2. ATTORNEY ESCROW ACCOUNTS

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The Lawyers' Fund for Client Protection

of the State of New York

Bridge The Gap Program Presentation

"Attorney Escrow Accounts" Program Outline

- **Facts About the Lawyers' Fund**
- **Opening An Escrow Account**
  - **Choosing A Bank**
  - **IOLA or Not?**
  - **Proper Account Names**
  - **Maintaining a Ledger**
  - **Missing Client Deposits**
  - **Deceased Attorney Accounts**
  - **Dishonored Check Notice Rule**
- **A Practical Guide to Attorney Trust Accounts**

The Lawyers' Fund for Client Protection

of the State of New York

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www.nylawfund.org

Prepared for

The New York State Bar Association

Facts About the Lawyers' Fund

Our Mission:

To protect legal consumers from dishonest conduct in the practice of law, to preserve the integrity of the bar, to safeguard the good name of lawyers for their honesty in handling client money, to promote public confidence in the administration of justice in the Empire State.

The Lawyers' Fund exists because of good lawyers!

Since 1982:

✓The Trustees have approved 7,068 reimbursement awards totaling over $158 million.

✓Forty percent of the *amount* of all awards approved involve the theft of real property escrow funds ($64M).

✓Approximately 1/3 of the *number* of all awards approved involve the theft of real property escrow funds (2,171).

✓4,195 of 7,068 (60%) of all awards of reimbursement are from the Second Judicial Department.

✓The Fund's award cap of $300,000 per law client loss is among the highest in the Nation.

Since 1982:

✓All awards of reimbursement since 1982 have involved only 1,001 dishonest lawyers.

✓Ninety-one cents of every $1 collected by the Fund is used for client reimbursement.

✓The Lawyers' Fund receives no money from tax revenue or the Interest on Lawyer Accounts (IOLA) program.

✓The Fund's principal source of revenue is $60 from the $375 biennial registration fee.

✓The Fund is administered by seven Trustees appointed by the Court of Appeals. (Five lawyers and Two lay-persons.)

The Fund's Finances

Breakdown of $375 Biennial Attorney Registration Fee

Attorney Escrow Account Basics

Nuts & Bolts:

Opening an Escrow Account

1. Choose an Approved Banking Institution.

An Approved Banking Institution is defined as a state or national bank, trust company, savings bank, savings and loan association or credit union that has agreed to provide dishonored check notice reports to the New York Lawyers' Fund for Client Protection.

A list of Approved Banking Institutions is maintained by the New York Lawyers' Fund for Client Protection at www.nylawfund.org

NOTE: Attorneys are not required to deposit client funds in an FDIC insured institution….but it is a good idea!

Attorney Escrow Account Basics

Some facts about the FDIC*:

FDIC insurance covers funds in deposit accounts, including checking and savings accounts, money market deposit accounts and certificates of deposit (CDs).

The FDIC provides separate insurance coverage for deposits held in different ownership categories such as single accounts, joint accounts, Individual Retirement Accounts (IRAs) and trust accounts.

*** Information available from www.fdic.gov.**

Attorney Escrow Account Basics

Some facts about the FDIC:

Present coverage is $250,000 per single account per banking institution. (Through December 2013)

Attorney escrow accounts are considered single accounts, but, compliance with record keeping rules demonstrates fiduciary nature of the account and permits extension of FDIC coverage for the benefit of individual client deposits*.(*N.B. coverage of client funds is in the aggregate).

Attorney Escrow Account Basics

Some facts about the FDIC:

FDIC Advisory Opinion FDIC 98-2 (June 16, 1998):

"The express indication that (an) account is held in a fiduciary capacity will not be necessary, however, in instances where the FDIC determines, in its sole discretion, that *the titling of the deposit account and the underlying deposit account records sufficiently indicate the existence of a fiduciary relationship*. This exception may apply, for example, where the deposit account title or records indicate that the account is held by an escrow agent, title company or a company whose business is to hold deposits and securities for others..." (12 CFR § 330.5, Emphasis supplied).

