



2nd Annual Meeting

June 6, 1999

**La Jolla Shores Room
Hilton La Jolla Torrey Pines
La Jolla, California**

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The Second Annual Meeting of the National Client Protection Organization, Inc. will be held on Sunday, June 6, 1999 at the Hilton La Jolla Torrey Pines, LaJolla, California. The breakfast meeting will begin at 8:00 a.m. and conclude by 10:00.

NCPO's by-laws provide for the annual election of officers: (President, five Vice-presidents, Treasurer, Secretary and Counsel, and one of NCPO's three at-large Directors. The Nominating Committee is preparing a slate of nominees for these offices. Contact Fred Miller (800/442-3863) if you would like to stand for election to any of these offices. Nominations can also be made from the floor at the Annual Meeting. ■

NCPO Plans Speakers Bureau

Would your Board of Trustees or Bar Association Committee benefit from a pep talk by a colleague? Or like to pick the brains of an experienced client protection administrator or trustee from another jurisdiction? Plans are underway to create a "speakers bureau" to provide protection funds, courts and bar associations with speakers from NCPO's membership. It's hoped that the cost to a jurisdiction will be minimal; most likely a share of the speaker's travel costs. The project will be discussed at the NCPO's Second Annual Meeting in La Jolla. Other projects include the development of a mission statement for NCPO; a brochure; procedures for handling multi-state claims; and protection fund standards. Suggestions and volunteers are needed. Contact: President Ken Bossong. ■

Agenda

Call to Order
Reports:

- Report of the Chairman
- Report of the Secretary
- Report of the Treasurer
- Reports of Committees
 - a. Finance
 - b. Executive
 - c. Membership
 - d. Publications

Old Business

New Business

Election of Officers
1999-2000

Adjournment

NCPO Plays Nashville

NCPO conducted its second Regional Workshop; this one for client protection fund administrators and trustees in the southeastern United States.

The Workshop was hosted by the Tennessee Lawyers' Fund for Client Protection, and was held in Nashville on Saturday, March 20, 1999. Participating were trustees and administrators from 10 jurisdictions: Alabama, District of Columbia, Georgia, Louisiana, Maryland, New Jersey, New York, North Carolina, South Carolina and Tennessee. Special guests included Mr. Justice Frank F. Drowota of the Tennessee Supreme Court and John A. Holtaway, Counsel to the ABA's Standing Committee on Client Protection.

The agenda discussions included, "Those #@%# Claims", led by A. Root Edmondson and W. Erwin Fuller Jr., Chair of the North Carolina fund. Many of the difficult fact patterns discussed at the session involved so-called unearned retainer claims. Mr. Fuller proposed the intriguing proposition that legal fees paid in advance should be impressed with a trust that they will be applied only to the providing of legal services.

Thomas W. Sumners Jr., Chair of the New Jersey fund, pointed out that a lawyer's failure to refund legal fees violates a Disciplinary Rule, and could be considered to be the functional equivalent of "dishonest conduct". In a related area, Trustee Zondra Taylor Hutto of the Alabama fund pointed out the need for procedures to protect clients when a lawyer's practice collapses.

Charles Swanson, a Trustee of the Tennessee fund, and NCPO President Kenneth J. Bossong followed with a discussion of the inter-relationship between unearned-retainer claims and fee arbitration; and the concept of being a "remedy of last resort".

Following lunch, David Shearon of the Tennessee fund and Fred Miller of New York led a wide-ranging discussion of

administrative issues ("Getting the Job Done"). Topics included available revenue sources for funds, the organization of a fund within a state's lawyer-regulation system, "lobbying" techniques, user-friendly computer software products, and public outreach efforts.

Dave Shearon told the group that a little-discussed aspect of a law client protection fund is its role in preserving "trust" in our systems of dispute resolution. Without trust between clients and their attorneys, and between attorneys, and between attorneys and courts, for example, the cost of the simplest legal transaction would be prohibitive. Clearly it's in the system's best interests to preserve that trust, and courts and bar associations should be reminded of this truth.

