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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.

Inside

- 2 Editorial
- 3 The Steps to Collection
- 4 "Dear Counselor:" A Heads-Up in Forged **Endorsement Claims**
- 5 Tightening the Purse Strings in Minnesota
- 6 NCPO News in Brief

NCPO Sponsors Boston Workshop

CPO'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

elcome 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

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)

nce 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

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 on 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 follow-

- -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.

"Dear Counsellor:" A **Heads-Up in Forged Endorsement Claims**

Many reimbursement claims which involve forged endorsements on checks are filed by attorneys who are helping clients recover from the client protection fund.

Statutory and common-law principles in this specialized area of the law are subtle and complex, and can easily result in a claimant's failure to secure recovery from a collateral source, like a bank or insurance company, that would ordinarily be liable.

Of course, it's not unimportant that a successful suit against a bank or insurance company can: avoid the need for an award of reimbursement from a client protection fund; and generate a fee for the claimant's attorney.

As an aide to practitioners, the New York Lawyers Fund has prepared this basic "heads-up" letter which is sent to each attorney who files a claim which involves a forged endorsement. This precedent can be readily tailored to accommodate the law in a particular state or other jurisdiction.

Dear Counsellor:

The loss in this claim appears to involve a forged endorsement on a negotiable instrument.

As we are a fund for law clients who have no other source of recovery, and your client has a civil remedy under our commercial laws, the purpose of this letter is to assist you in the enforcement of your client's causes of action.

Under section 3-419 of the Uniform Commercial Code, a drawee bank is liable to a payee, for the face amount of the check, if the bank paid the check on a forged endorsement. The payee has a cause of action in conversion against the drawee bank. (See, e.g., Hutzler v. Hertz Corp., 39 NY2d 209).

An action to enforce this remedy must be commenced within three years from the date of the instrument. (Henderson v. Lincoln Rochester Trust Co., 303 NY 27; CPLR 214). As part of the process, a payee should promptly make demand for reimbursement upon the drawee bank and supply it with an affidavit that his or her endorsement was forged.

Some insurance companies pay settlements with so-called "payable-through drafts". In these situations, the insurance company has the legal status of a drawee bank. (Official Comment to U.C.C. §3-120; The Florida Bar v. Allstate Insurance Company, 391 So. 2d 238, Smith v. General Casualty Co., 394 N. E. 2d 804).

A similar demand for reimbursement should be made upon the depository bank which cashed or paid the check. The depository may be held liable to a payee, in conversion, if it did not act in accordance with commercially reasonable standards. (U.C.C. §3-419 (3); see Sonnenberg v. Mfrs. Hanover, 87 Misc. 2d 202, Tette v. Marine Midland Bank, 78 AD2d 383; and Moore v. Richmond Hills Savings Bank, 117 AD2d 27).

A payee in New York also has a common law cause of action against the depository bank in contract for money had and received. (See Henderson, supra; Hechter v. N.Y. Life Insurance Co., 46 NY2d 34). A six-year statute of limitations applies. (Henderson, supra; CPLR 213).

In all cases, of course, a bank or insurer may be exonerated from liability if the payee authorized, or ratified, the endorsement of the check. It is therefore important to ascertain whether your client signed a power of attorney, either as a separate instrument or as part of the original retainer agreement.

An attorney does not have the apparent authority to negotiate or endorse a check which is payable

to a law client. (See, Lawyers Fund For Client Protection v. Manufacturer's Hanover Trust. 153 Misc.2d 360, 581 N.Y.S.2d 133).

I hope this statement of precedents and cautions is helpful to you and your client in recovering the loss involved in this claim.

Please keep us abreast of developments in your collection efforts. At a minimum, we require claimants in these situations to demand reimbursement from the banks or insurance companies involved, and to execute the necessary affidavits of forgery to protect and preserve their rights, which will accrue to the New York Lawyers Fund, by way of subrogation, in the event we reimburse a loss. Please make sure we are sent a copy of each affidavit.

If we can assist you in these efforts, please feel free to contact us.

Very truly yours,

Federal Government Has Fund to Reimburse **Forged Endorsements**

One would think that only the foolhardy would forge payee endorsements on checks issued by the United States Treasury. But it happens, and a special government fund exists to reimburse eligible payees.

The Check Forgery Insurance Fund, while little known, has been in existence since 1941. As its name indicates, this fund is designed to insure against losses resulting from forgeries on checks drawn upon federal treasury depositories.

The fund is available for use by the Commissioner of Financial Management Service and accountable officers of the United States. Basically, the fund's scope embraces all disbursing officers who are authorized by the Secretary of the Treasury to maintain official accounts.

How does the insurance system work? When a payee does not receive a

(cont'd. from page 4)

government check as planned, or realizes that it has been forged, the payee should contact the issuing agency within twelve months of the date of the check.

That agency will send the payee a copy of the check and a questionnaire. If the payee has received the check in the interim, as often happens, the matter is dropped. But if the payee has not received the check, or the payee's endorsement has been forged, the payee should complete and file the questionnaire and a claim with the issuing agency.