"If this record keeping requirement is satisfied, funds attributable to each client will be insured to the client in whatever right and capacity that client owned the funds." (FDIC 98-2, June 16, 1998)."

Attorney Escrow Account Basics

Nuts & Bolts:

Opening an Escrow Account

2. Decide on whether to open an IOLA escrow account.

Pursuant to NY Judiciary Law section 497, Lawyers, in their discretion, may participate in the Interest On Lawyer Account (IOLA) program. The lawyer must determine whether he/she has been entrusted with "Qualified Funds", i.e. funds too small in amount or are reasonably expected to be held for too short a time to justify the expense of administrating a segregated account.

If an attorney determines they are holding "Qualified Funds", participation in IOLA in mandatory (21 NYCRR 7200.8(a)).

Attorney Escrow Account Basics

Nuts & Bolts:

Opening an Escrow Account

3. Establish proper name for escrow account and printed checks and deposit slips.

A Lawyer is responsible to name a client funds account either **"Attorney Trust Account, Attorney Escrow Account**, or **Attorney Special Account**". One of these titles must also appear on any printed checks and deposit slips.

These account names can be further qualified such as: **"Attorney Trust Account – IOLA".**

Attorney Escrow Account Basics

Nuts & Bolts:

Opening an Escrow Account

4. Create and maintain a client ledger and a check register for all deposits and debits.

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.

For purposes of compliance with this rule, a check copy provided by a lawyers' banking institution pursuant to "Check 21" is considered an original document.

Attorney Escrow Account Basics

Nuts & Bolts:

Unclaimed Escrow Funds and
Funds Belonging to Missing Law Clients.

Court rules permit a lawyer to seek a judicial order to fix the lawyer's fees and disbursements and deposit the client's share with the Lawyers' Fund. (22 NYCRR Rule 1.15(f)).

The Fund deposits these monies to a dedicated escrow account to prevent escheat. The Fund also conducts a search for the missing client.

As a policy matter, the Fund will accept deposits under $1,000 without a judicial order in the interests of preserving clients' funds. See, Bar Assoc. Erie Co., Cttee. Prof. Ethics Op. #xx1-1/15/04

Attorney Escrow Account Basics

Nuts & Bolts:

Death of a Sole Signatory to an Attorney Escrow Account

Sole signatory to escrow account has died and client escrow funds are inaccessible.

The Supreme Court has the authority to appoint a successor signatory for the attorney trust account (22 NYCRR Rule 1.15(g)). The Successor must be an attorney admitted to practice in New York State.

There are no official forms for Unclaimed Escrow Funds for Missing Client Funds or Appointing a Successor Signatory to an attorney trust account. Sample pleadings are available on the Lawyers' Fund website at www.nylawfund.org

Attorney Escrow Account Basics

Nuts & Bolts:

Using Your Escrow Account

Overdrafts and Insufficient Funds on an Attorney Trust Account.

There should never be an instance where an attorney trust account is overdrawn.

If an attorney bounces an escrow account check, the item is reportable under the "Dishonored Check Notice Reporting Rule" (22 NYCRR Part 1300)

Attorney Escrow Account Basics

Nuts & Bolts:
Dishonored Check Reporting Rule

Codified at 22 NYCRR Part 1300.

Read in tandem with the Attorney Trust Accounting and Recordkeeping Rule 22 NYCRR Rule 1.15.

Lawyers may only use banking institutions which have agreed to provide the Lawyers' Fund with notice of escrow account checks which are returned for insufficient funds.

The rule extends to all Attorney Trust, Attorney Special or Attorney Escrow Accounts, including IOLA accounts.

Attorney Escrow Account Basics

Nuts & Bolts:
Dishonored Check Reporting Rule

- Banking Institution required to report in 5 business days.
- Reports held for 10 business days.
- Copy of the notice is forwarded to the appropriate Attorney Grievance Committee.
- The Attorney Grievance Committee requests an explanation and 6 months of bank records.
- The Lawyers' Fund has processed over 10,000 bounced check reports totaling over $300 million since 1993.