The wrap-up presentation ("If you can't keep them out of the front door, chase 'em out the back!") was led by Trustee Isaac Hecht of the Maryland fund and Dan Hendi of New Jersey. Isaac reviewed various loss-prevention devices being implemented around the United States (bounced-check rules, payee notice in personal injury settlements, etc.). Dan Hendi provided practical advice on protecting and securing a fund's creditor rights against dishonest attorneys.

President Bossong concluded the Workshop by thanking Root Edmondson, NCPO's Vice-President for the Southeast territories, and David Shearon (and their staffs) for organizing the session and providing the logistical support. Ken pointed out that the meeting materials, like those for the October 1998 Northeast Regional Workshop in Boston, will be posted on NCPO's Internet site: www.nylawfund.org/ncpo. ■

American Bar Association Contacts

For information in the client protection field, and access to information maintained by the American Bar Association, contact John A. Holtaway, Client Protection Counsel, ABA Center for Professional Responsibility, 541 North Fairbanks Court, Chicago, IL 60611. Tel: 312/988-5298; Fax: 312/988-5491; E-mail: jholtaway@staff.abanet.org. At the same address is the always helpful Debra (Debi) D. Taylor. Tel: 312/988-5325. Fax: 312/988-5280. E-mail: debrataylor@staff.abanet.org

The Check's in the Mail

A common variety of lawyer theft nationwide is the forgery of a client's endorsement on an insurance company's check which pays the settlement of a personal injury claim. The forgery typically follows the unauthorized settlement of the client's litigation, accompanied by the forgery of the client's signature to a discontinuance of the action and a release of claim. These acts of dishonesty are facilitated by the insurance industry's practice to make the settlement check payable to both client and attorney, and to mail the check directly to the attorney, without notice to the client.

In the ideal situation, the client should be able to recover from the insurance company's bank (the drawee), or the bank that cashed the check for the dishonest attorney (the depository).

Regrettably, however, litigation against the banks is usually a prerequisite; and the governing case law of liability can be subtle and complex, with pitfalls to the inexperienced. And because these forgeries are typically concealed by the dishonest attorney, a client's civil claims against the drawee and depository banks are frequently barred by a statute of limitations. In that case, the subrogation rights of a client protection fund are also barred.

The solution? A payee notification rule which requires an insurance carrier to notify a law client (in a straightforward and antiseptic letter) when it mails a settlement check to the client's attorney. The procedure originated in New York State with a state Insurance Department regulation to protect

(cont'd. on page 3)

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consumers, recommended by the Trustees of the client protection fund. It has since been approved by the ABA as a model rule, and versions of it have been adopted, by statute and administrative regulation, in California, Connecticut, Delaware, Georgia, Maryland, New Jersey, Pennsylvania and Rhode Island.

There are several significant benefits from the procedure. First, injured clients are compensated for their injuries. Second, the notice discourages risk-taking by dishonest practitioners since the consequences of discovery expose the lawyer to criminal prosecution and disbarment. Third, forgeries are promptly discovered, which facilitates recovery against liable banks. Fourth, the procedure is nearly cost-free and can be implemented everywhere in the nation by simple adjustments to insurance company computers. Last, every dollar saved by a client protection fund in this area of loss is a dollar that can be used elsewhere to protect law clients. All that's needed to implement the procedure is leadership. ■

Lawyer, Can You Spare 96 Cents a Week?

Having 17 years of near daily contact with the Pennsylvania Lawyers Fund for Client Security, I read with great interest Ken Bossong's editorial "Assessing Without Apology" in the January 1998 issue of *The Client Protection Webb*, Vol. No. 2. It recalled our protection fund's experience, in 1982, and some of the incredible arguments that were raised to escape the initial \$50 annual assessment required of Pennsylvania lawyers.

It's my firm belief that many funds underestimate the willingness of their lawyers to adequately finance their client protection programs which, after all, provide prompt compensation to victims of dishonest colleagues; help cleanse the bar of dishonest practitioners; and advance the profession's public reputation by demonstrating that it's not teeming with brigands who care for nothing but personal profit. Call this to mind: the overwhelming majority of lawyers in every state will fully support effective programs of law client protection.