When the issuing agency receives the claim, it conducts an investigation. If it finds a forged endorsement, the agency arranges with the Check Forgery Insurance Fund to reissue a check to the payee. The Insurance Fund thereafter recoups its loss administratively from the bank that honored the forged endorsement, or another in the chain of collec-

Additional specific information about the Check Forgery Insurance Fund and its procedures can be located on NCPO's website: www.nylawfund.org/ncpo/ chkforg.htm

Thanks to Louis W. Chicatelli, Jr. for his research on this collateral revenue source for client protection funds. Lou is a third-year student at the Albany Law School, and an intern at the New York Lawyers Fund.

NCPO ON THE INTERNET (www.nylawfund.org/ncpo)

Resources at the NCPO's Internet site include:

NCPO's Corporate Documents; Roster of Members; National Directory of Funds; Recent Judicial Decisions; A Bibliography of Materials; and the

ABA's Model Rules for Client Protection Funds.

Tightening the Purse Strings in Minnesota

Ken Bossong's commentary in the January 1998 issue of The Client Protection Webb ("Assessing Without Apology") is a powerful argument for an adequately financed client protection fund. The editorial closed with the warning that: "few funds have reduced their assessments without an eventual regret for the decision." We here in Minnesota hope this prophesy allows for an exception or two.

In May, 1998, the Minnesota Supreme Court ordered that the annual assessment for the Minnesota Client Security Fund be reduced from \$20 to \$17. Remarkably, perhaps, this reduction came after the fund's trustees proposed to the court a reduction to \$15. Why? Perhaps our unique situation and history will prove instructive.

When the Minnesota client protection fund was established in 1986, there was no annual assessment; but a one-time \$100 surcharge on the 1987 attorney registration fee. This generated \$1.4 million for the payment of pending claims, but promised no ongoing source of revenue. Four years later, the fund's assets hovered near the \$500,000

Following a bar committee's recommendation, and despite objections of many attorneys, the Supreme Court in 1982 imposed an annual assessment of \$20. The fund has been healthy and growing since, and was even able to absorb a record payout of more than \$700,000 in 1996. To quote the Bossong editorial: "It's not a crime for a fund to be financially healthy."

When the annual assessment was debated, there was healthy debate about how much money the fund needed to be considered "healthy." The state bar association proposed that the fund aim for \$2.5 million; others said that \$1.0 million was enough. The Supreme Court ordered that the fund report to it whenever there was a projected balance in the fund in excess of \$1.5 million.

In 1987, the fund reported a projected balance of nearly \$2.0 million, and indicated that it was planning to study the fund's revenue needs to determine whether a reduction in the annual assessment was feasible.

Instead, the court "reallocated" \$7 of the \$20 assessment, on a one-year basis, to the Minnesota Board of Continuing Legal Education for a much-needed computer project. The court also requested the fund to expedite its revenue study. In response, the trustees recommended that the court "only" cut the fund's annual allocation by \$5.

Was there a downside risk to this action? Of course. The trustees carefully studied various budget projections before making their recommendation to the court. Indeed, while the matter was pending, a major defalcation case came to light, from

which it appears likely that approximately \$500,000 or more in unanticipated and valid claims may result.

Situations like this every other year or so could still be handled by the fund, but more could prove difficult. And frankly, beginning a new fiscal year with less money coming in and one such major case already known is scary indeed. Perhaps in recognizing this risk, the Supreme Court reduced the fund's allocation by only \$3, thus retaining more than what the trustees were prepared to accept.

Assessing without apology is a valid aspiration for those of us working in the client protection field, for if we are not advocates for healthy funds, how can we expect others to advocate for us? Nevertheless, the reality in many states is that "healthy" is a very relative term, and maintaining good health sometimes requires short-term compromise. Time, of course, will tell.

Thanks for this report to Martin Cole, the Assistant Director of the Minnesota Client Security Fund.

Alaska Gets New **Protection Rules**

The Alaska Supreme Court has amended the Alaska Rules of Professional Conduct (ARPC) to require written disclosure to clients if lawyers don't have malpractice insurance coverage in certain amounts. The new amendments also require lawyers to have written fee agreements with their clients for fees more than \$500. Both amendments are effective January 15, 1999.

According to September-October 1998 issue of *The Alaska Bar Rag*, ARPC 1.4, as amended, requires lawyers to advise their clients in writing if they don't have malpractice insurance of at least \$100,000 per claimant, and \$300,000 total. Lawyers must also notify clients in writing if, at any time, their insurance drops below these amounts, or if their malpractice insurance is terminated.

This disclosure must be contained in the lawyer's written fee agreement which, under amended ARPC 1.5 and Bar Rule 35, will be required in all cases where the fee to be charged is more than \$500. This disclosure is also required in contingent fee agreements, which must be in writing. Disclosure is required to be made to the person or entity who is responsible for payment of the lawyer's legal fee. Exempt from these disclosure rules are government lawyers and in-house counsel.



■ 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.



The Client Protection Webb

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

■ 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 Liasion.

■ 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.