The "Bounced Check Rule" is a proven loss prevention and detection device having identified over 254 lawyers who were subsequently disciplined for misusing client funds.

The Lawyers' Fund for Client Protection
of the State of New York

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Attorney Trust Accounts and Recordkeeping

A Practical Guide

The New York Lawyers' Fund
for Client Protection
of the State of New York

January 2009

Dear Colleague:

We are pleased to contribute this revised version of *A Practical Guide* as a public service for the bar of New York, law-office staffs, and law students.

It is intended as a plain-English guide to current court rules, statutes and bar association ethics opinions on the subject of attorney trust accounts and law office recordkeeping. This brochure provides a summary of the applicable rules and standards when a lawyer holds client money and escrow funds. It is not a substitute for the black-letter provisions of the New York Rules of Professional Conduct or court rules in each of the four judicial departments in the State .

A Practical Guide was first published in April 1988, with the help of the Committee on Professional Ethics of the New York County Lawyers' Association. This new version is prompted by recent ethics opinions, changes in federal banking law and adoption of the Rules of Professional Conduct which replace existing Disciplinary Rules effective on April 1, 2009.

 We hope you find *A Practical Guide* to be informative and helpful in your practice.

What are a lawyer's ethical obligations regarding client funds?

A lawyer in possession of client funds and property is a fiduciary.[1] The lawyer must safeguard and segregate those assets from the lawyer's personal, business or other assets.

A lawyer is also obligated to notify a client when client funds or property are received by the lawyer. The lawyer must provide timely and complete accountings to the client, and disburse promptly all funds and property to which the client is entitled. A client's non-cash property should be clearly identified as trust property and be secured in the lawyer's safe or safe deposit box.

These fiduciary obligations apply equally to money and property of non-clients which come into a lawyer's possession in the practice of law.

What is an attorney trust account?

It's a "special" bank account, usually a checking account or its equivalent, for client money and other escrow funds that a lawyer holds in the practice of law. A lawyer can have one account, or several, depending on need. Each must be maintained separately from the lawyer's personal and business accounts, and other fiduciary accounts, like those maintained for estates, guardianships, and trusts.

An attorney trust account must be maintained in a banking institution located within New York State; that is, a "state or national bank, trust company, savings bank, savings and loan association or credit union". Out-of-state

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[1] 22 NYCRR Part 1200 (Rule 1.15). The Appellate Divisions' Rules of Professional Conduct are published in 22 NYCRR Part 1200; *McKinney's Judiciary Law (*Appendix*);* and *McKinney's New York Rules of Court.*

banks may be used only with the prior and specific written approval of the client or other beneficial owner of the funds. In all cases, lawyers can only use banks that have agreed to furnish "dishonored check notices" pursuant to statewide court rules.[2] While some banking institutions may offer overdraft protection on a client funds account, an attorney trust account should never be overdrawn and should not carry overdraft protection.

These rules also require lawyers to designate existing or new bank accounts as either **Attorney Trust Account, Attorney Special Account**, or **Attorney Escrow Account**, with pre-numbered checks and deposit slips imprinted with that title. These titles may be further qualified with other descriptive language. For example, an attorney can add "IOLA Account" or "Closing Account" below the required title. [3]

What is the purpose of an attorney trust account?

To safeguard clients' funds from loss, and to avoid the appearance of impropriety by the lawyer-fiduciary. The account is used solely for funds belonging to clients and other persons incident to a lawyer's practice of law. Funds belonging partly to a client and partly to the lawyer, presently or potentially, must also be deposited in the attorney trust account. The lawyer's portion may be withdrawn when due, unless the client disputes the withdrawal. In that event, the funds must remain intact until the lawyer and client resolve their dispute.