The Pennsylvania client protection fund is financed by assessments fixed by the Supreme Court in consultation with the fund's Trustees. Currently the assessment is \$45, and it has ranged between \$70 and, briefly, \$20. Of the 36,000 lawyers affected by the initial \$50 assessment, we received telephone calls and letters from about 220; less than 1 percent. A large number of these lawyers endorsed the fund's purpose, but objected to the fee since they, district attorneys and soldiers for example, did not deal with client money. They complained, in fact, about an assessment that amounted to 96 cents a week. The Supreme Court's response was that the fund was a concern of a profession of which they were an integral part. Complaints in succeeding years dried up.

It's obvious to any experienced administrator or trustee that an annual contribution of \$50 by each lawyer will generate a significant revenue stream for a protection fund. To the 1 percent who are likely to complain, we can ask: (cont'd. on page 4)

Recent Judicial Decisions

■ Melville gave his daughter Jane a check for \$101,000 for the purchase of a residence. The check was drawn on Melville's bank, Morgan Guaranty, and was payable to the seller of the residence. Jane's attorney forged her endorsement, collected the proceeds from his bank (Chemical) and stole the proceeds. Jane applied to the client protection fund and was reimbursed the fund's maximum award, \$100,000.

The protection fund, as subrogee of Jane, sued Morgan Guaranty for the tort of conversion. Morgan sued Chemical for its breach of warranty of good title to the check. Held: (1) summary judgment granted to the fund against Morgan for \$101,000, plus interest; (2) cross-judgment granted to Morgan against Chemical (the depository bank) in the amount of the fund's judgment; and (3) New York cases construing the Uniform Commercial Code do not authorize an award of an attorney's fee to Morgan. *Lawyers' Fund for Client Protection v. Morgan Guaranty*, 1999 N.Y. App.Div. Lexis 2516, 2520 (2nd Dept. 3/15/99).

■ Claimant engaged attorney to assist him in the purchase of several commercial real estate parcels between 1987 and 1993. Attorney was disbarred and sentenced to prison in May 1994, for unrelated thefts in the practice of law. Claimant applied to client protection fund in May 1995, seeking reimbursement of \$200,000 loss, which he claimed was a down payment in a real estate transaction that had been entrusted with the dishonest attorney in June 1992. Fund's investigation established that claimant had not complained to district attorney about the theft; and that he could not provide contract of sale, or related documents. Trustees declined an award of reimbursement. A subsequent lawsuit against the fund which alleged that the Trustees' decision was illegal, arbitrary and capricious has been rejected by trial and appellate courts. *Matter of Bluth v. Lawyers' Fund for Client Protection*, 1999 N.Y. App.Div. Lexis 2198 (2nd Dept. 3/8/99).

■ The NY Lawyers' Fund restored \$69,154 to an infant's trust, and sued the lawyer's bank on a forged endorsement of checks paying life insurance proceeds to the infant's trust. An appellate court ruled that the fund (as subrogee of the trustee) had standing to pursue a contract cause of action against the lawyer's New York City bank, in upstate Albany County, under 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. *Lawyers' Fund v. Gateway State Bank*, ___ A.D.2d ___, 658 N.Y.S.2d 705 (3rd Dept. 1997).

■ Further proceedings in the trial court have resulted in summary judgment to the fund, against the depository bank, on causes of action in contract, unjust enrichment, and money had and received. The trial court rejected the bank's defenses that it had acted in accordance with reasonable commercial standards when it failed to require a signature verification or a guarantee of the trustee's endorsements on the checks. The court found that the bank economically benefitted from its relationship (and bounced checks) with the dishonest attorney. It rejected the bank's claim to be a holder in due course, and held that the bank had a duty of inquiry as to whether the attorney was involved in a fraud against his fiduciary. The court's 17-page opinion provides a thorough survey of the commercial law when a fund seeks restitution from a depository bank on a forged endorsement. *Lawyers' Fund v. Gateway State Bank*, ___ Misc.2d ___ (Sup. Ct. Albany Co. 1999).

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Is not the reputation of your profession worth:

- 96 cents a week; or
- one beer every two weeks; or
- one cocktail for a client every 11 weeks; or
- one lottery ticket a week; or
- two thirds of a postage stamp a day???

