LAWYERS' ETHICS: ESCROW ACCOUNTS

Theodore Roosevelt American Inn of Court

December 20, 2017

Presented By:

Matthew K. Flanagan, Chair

Hon. Leonard Austin

Hon. Peter Skelos

Debora G. Nobel

Omid Zareh

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Speaker Biographies

JUSTICE LEONARD B. AUSTIN is a graduate of Georgetown University in 1974 and Hofstra University School of Law in 1977. Justice Austin engaged in the private practice of law until his election to the Supreme Court Bench in the Tenth Judicial District in 1998. He was reelected in 2012.

In his private practice, Justice Austin focused primarily on complex commercial litigation, matrimonial and family matters, personal injury and real estate matters. In 1980-81, he served as counsel to the Speaker of the New York State Assembly. In that capacity, he was assigned as counsel to the Agriculture and Commerce and Industry Committees.

Upon his election to the Bench, Justice Austin was assigned to a Dedicated Matrimonial Part in Suffolk County (1999) and a Matrimonial and Commercial Part in Nassau County (2000). In October 2000, and continuing until his elevation to the Appellate Division, Justice Austin presided in a Commercial Part. He was selected to serve as the Chairman of the Commercial Division Rules Committee and authored the Uniform Commercial Division Rules (22 NYCRR 202.70). Since 2014, he has been a member of the Chief Judge's Commercial Division Advisory Council.

In March 2009, Justice Austin was appointed to the Appellate Division for the Second Judicial Department by Governor David Paterson.

Justice Austin is currently a member of the Pattern Jury Instructions Committee. He has served on the Office of Court Administration's Matrimonial Practice and Commercial Division Curriculum Committees. He is a member of the New York State, Florida, Nassau County, Suffolk County, and New York State Women's Bar Associations. In addition, he was the President of the American College of Business Court Judges, the Presiding Member of the Judicial Section of the New York State Bar Association and the President of the Theodore Roosevelt American Inn of Court.

Over the years, Justice Austin has authored several articles dealing with Consumer Class Actions, Equitable Distribution and New York City's Forfeiture Law. He is a frequent lecturer in the fields of appellate, commercial and matrimonial law and practice. Since 2002, he has been an Adjunct Professor of Law at the Maurice A. Deane School of Law at Hofstra University.

April 2016

Debora G. Nobel

Debora G. Nobel is an Associate in the Medical Malpractice Group at Shaub, Ahmuty, Citrin & Spratt, LLP in Lake Success, N.Y. She has devoted her legal career to defending all disciplines of health care providers in malpractice litigation.

Debora is admitted to the New York bar (1980), to the United States District Courts for the Eastern and Southern District of New York (1980) and to the Supreme Court of the United States (1985). She is a graduate of New York Law School (J.D. 1979), the Wagner School of Public Service of New York University (M.P.A. in Health Policy and Administration 1974) and Yeshiva University (B.A. 1972, magna cum laude).

She currently serves as Secretary on the Executive Board of the Theodore Roosevelt American Inn of Court.

Matthew Flanagan is a 1989 graduate of Fordham University and received a Juris Doctorate degree from St. John's University School of Law in 1992. He is a skilled litigator with extensive trial and appellate experience in the area of legal malpractice defense, professional liability and general litigation. He has successfully argued numerous appeals in the Appellate Divisions for the First, Second and Third Departments, and New York's highest court: the Court of Appeals.

Mr. Flanagan has been named annually to the New York *Super Lawyers* list as one of the top attorneys in the New York Metropolitan area since 2012, and has been awarded a rating of AV Preeminent™ by Martindale-Hubbell. The Rating is the Highest Possible Rating in both Legal Ability and Ethical Standards, and was awarded following a Peer Review Rating Process, which included surveys of judges and other attorneys. He has also been named annually as one of the top professional liability and legal malpractice defense attorneys on Long Island by LexisNexis Martindale-Hubbell, and has been given an AVVO rating of "Superb" (10.0 out of 10.0).

Mr. Flanagan is admitted to practice before the Courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit. He is a member of the American Bar Association, New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt American Inn of Court.

Mr. Flanagan is a frequent lecturer regarding legal malpractice prevention and defense, and ethics and professional liability.

Matthew K. Flanagan, Esq

Partner

Catalano Gallardo & Petropoulos, LLP

100 Jericho Quadrangle

Suite 326

Jericho, New York 11753

(516) 931-1800

mflanagan@cgpllp.com

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Omid Zareh

Mr. Zareh is a founding partner of Weinberg Zareh Malkin Price LLP.

He focuses on the needs of executives and their companies in corporate planning and all phases of complex, commercial arbitration and litigation. He advises in varied areas of law including attorney professional responsibility, technology, intellectual property, real property, and contractual and corporate disputes. His clients range from law firms, entrepreneurs, start-up companies, established financial companies, and seasoned investors.

Mr. Zareh is a member of the bars of New York State and New Jersey, as well as the Federal Circuit. He is an active member of the NYU Law Alumni Association (a former Vice President), the Long Island Entrepreneurs Group where he serves as General Counsel currently, and the Nassau County Bar Association (former Chair of the Ethics Committee and former Co-Chair of the Intellectual Property Committee). He also has participated in a number of community and professional organizations, and often lectures about the law. Mr. Zareh also serves as an officer of real estate holding companies. While attending New York University Law School, Mr. Zareh was the Legal Theory Editor of the Review of Law and Social Change.

Weinberg Zareh Malkin Price LLP

45 Rockefeller Plaza, 20th Floor
New York, New York 10111
212-899-5470 (Main)
ozareh@wzmplaw.com

Follow the Money

Escrow Accounts: The Dangers of Excessive Delegation and Deference

By Matthew K. Flanagan

Tending to a firm's escrow account does not add to a firm's profitability, and attorneys who can avoid dealing with their firm's escrow accounts generally do so. Tasks associated with maintaining an escrow account are menial, often thankless and almost invariably non-billable. Many attorneys delegate such tasks to trusted staff members. Others defer to the firm's managing partner or to partners who use the escrow account more frequently.

Escrow account signatories who defer or delegate to others do so at their own peril. As the Court of Appeals reminded us in *In re Galasso*, "[f]ew, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds."[1] Although *Galasso* did not establish "a new or heightened degree of liability for attorneys," the Court made it clear that, when client funds are involved, a "high degree of vigilance" is required.

Disciplinary proceedings against attorneys based on their failure to oversee escrow accounts or to review escrow account records are not uncommon. This article will discuss the rules governing escrow accounts and the extent to which tasks related to the maintenance of escrow accounts can be delegated. It will look at situations in which attorneys who are signatories on escrow accounts have been found to have breached their duty to safeguard client money by failing to detect misconduct by others who had access to the accounts. It will also address the oversight lessons to be learned from *In re Galasso*.

A Brief Review of the Rules Governing Escrow Accounts

Thorough and accurate recordkeeping for attorney escrow accounts "is the linchpin upon which [courts], clients and the public must rely to assure the preservation of funds belonging to clients or other persons in a lawyer's possession."[2] That principle is embodied in Rule 1.15 of the Rules of Professional Conduct, which contains precise requirements regarding records that must be maintained for attorney escrow accounts. Pursuant to Rule 1.15(d), attorneys must maintain records of all deposits into, and withdrawals from, any escrow accounts. The records must "specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement." The records must also identify all individuals for whom money is being held, the amount held for each individual, the date or dates on which the money is disbursed, to whom it was disbursed, and a description of each disbursement.[3] The attorney must also maintain "all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips." All entries in the records must, of course, be accurate.

Failure to maintain records in accordance with the requirements of Rule 1.15 is deemed a violation of the Rules of Professional Conduct and will subject the attorney to disciplinary proceedings.[4]

The Delegation of Bookkeeping Tasks for Escrow Accounts

For many firms, the task of maintaining books and records for an escrow account is more than one attorney

Matthew K. Flanagan is a partner in the Jericho, NY law firm of Catalano, Gallardo & Petropoulos, LLP, where his practice is concentrated on the defense of legal malpractice and attorney liability matters. He is a frequent lecturer regarding ethics, legal malpractice defense, and professional liability matters. He is a graduate of St. John's University School of Law.

can handle. Some attorneys and firms, such as those who act as settlement agents for banks, can receive and disburse hundreds of thousands of dollars of client funds on a daily basis and, out of necessity, must delegate some bookkeeping tasks associated with maintaining escrow accounts.

It is permissible to delegate banking and bookkeeping responsibilities for an escrow account to a non-attorney. The Court of Appeals said as much in *In re Galasso*,[5] and Hon. A. Gail Prudenti, former Presiding Justice of the Appellate Division, Second Department, and currently the Chief Administrative Judge for the Courts of the State of New York, called the delegation of banking and bookkeeping responsibilities "perfectly permissible and often inevitable."[6]

The delegation of recordkeeping and other tasks relating to escrow accounts to others, be they lawyers or nonlawyers, must be done with care. Rule 5.3 of the Rules of Professional Conduct provides that "[a] lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate,"[7] and Rule 5.1 requires lawyers with management responsibility in a law firm to "make reasonable efforts" to ensure that other lawyers in the firm comply with the Rules.[8]

Complete deference to a co-signatory can lead to a disciplinary investigation when problems occur with the account. Under Rule 1.15(e), only attorneys can be signatories on escrow accounts, but attorneys are not free to assume that, because a co-signatory is an attorney, he or she will abide by the requirements of Rule 1.15. Thus, an attorney can be subject to discipline even where he or she did not convert or commingle funds, was not aware that a co-signatory converted funds or mishandled the account, and reported the problem as soon as it was discovered. One such instance was seen in *In re Cardoso*.[9] There, the respondent, a criminal attorney, left the handling of his firm's escrow account to his partner, who handled real estate work. Upon discovering improprieties in his partner's handling of the account, the respondent dissolved the partnership and reported the matter to the Grievance Committee. However, because he had admittedly failed to review the firm's financial and bookkeeping records for a year, a disciplinary proceeding was brought against him, and he received a public censure.

The public censure in *Cardoso* was consistent with the discipline in other cases in which the offending attorney had no disciplinary history and the co-signatory's misappropriation or mishandling of the account was reported promptly upon discovery.[10]

More egregious instances of attorneys relinquishing control of escrow accounts have led to more serious discipline. The most extreme example is *In re Duboff*,[11] in which the attorney agreed to act as a mortgage loan settlement agent for Island Mortgage Network, which would later be shut down by federal authorities. Attorney Duboff permitted the comptroller of Island Mortgage to have exclusive control of his signature stamp and to issue all checks from the attorney's escrow account using the stamp, with little or no supervision from Duboff. During the time that Island Mortgage controlled Duboff's account, there were periods when the accounts had an insufficient balance to meet the attorney's escrow obligations, and more than one individual failed to receive loan closing funds disbursed from the account. Duboff received a five-year suspension based on a number of charges, including allowing a non-attorney to issue checks from his attorney escrow account, allowing the comptroller of Island Mortgage to issue checks from the account with little or no supervision and delegating responsibility to review monthly statements to others, without instructing them to advise him of any bounced checks, stop payment orders or negative balances.

In re Galasso caused concern among some members of the Bar because the respondent attorney, who did not knowingly surrender control of his escrow account, was suspended when it was discovered that money had been stolen from the account by one of his employees. The respondent attorney, Galasso, had agreed to hold $4.8 million in an interest-bearing escrow account on behalf of a client who was involved in a matrimonial proceeding.[12] Galasso and his partner completed an application to open an escrow account at a local bank, and Galasso gave the application to his office manager/bookkeeper, who also happened to be his brother.[13] Galasso's brother altered the application to include himself as a signatory and to permit Internet transfers.[14] The brother proceeded to withdraw more than $4 million from the account and concealed his transfers by having the bank send the actual account statements to a post office address, and then sending fabricated statements to the firm.[15] The brother also had access to the firm's primary escrow account and made unauthorized withdrawals of funds from that account as well, resulting in hundreds of thousands of dollars in losses for two of the firm's other clients.[16]

The disciplinary charges against Galasso were based on his failure to deliver the funds held in escrow to the firm's client, and also on his failure to properly supervise his brother, a non-lawyer employee of his firm, in violation of Disciplinary Rule 1-104(d)(2), which was a predecessor to Rule 5.3 of the Rules of Professional Conduct.[17] Galasso maintained that he did not knowingly relinquish control over his firm's escrow account, that he periodically reviewed documents showing the balances in the firm's escrow accounts and that he unwittingly relied on the fabricated bank statements created and sent to him by his brother. He also pointed out that the district attorney who prosecuted his brother had submitted a letter stating that no one else at the firm knew of Galasso's brother's thefts and that nothing in the fabricated documents created by Galasso's brother would have raised any suspicions about the accounts.

Galasso was suspended by the Appellate Division, Second Department, for two years.[18] After the Court of Appeals granted Galasso leave to appeal, several bar associations sought to file *amicus curiae* briefs in support of Galasso's appeal, with some asserting that strict liability had been imposed and others asserting that suspension was too harsh a penalty.[19] The Court of Appeals, in affirming the charges against Galasso, rejected the arguments of Galasso and the bar associations and found that Galasso had "ceded an unacceptable level of control" over the firm's escrow accounts to his brother.[20]

The Lessons of *Galasso*

While some have maintained that the Court of Appeals's decision in *In re Galasso* imposes a strict liability standard,[21] the Court did not establish liability without fault, and a closer look at the facts of *Galasso* confirms that. The decision simply reaffirms that an attorney's fiduciary duty to safeguard client funds is non-delegable, and that attorneys, while delegating tasks associated with the maintenance of escrow accounts, cannot ignore their obligation to oversee the account and supervise those with access to it.

Nor did the Court impose financially onerous requirements on attorneys who safeguard client funds, as others have maintained.[22] To the contrary, the Court suggested specific oversight measures which, for most attorneys and firms, should not result in significant added costs or expenditures of time.