Withdrawals from the attorney trust account must be made to named payees, and not to cash. A lawyer may not issue a check from an attorney escrow account drawn against a bank or certified check that has not been deposited or has not cleared[4]. A lawyer is also not permitted to make an ATM withdrawal from a client funds account. Deposits by ATM may be permitted if the attorney carefully reviews and adequately documents the deposit transaction, and otherwise complies with the records retention requirements of Rule 1.15[5]

Only members of the New York bar can be signatories on the bank account. In certain instances, a lawyer may allow a paralegal to use the lawyer's signature stamp to execute escrow checks from a client trust account so long as the lawyer supervises the delegated work closely. The lawyer though remains completely responsible for any misuse of funds. [6]

What about bank service charges?

A lawyer may deposit personal funds into the attorney trust account that are necessary to maintain the account, including bank service charges.

Should interest-bearing accounts be used?

Lawyers, as fiduciaries, should endeavor to make client funds productive for their clients. By statute, every lawyer has complete discretion to determine whether client and escrow funds should be deposited in interest-bearing bank accounts.[7]

For funds nominal in amount, or which will be held only briefly by a lawyer or law firm, the statute authorizes their deposit in so-called IOLA bank accounts.

But lawyers may also establish interest-bearing accounts for individual clients. For all client funds, lawyers may use pooled accounts in banks which have the capability to credit interest to individual client sub-accounts. A lawyer or law firm may also do the calculations necessary to allocate interest to individual clients or other beneficial owners.

What is IOLA?

IOLA is the acronym for the Interest On Lawyer Account Fund and program.[8] IOLA is a state agency which uses interest on IOLA attorney trust accounts to fund non-profit agencies which provide civil legal services for the poor, and programs to improve the administration of justice.

The IOLA account is designed for nominal and short-term client deposits which, in the sole discretion of the attorney, would not generate income for the client-owner, net of bank fees and related charges. [9]

A lawyer's participation in IOLA has no income tax consequences for the lawyer, or for the client. In addition, IOLA assumes the cost of routine bank service charges and fees on the account. IOLA's offices are at 11 E. 44th Street, Suite 1406, New York, NY 10017.

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[2] 22 NYCRR Part 1200 (Rule 1.15 (b)(1)). The Dishonored Check Notice Reporting Rules, effective January 1, 1993, are reported at 22 NYCRR Part 1300.

[3] 22 NYCRR Part 1200 (Rule 1.15 (b)(2)).

[4] See, NYSBA Op. 737 (2001).

[5] See, NYSBA Op. 759 (2002).

[6] See, NYSBA Op. 693 (1997).

[7] Judiciary Law §497.

[8] State Finance Law §97-v; Judiciary Law §497.

[9] 21 N.Y.C.R.R. 7000.2(e)

Telephone (646) 865-1541 or 1-800-222-IOLA. The IOLA Fund also has a site on the internet at www.iola.org.

FDIC Insurance and Attorney Trust Accounts

Attorneys are not required by court rules to deposit client funds in an FDIC insured banking institution. Nevertheless, as a fiduciary of client funds, an attorney is wise to consider FDIC insured institutions in order to provide an added layer of protection. A lawyer who fails to consider the relative safety of a depositary banking institution might be exposed to civil liability.[10]

The Federal Deposit Insurance Corporation (FDIC) provides insurance coverage to various types of deposit accounts.

The FDIC considers attorney escrow accounts as single accounts. An attorney must comply with New York record keeping rules to demonstrate the fiduciary nature of an escrow account in order to extend FDIC coverage to individual client deposits.[11]

FDIC coverage of depositor funds is in the aggregate. Lawyers must therefore consider if their client has other funds on deposit with the lawyer's depositary bank. If a client has accumulated deposits in excess of FDIC coverage, then lawyers should discuss deposit alternatives with their client.

In light of an ever-changing financial landscape, practitioners are encouraged to visit the FDIC's website at www.fdic.gov to obtain the most current rules regarding available insurance coverage.

How should large trust deposits be handled?

When a client's funds and the anticipated holding period are sufficient to generate meaningful interest, a lawyer may have a fiduciary obligation to invest the client's funds in an interest-bearing bank account.[12]

In that case, prudence suggests that a lawyer consult with the client or other beneficial owner. And when dealing with large deposits and escrows, lawyers and clients should be mindful of federal bank deposit insurance limits. [13]

There may also be income tax implications to consider. Using the law client's social security or federal tax identification number on the bank account can avoid tax problems for the lawyer.