My advice to funds with skimpy annual assessments: try a \$50 assessment and couple it with an outreach effort to the bar that demonstrates what the fund does; how many people it helps; how many lawyers get disbarred only as a result of the claims and, particularly, how much it improves the reputation of the profession. You will be amazed how little resistance you will encounter thereafter. ■

Many thanks for this wise counsel to Arthur R. Littleton, Counsel and former Chair of the Pennsylvania Lawyers Fund for Client Security.

Managing a Catastrophe

The Pennsylvania Lawyers Fund for Client Security recently completed the disposition of more than 100 claims against one attorney, many of which presented interesting and challenging issues. The fund ultimately approved awards of \$1.3 million to 91 claimants. One award provides the fund with a subrogated interest in a potential constructive trust involving the proceeds of a life insurance policy that may have been purchased with stolen client money.

The lawyer's activities came to light as a result of Pennsylvania's overdraft notification rule. When the attorney knew he was about to be discovered, he took his own life, leaving behind many confused, angry and financially strapped people in his community.

His clients had many immediate concerns regarding their missing funds. They were initially advised to file claims against his estate with the county probate court. When the constructive trust issue arose, claims had to be filed in a judicial proceeding to protect the clients' rights. Claims were also filed with the Pennsylvania fund. It will not surprise that confusion abounded within the class of victims.

The dishonest attorney practiced in western Pennsylvania in a community with a population of about 120,000. He had a general practice, and his clients came from all walks of life. They included doctors, business executives, and single parents. He frequently advised clients to liquidate their assets and entrust the funds with him. He advised divorce clients that their funds would be protected from seizure by a spouse, or "frozen" pending resolution of the divorce. Real estate clients were advised that their funds were required by the bank as equity, or would be used to satisfy existing mortgages. Business clients were assured that their funds would be used to pay liens or were needed as good-faith bargaining deposits.

The Trustees of the fund determined, after individual investigation, that nearly all the claims merited reimbursement. However, there were two claims where the documentation indicated that the claimants were likely hiding assets from spouses. In both cases, several hundred thousand

dollars were given to the lawyer over a period of years. The relationships included trips to Switzerland. There was testimony that estranged spouses were unaware of the transfer of funds to the lawyer's escrow account. In evaluating these claims, the Trustees applied a "clean-hands" standard: claimants should not be reimbursed for funds which were knowingly used in an unethical, and quite possibly, an illegal activity. The judge in the constructive trust proceeding reached a similar conclusion, which is now being litigated in the appellate courts.

The constructive trust proceeding was preliminarily settled with the fund's recovery pegged at \$600,000, slightly less than half of its awards, but more than half of the distributable assets. More important, is the fact that most of the victims were made whole, at least in terms of principal. This would not have been the case but for the commitment of the Pennsylvania bar and courts to protecting law clients. ■

Many thanks for this article to Kathryn J. Peifer, Administrator of the Pennsylvania Lawyers Fund for Client Security.

Connecticut Opens New Protection Fund

Law client protection in Connecticut has been shifted from the Connecticut State Bar Association to a Client Security Fund Committee organized under the authority of the judicial branch of Connecticut. The reorganized fund opened on January 1, 1999, and will shortly begin the collection of its principal source of revenue: a \$75 annual assessment on all active members of the bar, including judges. Connecticut's bar numbers 27,000.

Reimbursement claims will be determined by a 15-member committee of lawyers, laymen, and judges appointed by Connecticut's Chief Justice. Seven affirmative votes are needed for an award. "Dishonest conduct" is defined to include the refusal to refund an unearned legal fee; and to exclude dishonesty in "the provision of investment services" to a claimant. The committee's rules currently establish no maximum limit on awards. The fund's offices are at 287 Main St., East Hartford, Ct 06118-1885. Contact: Christopher G. Blanchard, Staff Attorney, at 860/568-3450. ■

Memberships Available

Express your commitment to professional responsibility. Join NCPO. Membership contributions are tax deductible: organizations (\$200); individuals (\$25). New memberships (and renewals of charter memberships that expire on April 30, 1999) should be sent to NCPO's Treasurer: Isaac Hecht, c/o Hecht & Chapper, Esqs., 315 No. Charles St., Baltimore, MD 212-4325.