The oversight measures suggested by the Court were those taken by Galasso's firm after the thefts – measures which, the Court said, would have "mitigated, if not avoided, the losses," if they had been implemented earlier.[23] The suggested measures, and the other lessons of Galasso, are outlined below.

Perform Periodic Reviews and Look Beyond Your Firm's Internal Records

Galasso's brother had access to both the special escrow account created for the money held for the firm's matrimonial client and the firm's primary escrow account, and he stole from both. While he fabricated bank statements for the former account to conceal his thefts, he did not have to do so for the primary account because no one ever asked him for the bank statements for that account.[24] He prepared documents purportedly reflecting the balance in the primary escrow account, without providing the corresponding bank statements.[25]

"Personal review of the bank statements" was one of the post-theft measures adopted by the firm that the Court said might have prevented the thefts.[26] The Court did not specify how frequently account records should be reviewed, but it is suggested that escrow accounts should be reviewed monthly or quarterly. Although the periodic reviews should include an examination of internal records reflecting deposits and disbursements and the information required by Rule 1.15(d), the reviews should not be limited to those records. The corresponding bank statements must also be reviewed. Although, as *Galasso* demonstrates, those statements can be manipulated, it is more time-consuming and requires a more sophisticated thief, and there are ways to ensure the accuracy of the statements (by, for example, reviewing the statements online).

Have Direct Contact With Your Bank

The second post-theft measure taken by Galasso's firm, and tacitly endorsed by the Court, was creating direct contact with the firm's bank.[27] Galasso's brother was permitted to open the accounts himself, and thus, unbeknownst to Galasso, was able to have himself placed on one of the escrow accounts as a signatory.[28] He was also able to submit an application that permitted Internet transfers from the fund, even though the original application signed by Galasso did not permit such transfers.[29]

Once the escrow account was opened, Galasso's brother became the "conduit for information from the firm's bank."[30] If deposits were to be made, it was the brother who made them. When a discrepancy regarding the interest rate was raised by the accountant for the matrimonial client for whom the $4.8 million was being held, Galasso assigned his brother to address it with the bank.[31] Counsel for the Grievance Committee argued that, had Galasso made a single call to the bank when the discrepancy was pointed out, the fraud would have been detected and the theft of $3 million would have been prevented.[32]

Direct contact with the bank can consist of nothing more than personally opening the firm's escrow account and then periodically reviewing account statements online. The Court of Appeals did not suggest that the attorney himself must personally deposit each check at the local branch of his bank, but if any questions relating to the account are raised, either by the client, a staff member or an outside auditor, the attorney himself should contact the bank.

Make a Big Deal About Any Discrepancy

"A discrepancy in an escrow account should, at a minimum, be alarming to a reasonably prudent attorney."[33] So said the Court of Appeals in *Galasso*, and it may be the most instructive statement in the decision. The Grievance Committee's counsel argued that, when the discrepancy was noted by the client's accountant, Galasso asked his brother to investigate it and then took no steps to verify his brother's explanation.[34] That failure, according to the Grievance Committee, was part of the reason that the brother's wrongdoing continued to go undetected.[35]

Discrepancies in balances can and do occur frequently, and in most cases, they are the result of innocent errors. But attorneys should never assume that they are. Any discrepancy must be investigated thoroughly by the attorneys who are signatories on the account, not by a subordinate. Although the individual or individuals who are primarily responsible for bookkeeping tasks should

be consulted, they should not be relied on to conduct any investigation themselves. The discrepancy could be an indication of wrongdoing by those individuals, or incompetence. In either case, it is a potential problem for the signatory attorneys who, unlike the subordinate, are the ones charged with the fiduciary duty.[36]

Conclusion

When money goes missing from an attorney's escrow account, the attorney will not find a sympathetic ear at the Appellate Division or the Court of Appeals. Attorneys must exercise vigilance in safeguarding client funds and ensuring that client funds are not lost because of the negligence or misappropriation of co-signatories or employees, or the criminal acts of others. If a client who entrusts money to an attorney loses that money, the Grievance Committee and the courts will focus squarely on the oversight measures the attorney had in place, as well as the training and supervision of staff members involved in the maintenance of the accounts. Reliable oversight measures will leave the attorney in a better position to defend, or even avoid, a disciplinary proceeding in the unfortunate event that money being held for a client is misappropriated or stolen by another but, more important, the measures will help prevent client losses from occurring in the first place. ■

1. *In re Galasso*, 19 N.Y.3d 688, 694 (2012).
2. *In re Sack*, 74 A.D.3d 1697, 1698 (3d Dep't 2010).
3. 22 N.Y.C.R.R. § 1200.15(d)(1)(ii).
4. 22 N.Y.C.R.R. § 1200.15(j).
5. *Galasso*, 19 N.Y.3d at 695.
6. Hon. A. Gail Prudenti, *Be Wary of Delegating Bank and Bookkeeping Responsibilities*, 35 Westchester B.J. 57, 58 (2008).
7. 22 N.Y.C.R.R. § 1200.5.3(a).
8. 22 N.Y.C.R.R. § 1200.5.1(b)(1).
9. 152 A.D.2d 157 (2d Dep't 1989).
10. *See, e.g.*, *In re Marshburn*, 70 A.D.3d 231 (1st Dep't 2009); *In re Linn*, 200 A.D.2d 4 (2d Dep't 1994).
11. 21 A.D.3d 206 (2d Dep't 2005).
12. 19 N.Y.3d at 691.
13. *Id.* at 692.
14. *Id.*
15. *Id.*
16. *Id.* at 692–93.
17. 94 A.D.3d 30, 31–38 (2d Dep't 2012).
18. *Id.* at 37.
19. *See* Andrew Kershner, *Bars Rally Around Suspended Attorney*, N.Y.L.J., Mar. 29, 2012.
20. 19 N.Y.3d at 694.
21. *Id.*
22. *Compare* David S. Hammer & Richard M. Maltz, *Escrow Accounts After "Galasso": You Are Your Brother's Keeper*, N.Y.L.J., July 29, 2014 (arguing that *Galasso* "imposes (or appears to impose) a heavy new burden of financial oversight").
23. *Galasso*, 19 N.Y.3d at 694.
24. *See* Brief for Petitioner-Respondent Grievance Committee for the Ninth Judicial District in *Matter of Galasso*, dated July 31, 2012 (Grievance Committee Brief) at pp. 43–47.
25. *Id.*
26. *Galasso*, 19 N.Y.3d at 694.
27. *Id.*
28. *Id.* at 692.
29. *Id.*
30. Grievance Committee Brief at p. 51.
31. *Id.* at p. 37.
32. *Id.* at p. 36.
33. *Galasso*, 19 N.Y.3d at 695.
34. Grievance Committee Brief at p. 37.
35. *Id.*
36. *Galasso*, 19 N.Y.3d at 695.

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THURSDAY
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15TH & WEST STREETS
MINEOLA, NEW YORK 11501
516.747.4464

ATTORNEY ESCROW

NASSAU ACADEMY OF LAW
DEAN'S HOUR, April 7, 2016

Presented by:
Chris McDonough Esq.
Omid Zareh Esq.

I Escrow corpus
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Program material:

Rules of Professional Conduct §1.15
Matter of Galasso
Matter of Wilson
Model Real Estate Escrow Agreement
NYSBA Opinion 1060
NYSBA Opinion 1030
NYSBA Opinion 90
NYSBA Opinion 983
NCBA Op 1993-3

Assortment of Censure opinions for unintentional conversion and bookkeeping errors.
Assortment of Suspension opinions for unintentional conversion and bookkeeping errors.

RULE 1.15:
PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," or "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the

disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney

trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Matter of Galasso
2013 NY Slip Op 01269 [105 AD3d 103]
February 27, 2013
Per Curiam
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, May 22, 2013

[*1]

In the Matter of Peter J. Galasso (Admitted as Peter John Galasso), an Attorney, Respondent. Grievance Committee for the Ninth Judicial District, Petitioner.

Second Department, February 27, 2013

On the Court's own motion, it is ordered that the decision and order on remittitur of this Court dated December 19, 2012 in the above-entitled matter is recalled and vacated, and the following decision and order on remittitur is substituted therefor:

APPEARANCES OF COUNSEL

Gary L. Casella, White Plains (*Eddie Still, Antonia Cipollone* and *Matthew Lee-Renert* of counsel), for petitioner.

Moran Karamouzis, Rockville Centre (*Grace Moran* of counsel), and *Galasso, Langione, Catterson & LoFrumento, LLP*, Garden City (*Jeffrey Catterson* of counsel), for respondent.

{**105 AD3d at 105} OPINION OF THE COURT

Per Curiam.

Upon review of whether the two-year suspension previously imposed remains an [*2]appropriate sanction in light of the Court of Appeals's opinion and order dated October 23, 2012, we conclude that the sanction remains appropriate. The modification of this Court's opinion and order dated February 21, 2012, dismissing charge five of the petition, which charge alleged that the respondent failed to comply with the lawful demands of the Grievance Committee, does not warrant a change in the sanction imposed.

In determining an appropriate measure of discipline to impose, this Court considered all of the mitigation proffered by the respondent including, but not limited to, the absence of venality; the lengths to which the respondent went to bring his brother to justice; the expense the respondent has borne seeking recovery for his clients' losses; and the substantial evidence of the respondent's good character.

Whether, and to what extent, attorneys are subject to discipline under circumstances where a defalcation was occasioned by someone other than the attorney within the attorney's firm, depends on a number of factors: (1) the subject attorney's partnership status and/or level of experience; (2) the presence (or absence) of "early warning signs" of financial improprieties, whether such signs were ignored and, if so, for how long; (3) whether the proper authorities were notified of defalcations upon their discovery; (4) the presence (or absence) of monetary loss to clients and the magnitude thereof; and (5) whether the attorney attempted to reimburse client losses caused by another (*see e.g. Matter of Dahowski*, 103 AD2d 354 [1984]; *Matter of Cardoso*, 152 AD2d 157 [1989]; *Matter of Forman*, 250 AD2d 116 [1998]; *Matter of Ponzini*, 259 AD2d 142 [1999], *mod* 268 AD2d 478 [2000]; *Matter of Felman*, 299 AD2d 15 [2002]; *Matter of Fonte*, 75 AD3d 199 [2010]; *Matter of Laudonio*, 75 AD3d 144 [2010]; *see also Matter of Jones*, 100 AD3d 57 [2012]). The foregoing factors were all considered in this matter, particularly the presence of "warning signs" and "red flags"; the extent of the clients' monetary losses; and the fact that there has been no reimbursement of the client losses caused by the respondent's brother.{**105 AD3d at 106}

The cases proffered by the respondent in support of his argument that he should be, at most, publicly censured, are inapposite. Unlike those cases, the respondent herein was charged with having been unjustly enriched by the use of clients' funds for his personal benefit, and that charge was sustained.

The most fundamental obligation of attorneys entrusted with client funds is the duty to safeguard those funds. As the Court of Appeals stated, that duty, if no other, is "crystal clear" and " 'a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed' " *Matter of Galasso*, 19 NY3d 688, 694 [2012], quoting *Matter of Holtzman*, 78 NY2d 184, 191 [1991]). We reiterate that the respondent failed to maintain appropriate vigilance over his firm's bank accounts, resulting in actual and substantial harm to clients.

Eng, P.J., Mastro, Rivera, Dillon and Angiolillo, JJ., concur.

Upon remittitur, it is

Ordered that the sanction of a two-year suspension imposed by this Court in the opinion and order dated February 21, 2012 is adhered to; and it is further,

Ordered that the suspension from the practice of law of the respondent, Peter J. Galasso, admitted as Peter John Galasso, shall commence on March 5, 2013, and shall continue until further order of this Court. The respondent shall not apply for reinstatement earlier than September 5, 2014. In such application, the respondent shall furnish satisfactory proof that

during said period he: (1) refrained from practicing or attempting to practice law, (2) fully complied with this opinion and order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11 (c) (2), and (4) otherwise properly conducted himself; and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, Peter J. Galasso, admitted as Peter John Galasso, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application, or{**105 AD3d at 107} any advice in relation thereto, and (4) holding himself out in any way as an [*3]attorney and counselor-at-law; and it is further,

Ordered that if the respondent, Peter J. Galasso, admitted as Peter John Galasso, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

Matter of Wilson
2013 NY Slip Op 06372
Decided on October 2, 2013
Appellate Division, Second Department
Per Curiam.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on October 2, 2013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

RANDALL T. ENG, P.J.
WILLIAM F. MASTRO
REINALDO E. RIVERA
PETER B. SKELOS
MARK C. DILLON, JJ.

2011-04227

[*1]In the Matter of Learie Richard Wilson, an attorney and counselor-at-law. Grievance Committee for the Tenth Judicial District, petitioner; Learie Richard Wilson, respondent. (Attorney Registration No. 3062130)

DISCIPLINARY PROCEEDING instituted by the Grievance Committee for the Tenth Judicial District. By decision and order of this Court dated June 30, 2011, the Grievance Committee for the Tenth Judicial District was authorized to institute and prosecute a disciplinary proceeding against the respondent based upon the acts of professional misconduct set forth in a verified petition dated May 3, 2011, and the issues raised by the petition and any answer thereto were referred to Norma Giffords, Esq., as Special Referee, to hear and report. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on July 26, 2000.

Robert A. Green, Hauppauge, N.Y. (Mitchell T. Borkowsky of counsel), for petitioner.
McDonough & McDonough, LLP, Garden City, N.Y. (Chris McDonough of counsel), for respondent.

OPINION & ORDER

PER CURIAM.The Grievance Committee for the Tenth Judicial District served the respondent with a verified petition dated May 3, 2011, containing three charges of professional misconduct. Following a hearing, the Special Referee sustained charge one, but declined to sustain charges two and three. The Grievance Committee now moves to confirm in part, and disaffirm in part, the Special Referee's report, and to impose such discipline as this Court deems appropriate. The respondent, by his attorney, moves to confirm in part, and disaffirm in part, the Special Referee's report. He urges that all charges be rejected, and that no discipline be imposed. We find that the Special Referee properly sustained charge one and that she properly declined to sustain charge three. However, we find that the Special Referee improperly declined to sustain charge two, and that charge two should have been sustained based upon the evidence adduced.