May a lawyer retain the interest on an attorney trust account?

No. A lawyer, as a fiduciary, cannot profit on the administration of an attorney trust account. While a lawyer is permitted to charge a reasonable fee for administering a client's account, all earned interest belongs to the client. A lawyer's fee cannot be pegged to the interest earned[14].

What happens if a trust account check bounces?

A bounced check on an attorney trust account is a signal that law client funds may be in jeopardy. Banks in New York State report dishonored checks on attorney trust accounts to the Lawyers' Fund for Client Protection. Notices that are not withdrawn due to bank error are referred by the Lawyers' Fund to the proper attorney grievance committee for such inquiry as the committee deems appropriate.

These bank notices are required by the Appellate Divisions' Dishonored Check Notice Reporting Rules.[15] A "dishonored" instrument is a check which the lawyer's bank refuses to pay because of insufficient funds in the lawyer's special, trust, or escrow account.

The Lawyers' Fund holds each dishonored check notice for 10 business days to permit the filing bank to withdraw a report that was sent in error. However, the curing of an insufficiency of funds by a lawyer or law firm will not constitute reason for the withdrawal of a dishonored check notice.

Are there special banking rules for down payments?

Yes. A buyer's down payment, entrusted with a seller's attorney pending a closing, generally remains the property of the buyer until title passes. The lawyer-escrow agent is serving as a fiduciary, and must safeguard and segregate the buyer's down payment in a special trust account.

The purchase contract should make provisions

[10] See, *Bazinet v. Kluge*, 14 A.D.2d 324, 788 NYS 2d 77 (2005).

[11] See, 12 CFR § 330.5 and FDIC Advisory Opinion 98-2, June 16, 1998.

[12] See, NYSBA, Comm. on Prof. Ethics, Ops. 554 (1983), 575 (1986); Assoc. Bar, NYC, Comm. on Prof & Jud. Ethics, Op. 86-5 (1986).

[13] See, 22 NYCRR Part 1200 (Rule 1.15 (b)(1)), and *Bazinet v. Kluge*, 14 A.D.2d 324, 788 NYS 2d 77 (2005).

[14] NYSBA, Ops. 532 (1981), 582 (1987); Assoc. Bar, NYC, Op. 81-68 (1981).

[15] 22 NYCRR Part 1200 (Rule 1.15 (b)(1)). The Dishonored Check Notice Reporting Rules, effective January 1, 1993, are reported at 22 NYCRR Part 1300.

for depositing the down payment in a bank account, the disposition of interest, and other escrow responsibilities.

A 1991 statute codifies the fiduciary obligations of lawyers and realtors who accept down payments in residential purchases and sales, including condominium units and cooperative apartments.[16]

This statute requires that the purchase contract identify: (1) the escrow agent; and (2) the bank where the down payment will be deposited pending the closing.

There are also special rules, promulgated by the New York State Department of Law, where escrow accounts are established in connection with the conversion of buildings into condominiums and cooperatives.[17]

Are other bank accounts needed?

Yes. A practitioner needs a business account as a depository for legal fees, and to pay operating expenses. A typical designation is **Attorney Business Account**. Lawyers also need special bank accounts when they serve as fiduciaries for estates, trusts, guardianships, and the like.

Where are advance legal fees deposited?

This depends upon the lawyer's fee agreement with the client. The presumption in NewYork State is that the advance fee becomes the lawyer's property when it is paid by the client. As such, the fee should be deposited in the business account, and not in the attorney trust account.

If, on the other hand, by agreement with the client, the advance fee remains client property until it is earned by the lawyer, it should be deposited in the attorney trust account, and withdrawn by the lawyer or law firm as it is earned.[18]

In either event, a lawyer has a professional obligation to refund unearned legal fees to a client whenever the lawyer completes or withdraws from a representation, or the lawyer is discharged by the client.[19]
It is good business practice to deposit advance legal fees in a non-escrow fee account and draw upon the deposit only when legal fees are earned. This practice will ensure that a lawyer will be able to fulfill the professional obligation to refund unearned legal fees.