Chief Justices Adopt Client Protection Fund Standards

The Conference of Chief Justices has approved “A National Action Plan on Lawyer Conduct and Professionalism”. The Action Plan contains recommendations to the high courts of each state to assist them in the exercise of their regulatory authority over the legal profession.

With respect to client protection funds, the Action Plan provides:

The state’s system of lawyer regulation should include a Lawyers’ Fund for Client Protection to shield legal consumers from economic losses resulting from an attorney’s misappropriation of law client and escrow money in the practice of law. Rules or policies of the appellate court of highest jurisdiction should:

- Provide for a statewide client protection fund;
- Require that the fund substantially reimburse losses resulting from dishonest conduct in the practice of law;
- Finance the fund through a mandatory assessment on lawyers;
- Designate the fund’s assets to constitute a trust;
- Appoint a board of trustees, composed of lawyers and lay person, to administer the fund; and
- Require the board of trustees to publicize the fund’s existence and activities.

Comment

An effective client protection fund provides a state court system and the legal profession with a unique opportunity to promote public confidence in the administration of justice and the integrity of the legal profession. Client protection funds cover losses that are not covered by malpractice insurance or individual restitution. They do not compensate for neglect or matters like fee disputes. Fund procedures should be uncomplicated and prompt, and should provide significant reimbursement to every eligible victim.

The key to a fund’s effectiveness is a broad-based financing structure, and its administration under the aegis of the judiciary. To ensure adequate financing, the highest court of each state should provide for the administration of a client protection fund as a trust fund by a board of trustees appointed by the judges of the court. The fund should be financed by the legal profession through assessments on lawyers that are sufficient (based on the historical claims experience in that jurisdiction) to reimburse eligible claimants to the maximum extent feasible. The assessment should be fixed

by court rule or, if local law requires, authorizing legislation. The trustees should be required to coordinate its procedures with the state’s lawyer discipline agencies, and to publicize the existence and operations of the fund in its efforts to protect legal consumers from dishonest conduct in the practice of law. ■

Copies of the National Action Plan can be obtained from the ABA Center for Professional Responsibility in Chicago.

How Would You Resolve These Claims?

Rabbi Mark Rothchild and his spouse Lorraine, a homemaker, decide to petition the local Bankruptcy Court for a discharge of their debts pursuant to Chapter 7 of the Bankruptcy Code. Rabbi Rothchild retains sole practitioner Roger Smith as their attorney. Midway during the proceeding, Rabbi Rothchild dies. Smith discovers a \$100,000 life insurance policy, which designates Lorraine as sole beneficiary. Smith counsels Lorraine to deliver the proceeds to him, which he promises to invest as a trust for her and her three school-age children. Smith does not disclose the insurance proceeds to the Trustee in bankruptcy. The Bankruptcy Court determines that the Rothchilds have no assets, and discharges their debts.

Smith, who is heavily in debt himself, misappropriates the \$100,000 and is found dead in a New Jersey canal. Lorraine consults an attorney, who files reimbursement claims on behalf of Lorraine and each of three Rothchild children. The Bankruptcy Trustee learns of the life insurance and moves to re-open the bankruptcy case. She serves a demand on the client protection fund that it turn over to her, as an asset of the bankruptcy estate, all reimbursement that is payable by the fund as a result of Smith’s theft of the life insurance proceeds. She threatens suit in the federal courts.

Post your determination and analysis on NCPO’s Internet site. Select the Bulletin Board link on the Home Page menu: www.nylawfund.org/ncpo.

ABA Client Protection Forum # 15

The ABA's forum will be held on June 4 and 5 at the Hilton La Jolla Torrey Pines resort in California. Panels will address mandatory malpractice insurance; mediation and arbitration of client-attorney disputes; client protection funds as remedies of last resort; the role of a trustee in administering a fund; and difficult claims. Contact: ABA Center for Professional Responsibility.