Charge one, as amended, alleges that the respondent engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation, and conduct adversely reflecting on his fitness as a lawyer, by aiding and abetting a client in deceiving a lender at a real estate closing by withholding material information from the lender, in violation of former Code of Professional Responsibility DR [*2]1-102(a)(4) and (7) (22 NYCRR 1200.3[a][4], [7]), as follows:

On or before December 16, 2008, Amarbin Ahmed retained the respondent to represent him and his company, Bluenur, Inc. (hereinafter Bluenur), in connection with the purchase of an investment property located in the Bronx (hereinafter the premises) from Gladys Carter. At that time, Carter was facing loss of the premises through foreclosure.

When Ahmed first met the respondent, Ahmed was already in possession of a contract of sale, which provided for a sale price of $385,000, a down payment of $25,000, and a balance of $360,000 due to Carter at closing. However, at the time the respondent was retained, Ahmed had not yet delivered the down payment of $25,000 to Carter or her

attorney. Nonetheless, Ahmed had already secured a commitment for a loan of $345,000 from a private money lender, Thomas Gubitosi, in Gubitosi's capacity as trustee of a trust entitled Thomas Gubitosi TTEE Marie Holdings, Inc., RET PSB FBO Thomas Gubitosi. The $345,000 loan was to be secured by a first mortgage on the premises (hereinafter the first mortgage).

In addition to the first mortgage, Ahmed had also secured a commitment from Gubitosi for a line of credit (hereinafter the construction line of credit) for up to an additional $90,000, to be available to Ahmed and Bluenur following the closing, for construction and renovations at the premises in connection with Bluenur's proposed sale to a third party. The construction line of credit also was to be secured by a mortgage on the premises.

The closing on the transaction was scheduled for December 16, 2008, at the offices of Gubitosi's attorneys in Farmingdale. Prior thereto, it was calculated that the balance due, out of pocket, from Ahmed and Bluenur to Carter at the closing, net of the first mortgage proceeds, would be $46,642 (hereinafter the balance due). The balance due comprised the $25,000 down payment, which still had not been delivered, plus an additional $21,642.

On or about December 16, 2008, the respondent accompanied Ahmed to the closing. However, Ahmed did not bring sufficient funds to cover the balance due. Rather, the respondent brought with him to the closing a Chase Bank official check in the amount of $21,642, payable to Carter. The remitter listed on the bank check was Lisa Kernahan, an owner or employee of Central Abstract, a title company. At all relevant times, the respondent was an owner of, or had an equitable interest in, Central Abstract, whose offices were located upstairs from the respondent's law office.

The $21,642 check was intended by the respondent to be either (1) a loan to Ahmed, for the purpose of assisting him in paying the balance due to Carter at the closing, or (2) the respondent's own investment in the premises. On or about December 16, 2008, the respondent produced the $21,642 check and showed it to the other parties at the closing, including Gubitosi's attorney. At some point during the closing, the respondent retook possession and control of the $21,642 check.

During the closing, the respondent and Ahmed met with Carter and her attorney outside of the presence of Gubitosi's attorney. In the course of that meeting, the respondent prepared

a handwritten note stating:"Learie R. Wilson, an attorney duly admitted to practice before the courts of New York, personally guarantee [sic] that I will deliver [$21,642] from the proceeds of the second mortgage of [$90,000] to Gladys Carter[.]

> "Amarbin Ahmed will deliver [$25,000] to Gladys Carter from the proceeds of the second mortgage of $90,000."

The respondent and Ahmed executed the handwritten note and delivered it to Carter, in lieu of paying the balance due at the closing. Gubitosi's attorney was not advised at the closing that Ahmed had failed to deliver the $25,000 down payment or pay the balance due. Moreover, Gubitosi's attorney also was not advised at the closing that the respondent had failed to deliver the $21,642 check to Carter, or that the respondent and Ahmed had signed and delivered a handwritten note to Carter promising to draw checks against the construction line of credit to pay Carter the balance due, after the closing. Finally, Gubitosi's attorney was not advised at the closing that Ahmed had failed to contribute any of his own funds toward the purchase of the premises.

At the closing, Ahmed, on behalf of himself and as president of Bluenur, executed a $345,000 balloon note and a mortgage, and delivered it to Gubitosi's attorney, in connection with [*3]the first mortgage. Ahmed, on behalf of himself and as president of Bluenur, also executed a $90,000 mortgage and an Equity Credit Line Agreement and Disclosure Statement, and delivered it to Gubitosi's attorney, in connection with the construction line of credit.

Paragraph "N" of the Equity Credit Line Agreement and Disclosure Statement stated:

> "The funding of this loan by [Gubitosi] is strictly conditioned upon [Ahmed] delivering to [Gubitosi] a contract of sale between [Bluenur] and Mahammed Alam of . . . Kissena Blvd., Flushing, NY 11355. The contract must provide for a down payment of 10% of the purchase price on contract and the contract must contain no mortgage contingency language. As the contract has not been provided to [Gubitosi] prior to closing, [Gubitosi] reserves the right to impose additional conditions prior to funding if [he] so elects[.]"

At the closing, Gubitosi's attorney disbursed the proceeds of the first mortgage in accordance with the requirements of the transaction. The evidence showed that, had Gubitosi or his attorney been advised that Ahmed had never delivered the $25,000 down payment or the balance due to Carter, or that Ahmed had never delivered the $21,642 check

to Carter, or that Ahmed intended to draw against the construction line of credit to pay the balance due, or that Ahmed had not contributed any of his own funds toward the purchase of the premises, they would not have agreed to finance the transaction or disburse the proceeds of the first mortgage.

At the closing, Carter executed and delivered a deed conveying title to the premises to Bluenur. At the conclusion of the closing, the respondent counseled and permitted Ahmed to execute a HUD-1 settlement statement, which the respondent knew was false in that it stated, among other things, that a $25,000 down payment had been made in connection with the transaction when, in fact, it had not been made. The respondent left the closing in possession of the $21,642 check.

Following the closing, Gubitosi refused to permit Ahmed to draw against the construction line of credit without submitting legitimate and proper construction invoices and/or the contract of sale required by item "N" of the Equity Credit Line Agreement and Disclosure Statement. The respondent and Ahmed failed to pay to Carter any of the balance due and defaulted on the first mortgage.

Charge two alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, prejudicial to the administration of justice, and adversely reflecting on his fitness as a lawyer, by exercising a lack of candor with the Grievance Committee during its investigation of allegations of professional misconduct against him, in violation of former Code of Professional Responsibility DR 1-102(a)(4), (5), and (7) (22 NYCRR 1200.3[a][4], [5], [7]), as follows:

On October 14, 2010, the respondent appeared at the offices of the Grievance Committee to be examined under oath in connection with the Grievance Committee's investigation of a complaint filed by Gubitosi. At the respondent's examination under oath, he falsely testified that Ahmed had, in fact, delivered the $25,000 down payment to Carter, when the respondent knew or should have known that no down payment had been delivered in the transaction. The respondent also falsely testified that the balance due was withheld from Carter at the closing as a result of Carter's eleventh-hour demand that she be permitted to remain in the premises following the closing, for six months, rent free. The respondent knew or should have known that Carter remained in the premises following the closing due to his and Ahmed's failure to pay her the balance due at or following the closing, as required

by the respondent's own handwritten note promising delivery of the funds.

Based upon the evidence adduced, including the respondent's admissions, we find that the Special Referee properly sustained charge one. We further find that the Special Referee properly declined to sustain charge three, since the Grievance Committee failed to establish that the respondent engaged in the improper conduct alleged in that charge. However, we find that charge two should have been sustained, since the Grievance Committee established that the respondent exercised a lack of candor by engaging in the conduct described above. The Grievance Committee's motion to confirm in part, and disaffirm in part, the Special Referee's report, is granted to the extent that charges one and two are sustained, and denied to the extent that charge three is not sustained. The respondent's motion to confirm in part, and disaffirm in part, the Special Referee's report, is granted to the extent that charge three is not sustained, and denied to the extent that charges one and two are sustained. [*4]

In determining an appropriate measure of discipline to impose, this Court has considered six character letters/affidavits offered by the respondent. This Court has also considered the respondent's prior disciplinary history, which includes an Admonition and an Admonition, Personally Delivered.

Under the totality of the circumstances, the respondent is suspended from the practice of law for a period of one year.
ENG, P.J., MASTRO, RIVERA, SKELOS and DILLON, JJ., concur.

ORDERED that the petitioner's motion to confirm in part, and disaffirm in part, the Special Referee's report, is granted to the extent that charges one and two are sustained, and denied to the extent that charge three is not sustained; and it is further,

ORDERED that the respondent's motion to confirm in part, and disaffirm in part, the Special Referee's report, is granted to the extent that charge three is not sustained, and denied to the extent that charges one and two are sustained; and it is further,

ORDERED that the respondent, Learie Richard Wilson, is suspended from the practice of law for a period of one year, commencing November 1, 2013, and continuing until further order of this Court. The respondent shall not apply for reinstatement earlier than May 1, 2014. In such application, the respondent shall furnish satisfactory proof that during said period he (1) refrained from practicing or attempting to practice law, (2) fully complied with

this opinion and order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11 (c)(2), and (4) otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, Learie Richard Wilson, shall desist and refrain from (l) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that if the respondent, Learie Richard Wilson, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f).

ENTER:

Aprilanne Agostino

Clerk of the Court

Return to Decision List

Joint Model Down Payment Escrow Agreement

Notice: The following is a draft escrow agreement prepared for the Board of Trustees of the Lawyers Fund for Client Protection of the State of New York. It is being circulated to members of the New York bar for comment. All comments and suggestions are welcome. They can be addressed to Frederick Miller, Esq., New York Lawyers Fund, 119 Washington Avenue, Albany, New York 12210. Telephone 800/442-3863 or E-Mail your comments to escrow@nylawfund.org. (7/97)

Down Payment Escrow Agreement
(For Residential Sales in New York State)

Escrow agreement between the buyer and seller of real property and their attorneys as escrow agents. The use of the singular in this agreement shall be deemed to include the plural, and vice versa, whenever the context requires. If more than one person is buying or selling the premises covered by this agreement, their obligations shall be joint and several.

The buyer and seller have entered into a contract to purchase and sell residential real estate. The premises to be conveyed to the buyer are located at:

As a term of the contract of sale, the buyer is obligated to provide the seller with a down payment on the purchase price, to be held in escrow.

To safeguard the down payment from loss, the buyer and seller, and their attorneys, agree to the escrow arrangement set forth in this agreement. For that purpose, this agreement designates the buyer and seller as "escrow beneficiaries"; their attorneys as joint "escrow agents"' and the buyer's down payment as the "escrow deposit".

Escrow agents acknowledge the receipt of the escrow deposit in the amount of $_____.

Escrow agents acknowledge their fiduciary obligations to the escrow beneficiaries to safeguard the escrow deposit in a special bank account, and to provide to them a complete accounting of all financial transactions relating to that escrow deposit.

Escrow agents will make no claim for compensation for their services as escrow agents.

Escrow agents will deposit the escrow deposit in a bank account with the following banking institution in the State of New York at its branch located at the following address:

No later than 10 business days after the date of this agreement, escrow agents will provide the escrow beneficiaries with written notice confirming the escrow deposit required by this agreement, the title and number of the bank account and, if such account is interest-bearing, the initial rate of interest.

[Consumer Notice: Section 778 of the New York General Business Law sets forth the fiduciary obligations of escrow agents in possession of down payments in the sale of residential real estate. Section 497 of the New York State Judiciary Law authorizes special escrow bank accounts for attorneys called Interest On Lawyer Accounts (IOLA). Bank interest which is earned on these IOLA deposits, which can include down payments in real estate transactions, is used by the State of New York to finance legal services for the poor and to projects to improve the administration of justice. Law clients having questions about these laws should discuss them with their attorneys.]

Upon closing, the escrow agents will deliver the escrow deposit to the seller, together with interest, if any. In the event the closing does not occur, the escrow agents will refund the escrow deposit to the buyer, together with interest, if any. Upon payment of the escrow deposit to the seller, or its refund to the buyer, escrow agents will be fully released from all liability and other obligations with respect to the escrow deposit.

In the event of a dispute between the escrow beneficiaries concerning the distribution of the escrow deposit, the escrow agents will preserve the escrow deposit until the dispute between the beneficiaries is resolved by their agreement, or judicially in an action of interpleader. In the event that the escrow agents, singly or jointly, determine to commence an interpleader action, they shall provide the escrow beneficiaries with written notice of their intent.

[Consumer Notice: Section 1006 of the New York Civil Practice Law and Rules provides a judicial procedure for resolving conflicting claims to property that is held by stakeholders, including escrow deposits held by escrow agents.]

This agreement may be canceled by a written notice signed by the escrow beneficiaries and delivered to the escrow agents.

Escrow agents will be jointly and severally liable to the escrow beneficiaries for any loss of the escrow deposit which results from gross negligence, bad faith, or wilful misconduct. Escrow agents will not be liable for any error in judgement, or any act taken or omitted in good faith, any mistake of law, or any mistake of fact.

[Consumer Notice: The legal profession in New York State finances the Lawyers Fund for Client Protection. The Lawyers Fund protects law clients by reimbursing escrow money that is misused by an attorney in the practice of law. Losses protected by the Lawyers Fund include down payments and escrow accounts in the purchase and sale of real estate. Telephone 800/442-FUND]

Nothing in this agreement shall be interpreted to prevent an escrow agent from representing an escrow beneficiary as an attorney in any action or proceeding involving the purchase and sale of the premises covered by this agreement.

This agreement shall be governed by the laws of the State of New York. Any action or proceeding arising out of this agreement shall be commenced in the county in which the premises are located.

This agreement contains the entire understanding between the escrow beneficiaries and escrow agents with respect to the escrow deposit of the buyer's down payment. In the event of an inconsistency between the contract of sale and this escrow agreement, the provisions of this agreement shall prevail.