In the event of a fee dispute, court rules provide that a client may elect mandatory fee arbitration in most civil representation which commenced on or after January 1, 2002 when the disputed amount is between $1,000 and $50,000. [20] Fee arbitration is also mandatory in fee disputes in domestic relations matters. [21]

And advances from clients for court fees and expenses?

This also depends upon the lawyer's fee agreement with the client. If the money advanced by the client is to remain client property until it is used for specific litigation expenses, it should be segregated and safeguarded in the attorney trust account, or in a similar special account.

How are unclaimed client funds handled?

If a lawyer cannot locate a client or another person who is owed funds from the attorney trust account, the lawyer is required to seek a judicial order to fix the lawyer's fees and disbursements, and to deposit the client's share with the Lawyers' Fund for Client Protection.[22] To preserve client funds, the Lawyers' Fund will accept deposits under $1,000 without a court order.[23]

What happens when a sole signatory dies?

The Supreme Court has authority to appoint a successor signatory for the attorney trust account. The procedures are set forth in court rules adopted in 1994.[24]

What accounting books are required?

No specific accounting system is required by court rule, but a basic trust accounting system for a law firm consists of a trust receipts journal, a trust disbursements journal, and a trust ledger book containing the individual ledger accounts for recording each financial transaction affecting that client's funds.

At a minimum, each client's ledger account should reflect the date, source, and a description of each item of deposit, as well as the date, payee, and purpose of each withdrawal.

Many practitioners find that the so-called

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[16] See, General Business Law, Article 36-c, §§778, 778-a.

[17] See, General Business Law, §352-e (2-b).

[18] See, NYSBA Op. 570 (1985) and Op. 816 (2007).

[19] 22 NYCRR Part 1200(Rule 1.16 (e)).

[20] 22 NYCRR Part 137

[21] 22 NYCRR Part 136

[22] 22 NYCRR Part 1200 (Rule 1.15 (f)).

[23] See, Bar Assoc. Erie Co., Cttee. Prof. Ethics Op. #xx1-1/15/04

[24] 22 NYCRR Part1200 (Rule 1.15 (g)).

"one-write" or "pegboard" manual systems provide an efficient and economical method of trust accounting. There are also approved computer software packages for law office trust accounting.

Whether it be an attorney trust account or the lawyer's operating account, each should be maintained daily and accurately to avoid error. All documents like duplicate deposit slips, bank statements, canceled checks, checkbooks and check stubs must be preserved for seven years.

Internal office controls are essential. It is good business practice to prepare a monthly reconciliation of the balances in the trust ledger book, the trust receipts and disbursements journals, the bank account checkbook, and bank statements.

What bookkeeping records must be maintained?

Every lawyer and law firm must preserve[25], for seven years after the events they record:

- books of account affecting all attorney trust and office operating accounts; and
- original checkbooks and check stubs, bank statements, pre-numbered canceled checks and duplicate deposit slips[26]

Also, copies of:

- client retainer and fee agreements;
- statements to clients showing disbursements of their funds;
- records showing payments to other lawyers or non-employees for services rendered; and
- retainer and closing statements filed with the Office of Court Administration.

"Copies" means original records, photo copies or other images that cannot be altered without detection. Records required to be maintained by the Rules in the form of "copies" may be stored by reliable electronic means. Records that are initially created by electronic means may be retained in that form. Other records specifically described by the Rules that are created by entries on paper books of account, ledgers or other such tangible items should be retained in their original format.[27]

How are these rules enforced?

A violation of a Rule of Professional Conduct constitutes grounds for professional discipline under section 90 of the Judiciary Law. Also, the accounts and records required of lawyers and law firms by court rule may be subpoenaed in a disciplinary proceeding.

Lawyers are also required to certify their familiarity and compliance with Rule 1.15 in the biennial registration form that is filed with the Office of Court Administration.

What losses are covered by the Lawyers' Fund?