Midwest NCPO Workshop Ahead

Preliminary planning is underway for NCPO's third regional workshop, to be held in Chicago in the Autumn of 1999. The Illinois Client Protection Fund will host the workshop. Eileen W. Donahue, NCPO's Vice-President for the Midwest Region, has volunteered to take charge of planning. Please call Eileen to help, and with suggestions for the workshop's agenda. 312/565-2600.

With Friends Like This

Isaac Hecht, long-time Trustee and Treasurer of the Maryland Client's Security Fund (and a national treasure, to boot) has authored, "What is the *National Client Protection Organization*" published in the **Bar Bulletin** of the Maryland State Bar Association (9/15/98). Isaac serves as NCPO's Treasurer and oversaw NCPO's incorporation in Maryland. Isaac also secured, *pro bono publico*, the expert services of a Maryland colleague, Frank M. Chapper, Esq., to secure tax-exempt status for NCPO. As Isaac points out in his article, reimbursing clients is not only the "right thing to do"; it's the "smart thing to do" when it comes to protecting the reputation of the legal profession for its integrity.

ABA Salary Survey

The ABA Center for Professional Responsibility has published its survey of salaries paid administrators of client protection funds in the United States and Canada. In large jurisdictions (52,100 plus lawyers), the average salary for a lawyer-administrator is \$70,578. In medium jurisdictions (17,700 plus), the average salary is \$71,000. In smaller jurisdictions (3,500 plus), it's \$61,850. The range for non-lawyer administrators is \$41,760 to \$29,600. Contact: ABA Center for Professional Responsibility.

And Colorado Makes it 51!

The Colorado Supreme Court is establishing a client protection fund to be financed by an \$18 annual assessment on the 20,000 members of the Colorado bar. There are now funds in each of the United States and the District of Columbia.

ABA Creates Electronic Bulletin Board

The ABA Standing Committee on Client Protection has established a "listserve" for client protection funds throughout the United States and Canada. The "listserve" is an electronic bulletin board to post, and secure, information from the client-protection community. There is no charge for the service. Contact: ABA Center for Professional Responsibility.

Arizona Adopts Bonding Rules

The Arizona Supreme Court has promulgated standards for court-appointed fiduciaries. The Private Fiduciary Certification Rules require the licensing and bonding of persons who serve as guardians, conservators and personal representatives for a fee in non-family engagements. The Rules include training programs. They are intended to ensure that Arizona's elderly, mentally incapacitated and other vulnerable citizens have trained and certified individuals managing their financial affairs, medical decisions and other vital matters. The program is the first of its kind in the United States. Contact: Catherine Robbins, Program Coordinator, 602/542-9586, or visit the Rules on the Internet: www.supreme.state.az.us/aoc/fiduc/

New York Goes Excelsior

The Trustees of the New York Lawyers' Fund on March 10, 1999, increased the maximum limit on awards from \$100,000 to \$200,000, effective January 1, 1999. In the calendar year 1998, the Trustees approved 415 awards of reimbursement. They totaled \$6 million, and fully reimbursed 410 claimants, or 99 percent of all eligible victims. The fund's new \$200,000 in coverage will maximize victim reimbursement in large thefts from estates and real property transactions.

Malpractice Insurance Disclosure in South Dakota

The Supreme Court has amended South Dakota's Rules of Professional Conduct to require written disclosure to clients whenever a lawyer or law firm is not covered by malpractice insurance. The disclosure is mandated on the firm's letterhead if the policy limits are less than \$100,000, or if the policy lapses or is terminated. The disclosure is also required in all written and media advertisements. The new rules are effective January 1, 1999. Similar policies have been enacted in Alaska. See *The Client Protection Webb*, Vol. 2, No. 1, p. 5 (1/99).

Chutzpah

According to **The National Law Journal**, a sole practitioner referred 40-50 clients to Florida's client protection fund for reimbursement of their personal injury settlements. The lawyer reportedly told his clients that his financial records were "in serious disrepair", and that prevented him from issuing them their checks. The protection fund required the clients to pursue their civil remedies. As a result, a bankruptcy lawyer has filed a Chapter 7 petition on the clients' behalf to pursue their former lawyer's assets. "He gives new meaning to the word chutzpah," the clients' attorney told the Bankruptcy Court.



The Client Protection Webb

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

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