In Witness Whereof, the buyer and seller and their attorneys have signed this agreement on the ___ day of _____, 199_.

Buyer:

Name

Address

Social Security Number

Name

Address

Social Security Number

Buyer's Attorney:

Name

Address

Telephone

Seller:

Name

Address

Social Security Number

Name

Address

Social Security Number

Seller's Attorney:

Name

Address

Telephone Number

New York State Bar Association
Committee on Professional Ethics

Opinion 1060 (6/12/15)

Topic: Escrow account; attorney special account; delegation to nonlawyer employee

Digest: Law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts, and to transfer funds from a sub-account to the master escrow account, in name of a lawyer admitted in New York State and under that lawyer's direction, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

Rules: 1.15(b), (c), (d) & (e); 5.3.

FACTS

1. A law firm wishes to have a staff member of the law firm, who is not a lawyer, direct a bank to open individual sub-accounts under a master lawyer escrow account maintained by that bank for the law firm. The law firm also wishes to authorize the nonlawyer staff member to direct the bank to transfer funds from any sub-account to the master escrow account.

2. The law firm would permit distributions from the master escrow account to be initiated and authorized only by a lawyer in the law firm licensed to practice in New York. Authority of the non-lawyer staff would be limited to transferring funds from a sub-account to the master escrow account, and the nonlawyer could only make such transfers at the direction of a lawyer licensed to practice in New York. Transfers from the sub-accounts may be made only to the master escrow account. The only authorized method to withdraw funds from the master escrow account or any of the sub-accounts would be at the express direction of a lawyer in the law firm admitted to practice in New York, and upon the signature of a lawyer in the firm admitted to practice in New York. The nonlawyer would have no authority to move funds out of the master escrow account.

QUESTIONS

3. May a law firm or lawyer ethically authorize and instruct a nonlawyer staff member of the law firm to direct its bank to open individual sub-accounts under a master lawyer escrow account maintained by the bank for the law firm?

4. May the law firm or lawyer ethically instruct the nonlawyer staff member to direct a bank to transfer funds from a sub-account to a master escrow account, from which the funds would be distributed by a lawyer in the law firm, who would execute the checks?

OPINION

Rule 1.15(e): Requirements for Authorized Signatories on Lawyer Special Accounts

5. Rule 1.15 of the New York Rules of Professional Conduct (the "Rules") governs the obligations of lawyers with respect to the funds of others that the lawyer has received "incident to the lawyer's practice of law." This includes the following obligations:

- Not to misappropriate such funds. Rule 1.15(a).

- To maintain such funds in one or more special bank accounts. Rule 1.15(b).

- To maintain records of all deposits in and withdrawals from the special bank accounts, that identify the date, source and description of each item deposited, and the date, payee and purpose of each withdrawal or disbursement. Rule 1.15(d)(1)(i)

- To maintain records of the special accounts, including the source of all funds deposited and the persons for whom the funds are or were held. Rule 1.15(d)(1)(ii).

- To make accurate entries in their records of receipts and disbursements, special accounts and ledger books or similar records. Rule 1.15(d)(2).

- To ensure that special account withdrawals (i) are made only to a named payee and not to cash, (ii) are made by check or (with the approval of the party entitled to the proceeds) by bank transfer and – most important here – (iii) that all authorized signatories of a special account are lawyers admitted to practice law in New York State. Rule 1.15(e).

6. There are no comments to Rule 1.15 relevant to the questions presented.

Non-Lawyer employees of law firms

7. Rule 5.3(a) provides that "A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate." Rule 5.3(a) further provides that "the degree of supervision required is that which is reasonable under the circumstances," taking into account such factors as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter. However, what is reasonable in the circumstances of holding funds under Rule 1.15 may involve a higher standard of care than that required under other rules. For example, Rule 1.15(a) states that a lawyer in possession of funds belong to another person incident to his or her law practice is a fiduciary and Comment [1] to Rule 1.15 explains that the lawyer should hold such funds using the care required of a professional fiduciary. Moreover, as noted in paragraph 9, the lawyer may be responsible for the conduct of a nonlawyer employee that would be a violation of the Rules if engaged in by a lawyer. As noted in paragraph 13, we warned in N.Y. State 693 that, since the responsibility for client funds may not be delegated, the lawyer remains responsible to the client for errors. Finally, the courts, in evaluating the lawyer's care of client funds for disciplinary purposes, may use an exacting standard. See Matter of Galasso, infra (lawyer must use a high degree of vigilance to ensure that the funds [the clients] entrusted are returned to them upon request.)

8. Comment [2] to Rule 5.3 states that a law firm must ensure that nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, and that a law firm "should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules."

9. Violations of the Rules by a nonlawyer employee may subject certain firm lawyers to professional discipline. Rule 5.3(b) provides that a "lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer" where the lawyer either (i) has "managerial responsibility in a law firm" or (ii) has supervisory authority over the nonlawyer and knew or should have known of the conduct at issue in time to take reasonable remedial action.

10. These principles were affirmed in Matter of Galasso, 19 N.Y.3d 688 (2012), which involved a disciplinary proceeding against a lawyer for failing to properly supervise a bookkeeper, resulting in the misappropriation of the funds of several clients from an escrow account and the firm's IOLA account. Although Galasso and one of his partners were the only authorized signatories on the special account application, the bookkeeper apparently altered the account documentation to permit electronic funds transfers and to include himself as an authorized signatory.

11. The Court of Appeals in Galasso found several deficiencies in the firm's policies and procedures regarding client funds. For example, the lawyer's practice had been to review monthly financial reports generated by the bookkeeper rather than to review the account statements themselves (which might have disclosed that the bookkeeper was forging checks). In addition, the lawyer did not have personal contact with the bank and did not exercise sufficient oversight of the firm's books and records. Finally, the lawyer ceded an unacceptable level of control over the firm accounts to the bookkeeper, thereby creating the opportunity for misuse of client funds. Indeed, when a client's accountant pointed out a discrepancy in the escrow account, the lawyer did not resolve the discrepancy himself but rather allowed the bookkeeper to resolve it with the bank. The Galasso court stressed that attorneys are not prohibited from delegating tasks to firm employees, but also stressed that any delegation must be accompanied by an appropriate degree of oversight by a lawyer.

Establishing Sub-Accounts in the Special Account

12. No opinions of this Committee directly address the questions presented, but N.Y. State 693 (1997) is instructive. N.Y. State 693 discusses whether a lawyer may allow a paralegal to use a stamp bearing the lawyer's signature to execute checks drawn on a client escrow account. N.Y. State 693 notes that DR 9-102(E) of the Code of Professional Responsibility, the predecessor to Rule 1.15(e), explicitly states that only a lawyer may be a signatory to such a special account. Even so, the opinion notes that the Code "contemplates that lawyers will delegate tasks to nonlawyers," and that, despite restrictive holdings from case authorities that lawyers may not give signatory authority to nonlawyers, a lawyer could ethically authorize a nonlawyer to use the lawyer's signature stamp. Opinion 693 said:

[W]e believe that it is ethically permissible for a lawyer to authorize a paralegal to make use of the lawyer's signature stamp on checks drawn from a special account at closings under certain conditions and with proper controls. As with the rest of a paralegal's duties at a real estate closing ... the lawyer must consider in advance how the paralegal will use the signature stamp – including approving the purpose of the anticipated payments to be made by such checks, the nature of the payee and the authorized dollar amount range for each check to be issued – and review afterwards what actually happened to assure that the delegation of authority has been utilized property. [Emphasis added.]

13. N.Y. State 693 warns that the "responsibility for client funds may not be delegated," and that lawyers who authorize nonlawyers to use their signatures thus remain responsible to the client for any errors or misuse of the signature stamp. The opinion concludes that the delegation is permissible despite DR 9-102(E) "so long as the lawyer supervises the delegated work closely" and "exercises complete professional responsibility for the acts" of the nonlawyer.

14. In the inquiry here, the inquirer has assured us that transfers from sub-accounts can be made only to the master escrow account, not outside it, and that withdrawals can only be made by a lawyer licensed to practice in New York. In these circumstances, we believe a lawyer may delegate the two tasks described in the inquiry. Specifically, under procedures approved and closely supervised by the lawyer or law firm, the law firm may authorize a nonlawyer to direct the bank to set up the requested sub-accounts and to transfer funds from a sub-account to the master escrow

account. Of course, pursuant to Rule 5.3(b), the supervising lawyer remains professionally responsible for any ethical violations by the nonlawyer.

CONCLUSION

15. A lawyer or law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts and to transfer funds from such an account to the master escrow account in the name and under the direction of a firm lawyer admitted in New York State, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

(8-15)

New York State Bar Association
Committee on Professional Ethics

Opinion 1030 (10/30/14)

Topic: Trust Account; Letterhead

Digest: If a law firm with a new name partner is either the same firm (with a new name) or a legal successor to the business and property of the original firm, and the firm (i) makes all necessary corporate filings, and (ii) takes all steps with the bank that maintains its trust account necessary to reflect any changes taking place under the Business Corporation Law and the firm's constituent documents, then the firm may (1) continue to use its old letterhead while the remaining stock is being depleted and (2) continue to use the trust account and the checks used to draw upon it (although it would be desirable to indicate the change in firm name on the old checks).

Rules: Rules 1.15(b), 7.5(b), 8.4(c).

FACTS

1. A lawyer (Z) recently joined a law firm known as W, X & Y, P.C. as a partner. The firm would like to change the firm's name to add attorney Z's name to the firm's name to create the law firm of W, X, Y & Z, P.C.

QUESTIONS

2. A. Must the law firm discard all existing letterhead/stationery in the original name of the firm, or may it continue to use the old stationery, until it runs out?

B. May the law firm continue to use the original firm's checking account and checks until the checks run out, or must the firm open a new checking account in the new name?

OPINION

3. The answer to the questions posed here depend on both applicable law and the applicable provisions of the New York Rules of Professional Conduct (the "Rules"). The questions about applicable law -- whether the firm has merely changed its name, or is considered a completely new law firm, and, if the firm is a new corporate entity, whether it has succeeded to all of the rights and liabilities of the original firm, including its business and bank accounts -- are legal questions beyond our jurisdiction to answer, but, in the Committee's experience, it is common, when a professional corporation adds a name partner, to amend its certificate of incorporation to change its name. In this case, the firm is the same firm.[1]

Use of Old Letterhead

4. Rule 7.5 sets out the ethical rules with respect to professional notices, letterheads and signs. It provides generally that a lawyer or law firm may use letterheads, professional cards and similar professional notices, as long as they do not violate any statute or court rule and are not false, deceptive or misleading. In addition, Rule 7.5(b) provides, among other things, that "[a] lawyer in private practice shall not practice under . . . a name that is misleading as to the identity of the lawyer

or lawyers practicing under such name." Rule 8.4(c) prohibits an attorney from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

5. It is common for law firms to add partners from time to time, and also common for law firm names not to include the name of all partners in the firm. Consequently, assuming that W, X, Y & Z is either the same firm or a legal successor to W, X & Y, and that all necessary public filings have been made, we do not believe use of the old letterhead would be misleading while the remaining stock is being depleted merely because it does not reflect the new name of the firm.[2]

Use of Original Bank Account

6. Rule 1.15(b)(1) provides in relevant part:

A lawyer who is in possession of funds belong to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State. . . . Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or . . . is employed . . . .

The Rule does not apply to the firm's general (i.e. operating) account, that is, the account that contains only funds that belong to the lawyer or law firm, such as funds that will be used to pay salaries or rent. Rather, Rule 1.15(b)(1) applies only to the attorney trust or escrow account containing client funds. With respect to the firm's general account, Rule 8.4(c), quoted in ¶4, above, would be the applicable provision.

7. We believe that whether an attorney trust account in the original firm name is an account in the name of a firm of lawyers of which the lawyer is a member depends on the legal issue of whether the new firm is the same as, or a legal successor to, W, X & Y, so that the original trust account remains or becomes the trust account of the successor firm. If the trust or escrow account is or becomes the property of the successor firm, and the firm takes the steps necessary with the bank to reflect the changes taking place under the Business Corporation Law and the firm's constituent documents, then we believe that the firm may ethically continue to use the trust or escrow account and the checks used to draw on that account without violating Rule 1.15(b)(1), although it would be desirable to indicate the change in firm name on the old checks.

8. Similarly, if the firm with the new name partner is the same as or a successor to the original firm, and the firm takes the steps necessary with the bank to reflect the changes taking place under the Business Corporation Law and the firm's constituent documents, then the firm may ethically continue to use the general account and the checks associated with that account without violating Rule 8.4(c), while the old checks are being depleted, although it would be desirable to indicate the change in firm name on the old checks.

CONCLUSION

9. If a law firm with a new name partner is either the same firm (with a new name) or a legal successor to the business and property of the original firm, and if the firm (i) makes all necessary corporate filings, and (ii) takes all steps with the bank that maintains its trust or escrow account and its general account necessary to reflect any changes taking place under the Business Corporation Law and the firm's constituent documents, then the firm may (1) continue to use its old letterhead while the remaining stock is being depleted and (2) continue to use the trust account and general account and the checks used to draw on them (although it would be desirable to indicate the change in firm name on the old checks).

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion
Opinion #90 - 10/07/1968 (17-68)

Topic: Escrow Funds

Digest: Deposit of client's funds in interest-bearing savings account

Canon: Former Canon 11

QUESTION

May an attorney who is holding client's funds in escrow deposit those funds in an interest bearing savings account?

OPINION

This is largely a question of law rather than ethics, and this Committee does not answer questions of law. The lawyer's professional duty is to treat the funds in all respects as the client's property and if any income is realized on the funds, it would, of course, belong to the client. (N.Y. City 181 and 590; ABA Inf. 859.)