The New York Lawyers' Fund for Client Protection is financed by a $60 share of each lawyer's $350 biennial registration fee. The Lawyers' Fund receives no revenues from tax revenues or the IOLA program.

The Lawyers' Fund, established in 1982, is administered *pro bono publico* by a Board of Trustees appointed by the State Court of Appeals.[28] The Trustees provide approximately $8 million in reimbursement each year to victims of dishonest conduct in the practice of law.

The Lawyers' Fund is authorized to reimburse law clients for money or property that is misappropriated by a member of the New York bar in the practice of law. Awards are made after a lawyer's disbarment, and in situations where the lawyer is unable to make restitution. The Fund's current limit on reimbursement is $300,000 for each client loss.

To qualify for reimbursement, the loss must involve the misuse of law clients' money or property in the practice of law. The Trustees cannot settle fee disputes, nor compensate clients for a lawyer's malpractice or neglect.

Typical losses reimbursed include the theft of estate and trust assets, down payments and the proceeds in real property transactions, debt collection proceeds, personal injury settlements, and money embezzled from clients in investment transactions.

The Lawyers' Fund is located at 119 Washington Avenue, Albany, New York 12210. Telephone (518) 434-1935, or 1-800-442-FUND. The Lawyers' Fund also has a site on the internet at www.nylawfund.org.

[25] 22 NYCRR Part 1200 (Rule 1.15 (d)).

[26] N.B. With the advent of electronic banking and Check 21, the 'substitute check' provided by participating banking institutions is considered the legal equivalent of the canceled check and thus the original record that must be maintained by 22 NYCRR Part 1200 (Rule 1.15 (d)). See also, NYSBA Op. 758.

[27] See, NYSBA Ops. 680 (1996), 758 (2002).

[28] Judiciary Law, §468-b; State Finance Law, §97-t.

Michael G. Gaynor, Esq.

OUTLINE:
THE HANDLING OF ESCROW FUNDS BY ATTORNEYS

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THE HANDLING OF ESCROW FUNDS BY ATTORNEYS

INTRODUCTION

There often is confusion and a lack of awareness of the role and responsibility of an attorney who has received money from a client or third party. This section addresses the handling of escrow funds by attorneys.

ESCROW ACCOUNTS

An attorney who receives funds on behalf of a client or third party is a fiduciary and as such must safeguard those funds in accordance with the Code of Professional Responsibility,[1] court rules and the Judiciary Law. These funds, received in the course of the attorney's practice of law, are to be maintained in a special account, separate from any business or personal accounts and separate from any accounts the attorney may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity.[2]

Location of account. The escrow account is to be maintained in a New York bank which agrees to provide reports pursuant to the Dishonored Check Reporting Rule.[3] The account may be maintained in a bank outside of New York only if that bank complies with the Dishonored Check Reporting Rule and the attorney has obtained prior detailed written approval from the person to whom the funds belong.[4] Records for the account are to be available at the attorney's principal New York office.[5]

Title of account. The account is to be in the name of the attorney or law firm and must

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1 New York Rules of Professional Conduct, promulgated as joint rules of the Appellate Division of the Supreme Court and set forth in Part 1200 of Title 22 of New York Codes, Rules and Regulations (NYCRR).

2 Rule 1.15; *Matter of Bartholomew*, 195 AD2d 753, 600 NYS2d 336 (3rd Dept 1993).

3 22 NYCRR 1300, Dishonored Check Reporting Rules for Attorney Special, Trust and Escrow Accounts.

