works

Planning is underway for NCPO's second regional workshop, to be held in Atlanta on Saturday, March 13, 1999. Arrangements will be announced. Suggestions for workshop topics are welcome. Contact NCPO president Kenneth J. Bossong.

■ Wisconsin Fund Gets New Leader

Jennifer Darling has resigned as the Administrator of the Clients' Security Fund of the State Bar of Wisconsin. The fund's new Administrator is Kris Wenzel, P.O. Box 7158, Madison, Wisconsin 53707-7158.

■ ABA Completes Salary Survey

The Standing Committee on Client Protection has completed a first-time survey on salaries paid to administrators of client protection funds in the United States and Canada. The survey compiles average salary statistics from 36 jurisdictions in three categories, based upon lawyer population: small, medium and large. Questions about the survey should be addressed to John A. Holtaway, ABA's Client Protection Counsel.

■ NCPO Designates Liaison to ABA

The ABA's Standing Committee on Client Protection has tapped the NCPO for a liaison to the committee, who attend its meetings and assists in its work. NCPO's President Kenneth J. Bossong will serve as the new Liaison.

■ New Teeth For Fee Arbitration Rules

The September 1998 issue of *The Montana Lawyer* reports that the Montana Supreme Court has amended the State Bar's Fee Arbitration Rules to provide for the suspension from practice of lawyers who refuse to comply with the fee arbitration process. The new enforcement provisions took effective on July 29, 1998.



The Client Protection Webb

The Client Protection Webb is a public-interest publication of The National Client Protection Organization, Inc.

Interim Editor

Frederick Miller, Executive Director and Counsel of the New York Lawyers Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210-2235. Telephone 800/442-3863; Fax 518/434-5641; E-Mail: miller@nylawfund.org

The Interim Editor invites articles, news and other materials of interest to the client protection fund community in the United States and Canada.