Whether it is proper to deposit the funds in an interest bearing savings account will depend upon the circumstances. In some cases the client may believe he has the right of immediate withdrawal not subject to the notice and waiting period which sometimes applies to savings accounts. In some cases, the right of immediate withdrawal may be immaterial and it would be to the client's advantage to have the funds draw interest. Basically, it is a matter of the attorney's authority. The safest procedure would be to have the client's specific instructions whenever possible.

New York State Bar Association
Committee on Professional Ethics

Opinion 983 (10/8/13)

Topic: Legal fees; advance payment retainers

Digest: Lawyer may retain unearned portion of prior retainer on conclusion of matter, at client's request, as advance payment of fees for future legal services; such advance payment may be treated as client-owned funds depending on agreement with client.

Rules: 1.5; 1.15

FACTS

1. The inquirer is a lawyer who settled a case he was handling for his client. He had been paid a retainer (the "first retainer") that was not exhausted, and he sought to return the balance. The client asked him to keep the balance in his escrow account, telling the lawyer she "might need [him] for something else."

QUESTION

2. May the lawyer, at the client's request, keep the unearned portion of the first retainer in his escrow account, as an advance against unspecified legal services to be provided in the future?

OPINION

3. The inquiry concerns advance payment retainers, which the Committee has previously addressed. [1] "An advance payment retainer is a sum provided by the client to the lawyer to cover payment of legal fees expected to be earned during the representation." N.Y. State 816 ¶3 (2007). The arrangement proposed by the inquiry is of this type – it is a deposit toward payment of fees for future legal services – even though there is not yet any agreement between client and lawyer as to what further legal services, if any, will actually be provided. [2] Any ultimately unearned portion of an advance payment retainer must be returned to the client. [3]

4. The inquiry raises a question about how an advance payment retainer may be handled from the time it is provided to the lawyer until it is either earned by the lawyer or returned to the client. Under our opinions, the parties may choose either of two options. One option is to treat advance payment of legal fees as client funds, in which case the lawyer must deposit the advance payment into an escrow account and may not retain interest earned on the funds. [4] Alternatively, the parties may "agree to treat advance payment of fees as the lawyer's own." N.Y. State 816 ¶5. Under this option, the lawyer may use the money as the lawyer chooses (except that the lawyer may not deposit it in a client trust account), subject only to the requirement that any unearned fee paid in advance be promptly refunded to the client upon termination of the employment. In [this] case, any interest earned on the advance payment of fees would belong to the lawyer.

5. An advance payment retainer, in either of these two variations, is to be distinguished from a "general retainer," which is not a payment for specific legal services. Rather, it is "a payment to the lawyer for being available to the client in the future and for being unavailable to the client's

opponents," and it is "earned upon receipt." [6]

6. On the facts of the current inquiry, the first retainer was an advance payment retainer to pay for services in the matter that has now been concluded, and the funds in question are the unused balance of that first retainer. These funds are now intended to pay for unspecified legal services in the future, if and when the parties agree that such further services will be provided, rather than to secure the availability of the lawyer to the client. Thus these funds are being maintained as a further advance payment retainer.

7. The client has requested that the funds be kept in the lawyer's escrow account, and as seen above, the lawyer is free to agree to that request. The parties are thus agreeing that the funds will be treated not as belonging to the lawyer, but rather as belonging to the client unless and until earned by future provision of legal services. "[O]nce a lawyer agrees to treat a fee advance as client property, the lawyer is bound by that agreement and all of its consequences," including all ethical requirements "applicable to client funds and trust accounts." N.Y. State 570 (1985).

8. We note an additional question about the lawyer's ongoing duties during the period from completion of the first matter until such time as the parties may agree on the performance of further legal services. The inquiry does not specify whether the parties contemplate that their attorney-client relationship will continue during that period. It is possible that the lawyer could serve merely as an escrow agent for the funds without continuing as attorney for the person whose funds are being held. Even then, however, the lawyer would remain bound by certain ethical duties to that person. *See, e.g.*, Rule 1.9 (duties to former clients); Rule 1.15 (preserving identity of funds of others, fiduciary responsibility, and record keeping).

9. Alternatively, the attorney-client relationship may continue while the lawyer holds the advance payment retainer, in which case lawyer would continue to be bound by the full set of ethical duties owed to clients. The inquiry does not say that the lawyer has told the client that the representation has terminated. The parties have discussed the possible future provision of legal services. And the lawyer is agreeing to keep possession of the client's funds for that purpose. Each of these circumstances is a factor that may bear on whether the client reasonably views that the representation will continue. [7] However, whether there is an attorney-client relationship during the interim between past services and potential future ones is a legal rather than an ethical question. We have mentioned some relevant factors but it is not our province to opine whether the representation continues. *See, e.g.*, Rules Scope ¶[9] ("principles of substantive law external to these Rules determine whether an client-lawyer relationship exists"); N.Y. State 963 ¶10 (2013).

10. Of course the lawyer would be well advised to try to avoid misunderstandings as to either the treatment of the advance payment retainer or whether the representation is continuing. *See, e.g.*, N.Y. State 816 ¶9 (2007) ("imperative for a lawyer at the outset of the representation to discuss the advantages and disadvantages of advance payment retainers and to reach an agreement about the treatment of any such advances"). Moreover, to embody agreements with the client in writing, whether or not required, [8]may enhance clarity. *See, e.g.*, Rule 1.3, Cmt. [4] ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.").

Conclusion

11. At the client's request, the lawyer may retain the unspent portion of the retainer on the conclusion of a matter as an advance payment of fees to be used for unspecified future legal services. Such advance payment retainers may be treated either as client-owned funds, to be kept in the lawyer's escrow account, or as lawyer-owned funds, subject to the lawyer's obligation to reimburse the client for any portion ultimately not earned in fees.

Matter of Ian L. Polow 117 A.D.3d 19, 982 N.Y.S.2d 137, (N.Y.A.D. 2 Dept., 2014). Public censure was appropriate remedy for failure to properly maintain escrow and for neglect of legal matters entrusted to him, noting lack of intent, complete cooperation, remorse and accountability, and no prior discipline.

Matter of Samuel A. Ehrenfeld 123 A.D.3d 26, 992 N.Y.S.2d 569, (N.Y.A.D. 2 Dept., 2014) Public censure for converting client funds. Court substantial mitigation, lack of any claim that conversion of escrow funds were intentional, remorse, acceptance of responsibility, the isolated nature of the misconduct, remedial action, reputation for honesty and truthfulness, charitable works, and unlikelihood of similar misconduct in the future.

In the Matter of Edward J. Toscano 119 A.D.3d 58, 985 N.Y.S.2d 639, (N.Y.A.D. 2 Dept., 2014) Censure imposed where the escrow violation was an isolated event, no client ultimately was harmed and the respondent has no prior disciplinary history, despite respondent's failure to cooperate with the petitioner.

In re Kirshner 3 A.D.3d 201, 772 N.Y.S.2d 87 N.Y.A.D. 2 Dept.,2004. Respondent was censured for conversion for withdrawing purchasers' down payment from escrow and turning it over to lender's attorney without purchasers' knowledge. The Court consider in mitigation that the misappropriated funds were not used to benefit respondent, the funds were returned, this was an isolated incident, the respondent had an excellent reputation for honesty and trustworthiness, and he had been in emotional and physical distress at the time. Notably, the censure was granted here even though respondent had received a prior Admonition for escrow shortage and 2 cautions.

In re Carusona 304 A.D.2d 200, 758 N.Y.S.2d 111 N.Y.A.D. 2 Dept., 2003. Respondent was censured for failing to maintain sufficient balance in escrow, failing to properly designate such accounts as special accounts, permitting nonlawyers to have signing privileges, and writing escrow checks to "cash". The Court considered in mitigation that the misconduct was not venal, no client was harmed, attorney had long history of government service which resulted in his inexperience with escrow accounts, he had an unblemished record, and he had taken remedial steps.

In re Zerin 283 A.D.2d 88, 726 N.Y.S.2d 140 N.Y.A.D. 2 Dept.,2001. Respondent was censured for failing to maintain escrow funds, misappropriation of funds, and commingling. The Court accepted in mitigation attorney's unblemished record, character letters, lack of any evidence of venality, his cooperation with the Grievance Committee, the lack of injury to any clients, etc.

In re Billet 271 A.D.2d 43, 706 N.Y.S.2d 729 N.Y.A.D. 2 Dept.,2000. Respondent was censured for having an unintentional balance below situation, for commingling, failing to maintain records and bookkeeping violations. The Court noted in imposing a censure; that respondent was under stress due to his grandmother's death and his wife's pregnancy, his lack of venal intent, the lack of harm to a client or anyone else,

respondent's unblemished record, his cooperation with the Grievance Committee, his expressed remorse, and character support.

In re Lewis 268 A.D.2d 45, 705 N.Y.S.2d 79 N.Y.A.D. 2 Dept.,2000.
Respondent was censured for his misuse of escrow, commingling, and writing checks to cash. In issuing the censure the Court noted the respondent's unblemished record, his pro bono and assigned counsel work, his being a solo practitioner, the lack of any evidence of venal intent, and the steps he has taken to correct his practice.

In re Rabine 253 A.D.2d 144, 687 N.Y.S.2d 654 N.Y.A.D. 2 Dept.,1999.
Respondent was censured for having a balance below situation in his escrow account, for issuing checks from his escrow account before clients' checks had been deposited, and for his failure to properly designate his account as attorney trust or escrow account. In issuing the censure the Court noted the respondent's mistaken belief that the checks deposited into his escrow account had cleared, as well as his mistaken belief that his bank had transferred funds from a sub-account into the main account. The Court credited respondent's previously unblemished record, the evidence of his good reputation and good works, the absence of venality, and the fact that he was affected by a serious medical condition at the time in question.

In re Scattaretico-Naber 250 A.D.2d 334, 682 N.Y.S.2d 67 N.Y.A.D. 2 Dept.,1998.
Respondent was censured for multiple balance below situations, improper use of her escrow account, and commingling. The Court credited her cooperation with the Grievance Committee, her remorse, her corrective actions, her unblemished record, that her violations were unintentional, and that no clients were harmed.

See also In re Kwiatkowski 275 A.D.2d 141, 714 N.Y.S.2d 505 N.Y.A.D. 2 Dept.,2000. 63 mostly escrow related charges sustained. Censure based upon unique circumstances. Matter of Wodinsky 241 A.D.2d 85, 670 N.Y.S.2d 512, N.Y.A.D. 2 Dept., 1998 Respondent was censured for premature release of escrow and then covering up his misconduct.

CENSURE CASES

Matter of Ian L. Polow 117 A.D.3d 19, 982 N.Y.S.2d 137, (N.Y.A.D. 2 Dept., 2014). Public censure for failure to properly maintain escrow and for neglect of legal matters, noting lack of intent, complete cooperation, remorse and accountability, and no prior discipline.

Matter of Samuel A. Ehrenfeld 123 A.D.3d 26, 992 N.Y.S.2d 569, (N.Y.A.D. 2 Dept., 2014) Public censure for converting client funds. Court noted substantial mitigation, lack of any claim that conversion of escrow funds were intentional, remorse, acceptance of responsibility, the isolated nature of the misconduct, remedial action, reputation for honesty and truthfulness, charitable works, and unlikelihood of similar misconduct in the future.

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In re Carusona 304 A.D.2d 200, 758 N.Y.S.2d 111 N.Y.A.D. 2 Dept., 2003. Respondent was censured for failing to maintain sufficient balance in escrow, failing to properly designate such accounts as special accounts, permitting nonlawyers to have signing privileges, and writing escrow checks to "cash". The Court considered in mitigation that the misconduct was not venal, no client was harmed, attorney had long history of government service which resulted in his inexperience with escrow accounts, he had an unblemished record, and he had taken remedial steps.

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In re Billet 271 A.D.2d 43, 706 N.Y.S.2d 729 N.Y.A.D. 2 Dept.,2000. Respondent was censured for having an unintentional balance below situation, for commingling, failing to maintain records and bookkeeping violations. The Court noted in imposing a censure; that respondent was under stress due to his grandmother's death and his wife's pregnancy, his lack of venal intent, the lack of harm to a client or anyone else, respondent's unblemished record, his cooperation with the Grievance Committee, his expressed remorse, and character support.

In re Lewis 268 A.D.2d 45, 705 N.Y.S.2d 79 N.Y.A.D. 2 Dept.,2000. Respondent was censured for his misuse of escrow, commingling, and writing checks to cash. No evidence of venal intent.

In re Rabine 253 A.D.2d 144, 687 N.Y.S.2d 654 N.Y.A.D. 2 Dept.,1999. Respondent was censured for having a balance below situation in his escrow account, for issuing checks from his escrow account before clients' checks had been deposited, and for his failure to properly designate his account as attorney trust or escrow account. The Court credited, inter alia, the absence of venality.

In re Scattaretico-Naber 250 A.D.2d 334, 682 N.Y.S.2d 67 N.Y.A.D. 2 Dept.,1998. Respondent was censured for multiple balance below situations, improper use of her escrow account, and commingling. The Court credited her cooperation with the Grievance Committee, her remorse, her corrective actions, her unblemished record, that her violations were unintentional, and that no clients were harmed.

SUSPENSION CASES

Matter of Altomerianos, 160 A.D.2d 96 (1st Dept 1990). This case was important in its finding that conversion of escrow funds, absent "venal intent" did not warrant disbarment. Two year suspension imposed.

In re Princivil, 122 A.D.3d 23, 991 N.Y.S.2d 338 (2d Dept. 2014). In that case, the Respondent mailed the client two settlement checks drawn on his trust account. The client did not attempt to cash the checks for eleven months. In the meantime, (1) the balance in the trust account dropped (for a one-month period) below the total amount of the checks, and (2) due to a security breach, the Respondent closed his trust account and opened a new one without notifying the client. When the client finally tried to cash the checks, she was told the account was closed. The Respondent immediately issued two new checks, and the client ultimately received her settlement funds. Id. at 25, 991 N.Y.S.2d at 339. Despite the Court's recognition of Respondent's "unblemished record," the Court imposed a six-month suspension.

In re Feldman, 993 N.Y.S.2d 717 (2d Dept. 2014). The Respondent had mistakenly issued two checks (totaling $800) from her escrow account for firm business expenses. She discovered the mistake and restored the funds to the account in four days. Although the Court recognized that the lawyer made a mistake and that no client was injured, the Court, nevertheless, found a violation of N.Y. Rule 1.15(a). This, together with an unrelated violation relating to a client release, resulted in a six-month suspension, despite the submission of numerous affidavits attesting to Respondent's character and what the Court described as her "otherwise unblemished record." *Id.* at 720.

Matter of Weiss 77 A.D.3d 1 (2d Dept. 2010). The respondent was suspended for two years for bookkeeping errors and, interestingly, for conversion of escrow funds because money that was supposed to be deposited into one trust account was actually deposited into a second trust account, despite his escrow balance being sufficient.

Matter of Feiden 29 A.D.3d 115. Two year suspension imposed upon the court confirming his unintentional bookkeeping errors and misuse of escrow account, because of his failure to produce records when requested.

BAR ASSOCIATION OF NASSAU COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 1993-3
(Inquiry No. 446)

Archive of Ethics Opinions

Re:
Disbursement of escrow funds.

Digest:
To the extent escrow funds are insufficient to pay the sum due to party entitled thereto because of the escrow attorney's error, the deficiency should be covered by the attorney so that the full amount due can be paid.

Code Provisions:
DR 1-102
EC 1-1
1-5
9-1
9-6

Described Facts:
Inquiring counsel represented a client in connection with a personal injury claim. A narrative report from the client's Orthopedist was required. Inquiring counsel discussed with the client the possibility of giving the Orthopedist a lien on the settlemept to cover his charge for the report. The client agreed and inquiring counsel wrote to the orthopedist offering a lien on any settlement in lieu of present payment of the report fee. The Orthopedist agreed and submitted his report. No other documentation concerning the client was signed by inquiring counsel, or to counsel's knowledge, by the client. The personal injury claim was subsequently settled and the settlement check was deposited to inquiring counsel's escrow account. In disbursing the escrowed funds to the client, an error was made in the client's favor, leaving insufficient funds in the escrow account to pay the orthopedist his fee. Upon discovery of the error, before client presented the check for payment, counsel advised the client that an error had been made and not to deposit the check. The client disregarded the instruction and deposited the check anyway. Client refuses to remit the overpayment.

Inquiry:
May inquiring attorney deduct the overage from the amount due the Orthopedist and should the balance in the escrow account be paid to the Orthopedist or to the client?

Determination:
The question of to whom the funds in escrow belong is one of law beyond the purview of this committee, but to the extent that the funds deposited belong to the Orthopedist, they should be paid to him and if the balance on hand in the escrow is insufficient because of the erroneous overpayment to the client, the error is for counsel's account and the shortage must be made up by him to make the Orthopedist whole.

Analysis:
Whether or not a lien in favor of the Orthopedist was created and to whom escrow funds belong are questions of law beyond the purview of this committee. However, inquiring counsel did offer a right to payment against the settlement in exchange for the orthopedist's report which offer the Orthopedist accepted by furnishing the report. The making of the offer was authorized by the client as indicated by the inquiring counsel. Inquiring counsel recognized the obligation to the Orthopedist by depositing the settlement funds in his escrow account and attempting to retain the appropriate amount for remittance. Only by reason of an error was the amount retained after payment to the client insufficient to cover the sum due the Orthopedist. The error, being that of the attorney, cannot be charged to the Orthopedist. The

attorney should cover the deficiency and seek reimbursement from his client.

EC 1-1 provides that it is a lawyer's ethical responsibility to maintain the integrity of the Bar to meet the highest standards. EC 1-5 states that "A lawyer shall maintain the highest standards of professional conduct and should encourage others to do so." As provided in DR 1-102 A 4, a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." A lawyer should promote public confidence in the legal profession (EC 9-1) and "every lawyer owes a solemn duty to uphold the integrity and honor of the profession ... and to strive to avoid not only professional impropriety but also the appearance of impropriety" (EC 9-6).

The Orthopedist, by his actions, in responding to the lawyer's offer, is entitled to rely on the lawyer fulfilling the terms of the offer. A failure by inquiring counsel to deliver as promised, in the opinion of this committee, would violate the mandates set forth in the above cited ethical considerations and disciplinary rule.

[Approved by the Executive Subcommittee on 1/5/93] [Approved by the Full committee on 1/27/93].

CHRIS McDONOUGH ESQ.
McDONOUGH and McDONOUGH LLP
401 Franklin Avenue, Garden City, N.Y. 11530
Newyorkethicslawyer.com

Chris McDonough is an attorney who has spent his 25 plus year legal career practicing and educating in the field of professional ethics. Admitted in 1988 in New York and Colorado he began his legal career by working for a brief time for the Supreme Court Law Department. He was appointed to the position of Assistant Counsel to the Grievance Committee for the Tenth Judicial District in 1989. During his thirteen years with the committee he prosecuted numerous attorney disciplinary proceedings, and briefed appeals to the Appellate Divisions, the Court of Appeals and the U.S. Supreme Court. He began practicing in January 2003, with primary offices in Nassau County.

Mr. McDonough's practice is focused on matters involving attorney and judicial disciplinary defense, professional licensing, character and fitness/admission matters, law school discipline, bar exam issues, and risk management. He is on retainer to a number of law firms, from solo practices to numerous lawyer firms, to provide professional evaluation and guidance.

Mr. McDonough has taught as an Adjunct Professor of Ethics. He has authored numerous articles for various law reviews, law journals, and other publications. He is a regular CLE instructor for local law schools, local and regional bar associations, attorney groups, etc. He sits as an Executive Sub-Committee member for the Professional Ethics Committee of the Nassau County Bar Association. He is a member of the New York State Bar Association.

Omid Zareh

Omid Zareh is co-founding partner of Weinberg Zareh & Geyerhahn, LLP. He focuses on the needs of executives and their companies in corporate planning and all phases of complex, commercial arbitration and litigation. He advises in varied areas of law including technology, intellectual property, real property, and corporate disputes. His clients range from entrepreneurs and their start-up companies (often in the technology sector), to more established financial companies and seasoned investors.

Mr. Zareh is a member of the bars of New York State and New Jersey, as well as the Federal Circuit. He is an active member of the NYU Law Alumni Association (a former Vice President), the Long Island Entrepreneurs Group where he serves as General Counsel currently, and the Nassau County Bar Association where he serves as the Chair of the Ethics Committee currently. He also has participated in a number of community and professional organizations, and often lectures about the law. Mr. Zareh also serves as an officer of real estate holding companies. While attending New York University Law School, Mr. Zareh was the Legal Theory Editor of the Review of Law and Social Change.

Weinberg Zareh & Geyerhahn, LLP
45 Rockefeller Plaza, 20th Floor
New York, New York 10111
212-899-5470 (Main)
Omid@WZGLLP.com
www.WZGLLP.com

PERSONAL & CONFIDENTIAL

Respondent
Address
Address

Re: File No.

Dear

Please be advised that pursuant to the Dishonored Check Reporting Rules for Attorney Special, Trust and Escrow Accounts (22 NYCRR part 1300), this Committee has received from the Lawyer's Fund for Client Protection a dishonored check report pertaining to an account purportedly maintained by you. The report (copy enclosed) reflects that the designated check[*s*] *was/were* drawn against insufficient available funds in an account related to your practice of law.

Based upon this information, this Committee has initiated a complaint and investigation, *sua sponte*, concerning your professional conduct pursuant to Section 1240.7 of the Rules for Attorney Disciplinary Matters (22 NYCRR part 1240 et seq.). As part of this investigation, you are hereby requested to submit to the undersigned, within twenty (20) days of your receipt of this letter, your written answer, setting forth any explanation of the circumstances which caused the subject check[*s*] to be drawn against insufficient funds. With your answer, you are requested to produce the following required bookkeeping records, as specified in the Rules of Professional Conduct (22 NYCRR part 1200 [Rule 1.15]), for the six (6) months preceding the date that the check in question was dishonored (copies of the records will suffice at this time):

1. Records of all deposits in and withdrawals from the account, which specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

2. A record showing the source of all funds deposited in the account, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amount, and the names of all persons to whom such funds were disbursed; and

3. All checkbooks and check stubs, bank statements, pre-numbered canceled checks (front and back), and duplicate deposit slips.

Please feel free to include with your answer any additional information or materials which you consider relevant.

[Also enclosed is a Background Questionnaire, which you are requested to complete and submit with your written answer.]

You are advised that an unexcused failure to timely respond or otherwise properly cooperate in this matter constitutes "professional misconduct" independent of the underlying

investigation. In addition, an unexcused failure to produce the required bookkeeping records specified above may be deemed a violation of the Rules of Professional Conduct and may subject you to disciplinary proceedings (*see* 22 NYCRR part 1200 [Rule 1.15(i) and (j)]).

Very truly yours,

Enclosure(s)

Supreme Court, Appellate Division, All Departments

Part 1240. RULES FOR ATTORNEY DISCIPLINARY MATTERS

(effective October 1, 2016)

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Supreme Court, Appellate Division, All Departments

Part 1240. RULES FOR ATTORNEY DISCIPLINARY MATTERS

(effective October 1, 2016)

§ 1240.1 Application

These Rules shall apply to (a) all attorneys who are admitted to practice in the State of New York; (b) all in-house counsel registered in the State of New York; (c) all legal consultants licensed in the State of New York; (d) all attorneys who have an office in, practice in, or seek to practice in the State of New York, including those who are engaged in temporary practice pursuant to Part 523 of this Title, who are admitted pro hac vice, or who otherwise engage in conduct subject to the New York Rules of Professional Conduct; and (e) the law firms that have as a member, retain, or otherwise employ any person covered by these Rules.

§ 1240.2 Definitions

(a) Professional Misconduct Defined. A violation of any of the Rules of Professional Conduct, as set forth in Part 1200 of this Title, including the violation of any rule or announced standard of the Appellate Division governing the personal or professional conduct of attorneys, shall constitute professional misconduct within the meaning of Judiciary Law §90(2).

(b) Admonition: discipline issued at the direction of a Committee or the Court pursuant to these Rules, where the respondent has engaged in professional misconduct that does not warrant public discipline by the Court. An Admonition shall constitute private discipline, shall be in writing, may be delivered to a recipient by personal appearance before the Committee or its Chairperson, and may be considered by a Committee or the Court in determining the action to be taken or the discipline to be imposed upon a subsequent finding of misconduct.

(c) Censure: censure pursuant to Judiciary Law §90(2).

(d) Committee: an attorney grievance committee established pursuant to these Rules.

(e) Complainant: a person or entity that submits a complaint to a Committee.

(f) Court: the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over a complaint, investigation, proceeding or person covered by these Rules.

(g) Disbar; Disbarment: to remove, or the removal, from office pursuant to Judiciary Law §90(2). Such terms shall also apply to any removal based upon a resignation for disciplinary reasons, a felony conviction, or the striking of an attorney's name from the roll of attorneys for any disciplinary reason, as stated in these Rules.

(h) Letter of Advisement: letter issued at the direction of a Committee pursuant to section 1240.7(d)(2)(iv) of these Rules, upon a finding that the respondent has engaged in conduct requiring comment that, under the facts of the case, does not warrant the imposition of discipline. A Letter of Advisement shall be confidential and shall not constitute discipline, but may be considered by a Committee or the Court in determining the action to be taken or the discipline to be imposed upon a subsequent finding of misconduct.

(i) Respondent: a law firm, an attorney or other person that is the subject of an investigation or a proceeding before the Committee or the Court pursuant to these Rules.

(j) Suspension: the imposition of suspension from practice pursuant to Judiciary Law §90(2).

§ 1240.3 Discipline Under These Rules Not Preclusive

Discipline pursuant to these Rules shall not bar or preclude further or other action by any court, bar association, or other entity with disciplinary authority.

§ 1240.4 Appointment of Committees

Each Department of the Appellate Division shall appoint such Attorney Grievance Committee or Committees (hereinafter referred to as "Committee") within its jurisdiction as it may deem appropriate. Each Committee shall be comprised of at least 21 members, of which no fewer than 3 members shall be non-lawyers. A lawyer member of a Committee shall be appointed to serve as Chairperson. All members of the Committee shall reside or maintain an office within the geographic jurisdiction of the Committee. Two-thirds of the membership of a Committee shall constitute a quorum for the conduct of business; all Committee action shall require the affirmative vote of at least a majority of the members present.

§ 1240.5 Committee Counsel and Staff

Each Department of the Appellate Division shall appoint to a Committee or Committees such chief attorneys and other staff as it deems appropriate.

§ 1240.6 Conflicts; Disqualifications from Representation

(a) No (1) current member of a Committee, (2) partner, associate or member of a law firm associated with a current member of a Committee, (3) current member of a Committee's professional staff, or (4) immediate family member of a current Committee member or Committee staff member, may represent a respondent or complainant in a matter investigated or prosecuted before that Committee.

(b) No referee appointed to hear and report on the issues raised in a proceeding under these Rules may, in the Department in which he or she was appointed, represent a respondent or complainant until the expiration of two years from the date of the submission of that referee's final report.

(c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent or complainant in a matter investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service.

(d) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent or complainant in any matter in which the Committee member or staff member participated personally while in the Committee's service.

§ 1240.7 Proceedings Before Committees

(a) Complaint

(1) Investigations of professional misconduct may be authorized upon receipt by a Committee of a written original complaint, signed by the complainant, which need not be verified. Investigations may also be authorized by a Committee acting sua sponte.

(2) The complaint shall be filed initially in the Judicial Department encompassing the respondent's registration address on file with the Office of Court Administration. If that address lies outside New York State, the complaint shall be filed in the Judicial Department in which the respondent was admitted to the practice of law or otherwise professionally licensed in New York State. The Committee or the Court may transfer a complaint or proceeding to another Department or Committee as justice may require.

(b) Investigation; Disclosure. The Chief Attorney is authorized to:

(1) interview witnesses and obtain any records and other materials and information necessary to determine the validity of a complaint;

(2) direct the respondent to provide a written response to the complaint, and to appear and produce records before the Chief Attorney or a staff attorney for a formal interview or examination under oath;

(3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a respondent or witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein; and

(4) take any other action deemed necessary for the proper disposition of a complaint.

(c) Disclosure. The Chief Attorney shall provide a copy of any complaint not otherwise disposed of pursuant to section 1240.7(d)(1) of these Rules within 60 days of receipt of that complaint. Prior to the taking of any action against a respondent pursuant to sections 1240.7(d)(2)(iv), (v) or (vi) of these Rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent.

(d) Disposition.

(1) Disposition by the Chief Attorney.

(i) The Chief Attorney may, after initial screening, decline to investigate a complaint for reasons including but not limited to the following: (A) the matter involves a person or conduct not covered by these Rules; (B) the allegations, if true, would not constitute professional misconduct; (C) the complaint seeks a legal remedy more appropriately obtained in another forum; or (D) the allegations are intertwined with another pending legal action or proceeding. The complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.

(ii) The Chief Attorney may, when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant.

(2) Disposition by the Committee. After investigation of a complaint, with such appearances as the Committee may direct, a Committee may take one or more of the following actions:

(i) dismiss the complaint by letter to the complainant and to the respondent;

(ii) when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant;

(iii) make an application for diversion pursuant to section 1240.11 of these Rules;

(iv) when the Committee finds that the respondent has engaged in conduct requiring comment that, under the facts of the case, does not warrant imposition of discipline, issue a Letter of Advisement to the respondent;

(v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, but that public discipline is not required to protect the public, maintain the integrity and honor of the profession, or deter the commission of similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, on such terms as the Committee deems just, to seek reconsideration of the proposed Admonition.

(vi) when the Committee finds that there is probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, maintain the integrity and honor of the profession, or deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section 1240.8 of these Rules.

(3) As may be permitted by law, the complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Committee.

(e) Review.

(1) Letter of Advisement.

(i) Within 30 days of the issuance of a Letter of Advisement, the respondent may file a written request for reconsideration with the chair of the Committee, with a copy to the Chief Attorney. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

(ii) Within 30 days of the final determination denying a request for reconsideration, the respondent may seek review of a Letter of Advisement by submitting an application to the Court, on notice to the Committee, upon a showing that the issuance of the letter was in violation of a fundamental constitutional right. The respondent has the burden of establishing a violation of such a right.

(2) Admonition. Within 30 days of the issuance of an Admonition, the respondent may make an application to the Court, on notice to the Committee, to vacate the Admonition. Upon such application and the Committee's response, if any, the Court may consider the entire record and take whatever action it deems appropriate.

(3) Review of Dismissal or Declination to Investigate. Within 30 days of the issuance of notice to a complainant of a Chief Attorney's decision declining to investigate a complaint, or of a Committee's dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to grant or deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

(4) As permitted by law, a respondent or complainant who has submitted a request for review pursuant to this section shall be provided with a brief description of the basis for the determination of such request. In the event that such review results in a change in the outcome of a determination, any respondent or complainant adversely affected thereby shall be provided with a brief description of the basis for the determination.

§ 1240.8 Proceedings in the Appellate Division

(a) Procedure for formal disciplinary proceedings in the Appellate Division.

(1) Formal disciplinary proceedings shall be deemed special proceedings within the meaning of CPLR Article 4, and shall be conducted in a manner consistent with the rules of the Court, the rules and procedures set forth in this Part, and the requirements of Judiciary Law §90. Unless otherwise directed by the Court, there shall be (i) a notice of petition and petition, which the Committee shall serve upon the respondent in a manner consistent with Judiciary Law §90(6), and which shall be returnable on no less than 20 days' notice; (ii) an answer; and (iii) a reply if appropriate. Except upon consent of the parties or by leave of the Court or referee, no other pleadings or amendment or supplement of pleadings shall be permitted. All pleadings shall be filed with the Court. The Court shall permit or require such appearances as it deems necessary in each case.

(2) Statement of Disputed Facts. Within 20 days after service of the answer or, if applicable, a reply, the Committee shall file with the Court a statement of facts that identifies those allegations that the Committee contends are undisputed and those allegations that the party contends are disputed and for which a hearing is necessary. Within 20 days following submission by the Committee, the respondent shall respond to the Committee's statement and, if appropriate, set forth respondent's statement of facts identifying those allegations that the respondent contends are undisputed and those allegations that the respondent contends are disputed and for which a hearing is necessary. In the alternative, within 30 days after service of the answer or, if applicable, a reply, the parties may (i) file a joint statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or (ii) file a joint stipulation of disputed and undisputed facts.

(3) Disclosure Concerning Disputed Facts. Except as otherwise ordered by the Court, a party must, no later than 14 days after filing a statement of facts with the Court as required by section 1240.8(a)(2) of these Rules, provide to any other party disclosure concerning the allegations that the party contends are disputed. The disclosure shall identify the following:

(i) the name of each individual likely to have relevant and discoverable information that the disclosing party may use to support or contest the disputed allegation and a general description of the information likely possessed by that individual; and

(ii) a copy of each document that the disclosing party has in its possession or control that the party may use to support or contest the allegation, unless copying such documents would be unduly burdensome or expensive, in which case the disclosing party may provide a description of the documents by category and location, together with an opportunity to inspect and copy such documents.

(4) Subpoenas. Upon application by the Committee or the respondent, the Clerk of the Court may issue subpoenas for the attendance of witnesses and the production of books and papers before Court or the referee designated by the Court to conduct a hearing on the issues raised in the proceeding, at a time and place therein specified. When there is good cause to believe that a potential witness will be unavailable at the time of a hearing, the testimony of that witness may be initiated and conducted, and used at the hearing, in a manner provided by Article 31 of the New York Civil Practice Law and Rules.

(5) Discipline by Consent.

(i) At any time after the filing of the petition with proof of service, the parties may file a joint motion with the Court requesting the imposition of discipline by consent. The joint motion shall include:

(A) a stipulation of facts;

(B) the respondent's conditional admission of the acts of professional misconduct and the specific rules or standards of conduct violated;

(C) any relevant aggravating and mitigating factors, including the respondent's prior disciplinary record; and

(D) the agreed upon discipline to be imposed, which may include monetary restitution authorized by Judiciary Law §90(6-a).

(ii) The joint motion shall be accompanied by an affidavit of the respondent acknowledging that the respondent:

(A) conditionally admits the facts set forth in the stipulation of facts;

(B) consents to the agreed upon discipline;

(C) gives the consent freely and voluntarily without coercion or duress; and

(D) is fully aware of the consequences of consenting to such discipline.

(iii) Notice of the joint motion, without its supporting papers, shall be served upon the referee, if one has been appointed, and all proceedings shall be stayed pending the Court's determination of the motion. If the motion is granted, the Court shall issue a decision imposing discipline upon the respondent based on the stipulated facts and as agreed upon in the joint motion. If the motion is denied, the conditional admissions shall be deemed withdrawn and shall not be used against the respondent or the Committee in the pending proceeding.

(b) Disposition by Appellate Division.

(1) Hearing. Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The referee may grant requests for additional disclosure as justice may require. Unless otherwise directed by the Court, the referee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, following post-hearing submissions, file with the Court a written report setting forth the referee's findings and recommendations. Formal disciplinary charges may be sustained when the referee finds, by a fair preponderance of the evidence, each essential element of the charge. The parties may make such motions to affirm or disaffirm the referee's report as permitted by the Court.

(2) Discipline. In presenting arguments on the issue of appropriate discipline for misconduct, the parties may cite any relevant factor, including but not limited to the nature of the misconduct, aggravating and mitigating circumstances, the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions, and applicable case law and precedent. Upon a finding that any person covered by these Rules has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, maintain the honor and integrity of the profession, or deter others from committing similar misconduct.

(c) Applications and Motions to the Appellate Division

Unless otherwise specified by these Rules, applications and motions shall be made in accordance with the rules of the Court in which the proceeding is pending.

§ 1240.9 Interim Suspension While Investigation or Proceeding is Pending

(a) A respondent may be suspended from practice on an interim basis during the pendency of an investigation or proceeding on application or motion of a Committee, following personal service upon the respondent, or by substitute service in a manner approved by the Presiding Justice, and upon a finding by the Court that the respondent has engaged in conduct immediately threatening the public interest. Such a finding may be based upon: (1) the respondent's default in responding to a petition, notice to appear for formal interview, examination, or pursuant to subpoena under these Rules; (2) the respondent's admission under oath to the commission of professional misconduct; (3) the respondent's failure to comply with a lawful demand of the Court or a Committee in an investigation or proceeding under these Rules; (4) the respondent's willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, judgment, or other clear and convincing evidence; or (5) other uncontroverted evidence of professional misconduct.

(b) An application for suspension pursuant to this rule may provide notice that a respondent who is suspended under this rule and who has failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of the order of suspension may be disbarred by the Court without further notice.

(c) Any order of interim suspension entered by the Court shall set forth the basis for the suspension and provide the respondent with an opportunity for a post-suspension hearing.

(d) An order of interim suspension together with any decision issued pursuant to this subdivision shall be deemed a public record. The papers upon which any such order is based shall be deemed confidential pursuant to Judiciary Law §90(10).

§ 1240.10 Resignation While Investigation or Proceeding is Pending

(a) A respondent may apply to resign by submitting to a Court an application in the form in Appendix A to these Rules, with proof of service on the Committee, setting forth the specific nature of the charges or the allegations under investigation and attesting that:

(1) the proposed resignation is rendered voluntarily, without coercion or duress, and with full awareness of the consequences, and that the Court's approval of the application shall result in the entry of an order disbarring the respondent; and

(2) the respondent cannot successfully defend against the charges or allegations of misconduct.

(b) When the investigation or proceeding includes allegations that the respondent has willfully misappropriated or misapplied money or property in the practice of law, the respondent in the application shall:

(1) identify the person or persons whose money or property was willfully misappropriated or misapplied;

(2) specify the value of such money or property; and

(3) consent to the entry of an order requiring the respondent to make monetary restitution pursuant to Judiciary Law §90(6-a).

(c) Upon receipt of an application for resignation, and after affording the Committee an opportunity to respond, the Court may accept the resignation and remove the respondent from office by order of disbarment pursuant to Judiciary Law §90(2).

§ 1240.11 Diversion to a Monitoring Program

(a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues, the Court, upon application of any person or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider:

(1) the nature of the alleged misconduct;

(2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and

(3) whether diverting the respondent to a monitoring program is in the public interest.

(b) Upon submission of written proof of successful completion of the monitoring program, the Court may direct the discontinuance or resumption of the investigation, charges or proceeding, or take other appropriate action. In the event the respondent fails to comply with the terms of a Court-ordered monitoring program, or the respondent commits additional misconduct during the pendency of the investigation or proceeding, the Court may, after affording the parties an opportunity to be heard, rescind the order of diversion and direct resumption of the disciplinary charges or investigation.

(c) All aspects of a diversion application or a respondent's participation in a monitoring program pursuant to this rule and any records related thereto are confidential or privileged pursuant to Judiciary Law §§90(10) and 499.

(d) Any costs associated with a respondent's participation in a monitoring program pursuant to this section shall be the responsibility of the respondent.

§ 1240.12 Attorneys Convicted of a Crime

(a) An attorney to whom the rules of this Part shall apply who has been found guilty of any crime in a court of the United States or any state, territory or district thereof, whether by plea of guilty or nolo contendere, or by verdict following trial, shall, within 30 days thereof notify the Committee having jurisdiction pursuant to section 1240.7(a)(2) of these Rules of the fact of such finding. Such notification shall be in writing and shall be accompanied by a copy of any judgment, order or certificate of conviction memorializing such finding of guilt. The attorney shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation. The obligations imposed by this rule shall neither negate nor supersede the obligations set forth in Judiciary Law §90(4)(c).

(b) Upon receipt of proof that an attorney has been found guilty of any crime described in subdivision (a) of this section, the Committee shall investigate the matter and proceed as follows:

(1) If the Committee concludes that the crime in question is not a felony or serious crime, it may take any action it deems appropriate pursuant to section 1240.7 of these Rules.

(2) If the Committee concludes that the crime in question is a felony or serious crime as those terms are defined in Judiciary Law §90(4), it shall promptly apply to the Court for an order (i) striking the respondent's name from the roll of attorneys; or (ii) suspending the respondent pending further proceedings pursuant to these Rules and issuance of a final order of disposition.

(c) Upon application by the Committee, and after the respondent has been afforded an opportunity to be heard on the application, including any appearances that the Court may direct, the Court shall proceed as follows:

(1) Upon the Court's determination that the respondent has committed a felony within the meaning of Judiciary Law §90(4)(e), the Court shall strike the respondent's name from the roll of attorneys.

(2) Upon the Court's determination that the respondent has committed a serious crime within the meaning of Judiciary Law §90(4)(d),

(i) the Court may direct that the respondent show cause why a final order of suspension, censure or disbarment should not be made; and

(ii) the Court may suspend the respondent pending final disposition unless such a suspension would be inconsistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice; and

(iii) the Court, upon the request of the respondent, shall refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and

(iv) the Court, upon the request of the Committee or upon its own motion, may refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and

(v) after the respondent has been afforded an opportunity to be heard, including any appearances that the Court may direct, the Court shall impose such discipline as it deems proper under the circumstances.

(3) Upon the Court's determination that the respondent has committed a crime not constituting a felony or serious crime, it may remit the matter to the Committee to take any action it deems appropriate pursuant to section 1240.7 of these Rules, or direct the commencement of a formal proceeding pursuant to section 1240.8 of these Rules.

(d) A certificate of the conviction of a respondent for any crime shall be conclusive evidence of the respondent's guilt of that crime in any disciplinary proceeding instituted against the respondent based on the conviction.

(e) Applications for reinstatement or to modify or vacate any order issued pursuant to this section shall be made pursuant to section 1240.16 of these Rules.

§ 1240.13 Discipline for Misconduct in a Foreign Jurisdiction

(a) Upon application by a Committee containing proof that a person or firm covered by these Rules has been disciplined by a foreign jurisdiction, the Court shall direct that person or firm to demonstrate, on terms it deems just, why discipline should not be imposed in New York for the underlying misconduct.

(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Any or all of the following defenses may be raised:

(1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or

(3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.

(c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds that the procedure in the foreign jurisdiction deprived the respondent of due process of law, that there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.

(d) Any person or firm to whom these Rules shall apply who has been disciplined in a foreign jurisdiction shall, within 30 days after such discipline is imposed, advise the appropriate Court (as described in section 1240.7(a)(2) of these Rules) and Committee of such discipline. Such notification shall be in writing and shall be accompanied by any judgment, order or certificate memorializing the discipline imposed. The person or firm shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

§ 1240.14 Attorney Incapacity

(a) Upon application by a Committee that includes proof of a judicial determination that a respondent is in need of involuntary care or treatment in a facility for the mentally disabled, or is the subject of an order of incapacity, retention, commitment or treatment pursuant to the Mental Hygiene Law, the Court may enter an order immediately suspending the respondent from the practice of law. The Committee shall serve a copy of the order upon the respondent, a guardian appointed on behalf of the respondent or upon the director of the appropriate facility, as directed by the Court.

(b) At any time during the pendency of a disciplinary proceeding or an investigation conducted pursuant to these Rules, the Committee, or the respondent, may apply to the Court for a determination that the respondent is incapacitated from practicing law by reason of mental disability or condition, alcohol or substance abuse, or any other condition that renders the respondent incapacitated from practicing law. Applications by respondents shall include medical proof demonstrating incapacity. The Court may appoint a medical expert to examine the respondent and render a report. When the Court finds that a respondent is incapacitated from practicing law, the Court shall enter an order immediately suspending the respondent from the practice of law and may stay the pending proceeding or investigation. Upon reinstatement of the incapacitated attorney pursuant to § 1240.17 of these rules, the Court may take such action as it deems advisable, including a direction for the resumption of the proceeding or investigation.

§ 1240.15 Conduct of Disbarred or Suspended Attorneys

(a) Prohibition Against Practicing Law. Attorneys disbarred or suspended shall comply with Judiciary Law §§478, 479, 484 and 486. After entry of an order of disbarment or suspension, the affected respondent shall not accept any new retainer or engage in any new case or legal matter of any nature as attorney for another. However, during the period between the entry date of the order and its effective date, the respondent may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(b) Notification of Clients. Within 10 days of the date of entry of an order of suspension or disbarment, the affected respondent shall notify, by certified mail and, where practical, electronic mail, each client of the respondent, the attorney for each party in any pending matter, the court in any pending matter, and the Office of Court Administration for each action where a retainer statement has been filed pursuant to court rules. The notice shall state that the respondent is unable to act as counsel due to disbarment or suspension. A notice to a respondent's client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent's client. Where counsel has been appointed by a court, notice shall also be provided to the appointing court.

(c) Duty to Return Property and Files. Within 30 days of the date of entry of the order of suspension or disbarment, the affected respondent shall deliver to all respondent's clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.

(d) Discontinuation of Attorney Advertising. Within 30 days of the date of entry of the order of suspension or disbarment, the affected respondent shall discontinue all public and private notices through advertising, office stationery and signage, email signatures, voicemail messages, social media, and other methods, that assert that the respondent may engage in the practice of law.

(e) Forfeiture of Secure Pass. Within 30 days of the date of entry of the order of suspension or disbarment, the affected respondent shall surrender to the Office of Court Administration any Attorney Secure Pass issued to him or her.

(f) Affidavit of Compliance. Within 45 days after the date of service of the order of disbarment or suspension, the affected respondent shall file with the Court, together with proof of service upon the Committee, an affidavit in the form in Appendix B to these Rules showing a current mailing address for the respondent and that the respondent has complied with the order and these Rules.

(g) Compensation. A respondent who has been disbarred or suspended from the practice of law may not share in any fee for legal services rendered by another attorney during the period of disbarment or suspension but may be compensated on a quantum meruit basis

for services rendered prior to the effective date of the disbarment or suspension. On motion of the respondent, with notice to the respondent's client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.

(h) Required Records. A respondent who has been disbarred or suspended from the practice of law shall keep and maintain records of the respondent's compliance with this rule so that, upon any subsequent proceeding instituted by or against the respondent, proof of compliance with this rule and with the disbarment or suspension order or with the order accepting resignation will be available.

§ 1240.16 Reinstatement of Disbarred or Suspended Attorneys

(a) Upon motion by a respondent who has been disbarred or suspended, with notice to the Committee and the Lawyers' Fund for Client Protection, and following such other notice and proceedings as the Court may direct, the Court may issue an order reinstating such respondent upon a showing, by clear and convincing evidence, that: the respondent has complied with the order of disbarment, suspension or the order removing the respondent from the roll of attorneys; the respondent has complied with the rules of the court; the respondent has the requisite character and fitness to practice law; and it would be in the public interest to reinstate the respondent to the practice of law. Within thirty days of the date on which the application was served upon the Committee, or within such longer time as the Court may allow, the Committee may file an affidavit in relation thereto.

(b) Necessary papers. Papers on an application for reinstatement of a respondent who has been disbarred or suspended for more than six months shall include a copy of the order of disbarment or suspension, and any related decision; an affidavit in the form in Appendix C to these Rules; and proof that the respondent has, no more than one year prior to the date the application is filed, successfully completed the Multistate Professional Responsibility Examination described in section 520.9 of this Title.
After the application has been filed, the Court may deny the application with leave to renew upon the submission of proof that the respondent has successfully completed the New York State Bar Examination described in section 520.8 of this Title, or a specified requirement of continuing legal education, or both. A respondent who has been suspended for a period of six months or less shall not be required to submit proof that the respondent has successfully completed the Multistate Professional Responsibility Examination, unless otherwise directed by the Court.

(c) Time of application

(1) A respondent disbarred by order of the Court for misconduct may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment.

(2) A suspended respondent may apply for reinstatement after the expiration of the period of suspension or as otherwise directed by the Court.

(d) Respondents suspended for a fixed term of six months or less. A respondent who has been suspended for six months or less pursuant to disciplinary proceedings may file an application for reinstatement with the Court no more than thirty days prior to the expiration of the term of suspension, in the form prescribed at Appendix D to these Rules, together with proof of service of a copy of same upon the appropriate Committee and the Lawyers' Fund for Client Protection. Within twenty days of the date on which the application was served upon the Committee and Lawyers' Fund, or within such longer time as the Court may allow, the Committee and Lawyers' Fund may file a response thereto. After the Committee and Lawyers' Fund have had an opportunity to be heard, the Court may issue an order reinstating the respondent upon a showing, by

clear and convincing evidence, that the respondent has otherwise satisfied the requirements of section 1240.16 (a) of these Rules.

(e) The Court may establish an alternative expedited procedure for reinstatement of attorneys suspended for violation of the registration requirements set forth in Judiciary Law §468-a.

§ 1240.17 Reinstatement of Incapacitated Attorneys

(a) Time of application. A respondent suspended on incapacity grounds pursuant to section 1240.14 of these Rules may apply for reinstatement at such time as the respondent is no longer incapacitated from practicing law.

(b) Necessary papers. Papers on an application for reinstatement following suspension on incapacity grounds shall include a copy of the order of suspension, and any related decision; proof, in evidentiary form, of a declaration of competency or of the respondent's capacity to practice law; a completed affidavit in a form approved by the Court; a copy of a letter to The Lawyers' Fund for Client Protection notifying the Fund that the application has been filed; and such other proofs as the Court may require. A copy of the complete application shall be served upon the Committee.

(c) Such application shall be granted by the Court upon showing by clear and convincing evidence that the respondent's disability or incapacity has been removed and the respondent is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper for a determination as to whether the respondent's disability or incapacity has been removed, including a direction of an examination of the respondent by such qualified experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the respondent. In a proceeding under this section, the burden of proof shall rest with the suspended respondent.

(d) Where a respondent has been suspended by an order in accordance with the provisions of section 1240.14 of these Rules and thereafter, in proceedings duly taken, the respondent has been judicially declared to be competent, the Court may dispense with further evidence that the respondent's disability or incapacity has been removed and may direct the respondent's reinstatement upon such terms as are deemed proper and advisable.

(e) Waiver of Doctor-Patient Privilege Upon Application for Reinstatement. The filing of an application for reinstatement by a respondent suspended for incapacity shall be deemed to constitute a waiver of any doctor-patient privilege existing between the respondent and any psychiatrist, psychologist, physician, hospital or facility who or which has examined or treated the respondent during the period of disability. The respondent shall be required to disclose the name of every psychiatrist, psychologist, physician, hospital or facility by whom or at which the respondent has been examined or treated since the respondent's suspension, and the respondent shall furnish to the Court written consent to each to divulge such information and records as may be requested by court-appointed experts or by the Clerk of the Court.

§ 1240.18 Confidentiality

(a) All disciplinary investigations and proceedings shall be kept confidential by Court personnel, Committee members, staff, and their agents.

(b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any respondent under these Rules are sealed and deemed private and confidential pursuant to Judiciary Law §90(10). This provision is not intended to proscribe the free interchange of information among the Committees.

(c) All proceedings before a Committee or the Court shall be closed to the public absent a written order of the Court opening the proceedings in whole or in part.

(d) Application to Unseal Confidential Records or for Access to Closed Proceedings. Unless provided for elsewhere in these Rules, an application pursuant to Judiciary Law §90(10) to unseal confidential documents or records, or for access to proceedings that are closed under these Rules, shall be made to the Court and served upon such other persons or entities as the Presiding Justice may direct, if any, and shall specify:

(1) the nature and scope of the inquiry or investigation for which disclosure is sought;

(2) the papers, records or documents sought to be disclosed, or the proceedings that are sought to be opened; and

(3) other methods, if any, of obtaining the information sought, and the reasons such methods are unavailable or impractical.

(e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or claims seeking reimbursement from the Fund for the wrongful taking of money or property by any respondent who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto.

§ 1240.19 Medical and Psychological Evidence

Whenever a respondent intends to offer evidence of a medical or psychological condition in mitigation of allegations or charges, he or she shall give written notice to the Committee of the intention to do so no later than 20 days before the scheduled date of any appearance, argument, examination, proceeding, or hearing during which the respondent intends to offer such evidence to the Court, referee, Committee, subcommittee thereof, or counsel to a Committee. Said notice shall be accompanied by (a) the name, business address, and curriculum vitae of any health care professional whom the respondent proposes to call as a witness, or whose written report the respondent intends to submit; and (b) a duly executed and acknowledged written authorization permitting the Committee to obtain and make copies of the records of any such health care professional regarding the respondent's medical or psychological condition at issue.

§ 1240.20 Abatement; Effect of Pending Civil or Criminal Matters; Restitution

(a) Any person's refusal to participate in the investigation of a complaint or related proceeding shall not require abatement, deferral or termination of such investigation or proceeding.

(b) The acquittal of a respondent on criminal charges, or a verdict, judgment, settlement or compromise in a civil litigation involving material allegations substantially similar to those at issue in the disciplinary matter, shall not require termination of a disciplinary investigation.

(c) The restitution of funds that were converted or misapplied by a person covered by these Rules shall not bar the commencement or continuation of a disciplinary investigation or proceeding.

§ 1240.21 Appointment of Attorney to Protect Interests of Clients or Attorney

(a) When an attorney is suspended, disbarred or incapacitated from practicing law pursuant to these Rules, or when the Court determines that an attorney is otherwise unable to protect the interests of his or her clients and has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct, appointing one or more attorneys to take possession of the attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the clients' interests. An application for such an order shall be by motion, with notice to the Committee, and shall include an affidavit
setting forth the relationship, if any, as between the moving party, the attorney to be appointed and the suspended, disbarred or incapacitated attorney.

(b) Compensation. The Court may determine and award compensation and costs to an attorney appointed pursuant to this rule, and may direct that compensation of the appointee and any other expenses be paid by the attorney whose conduct or inaction gave rise to those expenses.

(c) Confidentiality. An attorney appointed pursuant to this rule shall not disclose any information contained in any client files without the client's consent, except as is necessary to carry out the order appointing the attorney or to protect the client's interests.

§ 1240.22 Resignation for Non-Disciplinary Reasons; Reinstatement

(a) Resignation of attorney for non-disciplinary reasons.

(1) An attorney may apply to the Court for permission to resign from the bar for non-disciplinary reasons by submitting an affidavit in the form in Appendix E to these Rules. A copy of the application shall be served upon the Committee and the Lawyers' Fund for Client Protection, and such other persons as the Court may direct.

(2) When the Court determines that an attorney is eligible to resign for non-disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and stating the non-disciplinary nature of the resignation.

(b) Reinstatement. An attorney who has resigned from the bar for non-disciplinary reasons may apply for reinstatement by filing with the Court an affidavit in the form in Appendix F to these Rules. The Court may grant the application and restore the attorney's name to the roll of attorneys; or deny the application with leave to renew upon proof that the applicant has successfully completed the Multistate Professional Responsibility Examination described in section 520.9 of this Title, or the New York State Bar Examination described in section 520.8 of this Title; or take such other action as it deems appropriate.

§ 1240.23 Volunteers/Indemnification

Members of the Committee, as well as referees, bar mediators, bar grievance committee members when assisting the Court of the Committee, and pro bono special counsel acting pursuant to duties or assignments under these Rules, are volunteers and are expressly authorized to participate in a State-sponsored volunteer program, pursuant to Public Officers Law §17(1).

§ 1240.24 Costs and Disbursements

The necessary costs and disbursements of an agency, committee or appointed attorney in conducting a proceeding under this Part shall be paid in accordance with Judiciary Law §90(6).