4 Rule 1.15(B)(1); *Matter of Weisman*, 139 AD2d 249, 531 NYS2d 255 (1st Dept 1988).

5 Rule 1.15 (I).

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contain the title "Attorney Special Account", "Attorney Trust Account" or "Attorney Escrow Account".[6] Bank statements, checks and deposit slips must also bear that designation.[7]The account title may include other descriptive language, as long as it does not conflict with the required language. For example, an attorney may add "Real Estate Account" or "Closing Account" following the required title. A non-escrow account may not be labeled as an escrow account.[8] If the escrow account is an IOLA account, which most should be, an additional designation is required.[9]

Only attorneys in good standing may maintain an escrow account. A suspended or disbarred attorney may not continue to maintain or use an escrow account which was in use prior to the attorney's removal from the practice of law.[10]

Funds of Attorney. Other than an amount sufficient to maintain the account, no funds belonging to the attorney may be kept in the escrow account.[11] Escrow accounts are not to be used to pay personal debts nor are they to be used to shelter an attorney's funds from judgment creditors or tax liens.[12]

Deposits. All funds received by an attorney on behalf of a client or third party should be

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6 *Mater of Rabine, 253 AD2d 144, 687 NYS2d 654 (2nd Dept 1999); Matter of Bollettieri, 225 AD2d 887, 639 NYS2d 504 (3rd Dept 1996); Matter of Holsberger, 223 AD2d 920, 637 NYS2d 322 (3rd Dept 1996).*

7 *Matter of Scattaretico-Naber, 250 AD2d 334, 682 NYS2d 67 (2nd Dept 1998).*

8 *Matter of Connolly, 225 AD2d 241, 650 NYS2d 275 (2nd Dept 1996).*

9 *See,* ***IOLA ACCOUNTS****, infra.*

10 *Matter of Kwiatkowski, 275 AD2d 141, 714 NYS2d 505 (2nd Dept 2000); Matter of Leff, 268 AD2d 37, 705 NYS2d 603 (2nd Dept 2000).*

11 *Matter of Hammer, 253 AD2d 226, 687 NYS2d 71 (1st Dept 1999).*

12 *Matter of McCann, 3 AD3d 5, 769 NYS2d 243 (1st Dept 2003); Matter of Rose, 286 AD2d 1, 730 NYS2d 161 (2nd Dept 2001); Matter of Betancourt, 232 AD2d 9, 661 NYS2d 208 (1st Dept 1997).*

deposited into the attorney's escrow account.[13] An attorney may not deposit client funds into a non-escrow account out of fear that an escrow account in the attorney's name will be subject to attachment by a creditor of the attorney or the IRS.[14] The funds may not be put in a safe, locked cabinet or safe deposit box.[15] They should not be deposited in an account in the attorney's name as trustee or in a certificate of deposit in the attorney's name designated "as attorney".[16] An attorney who receives funds on behalf of a client or third party in the course of legal representation does not do so in the capacity of financial advisor or investment counselor. It is the attorney's duty to safeguard the funds, not to invest them in the hope of obtaining a higher rate of return. Specific language permitting deposit into an account other than an "identifiable bank account" was rejected when DR 9-102 was amended in 1990.[17] It is noted that DR 9-102 was the applicable disciplinary rule up to April 1, 2009 when this section became Rule 1.15 of the New York Rules of Professional Conduct.

Where a check is received payable to the attorney and client, it is not appropriate for the attorney to deposit the check into an escrow account by use of a "For Deposit Only" endorsement. The client should personally endorse the check.[18] An attorney may use a revocable power of attorney, either in a stand alone document or as part of a retainer agreement, that authorizes the attorney to settle a case and to endorse the client's name to the settlement check, provided the attorney makes full disclosure as to the effect of such power of attorney and further that (i) the attorney may only settle a case on terms indicated in advance by the client or if the settlement is submitted to the client for approval, and (ii)

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13 *Matter of Segal, 274 AD2d 127, 710 NYS2d 102 (2nd Dept 2000).*

14 *Matter of Wagshul, 308 AD2d 248, 765 NYS2d 47 (2nd Dept 2003); Matter of Projansky, 286 AD2d 35, 730 NYS2d 714 (2nd Dept 2001); Matter of Grubart, 152 AD2d 185, 547 NYS2d 638 (1st Dept 1989); Matter of Weisman, 139 AD2d 249, 531 NYS2d 255 (1st Dept 1988).*

15 *Matter of Cox, 283 AD2d 85, 728 NYS2d 599 (4th Dept 2001); Matter of Collins, 193 AD2d 22, 602 NYS2d 553 (2nd Dept 1993).*

16 *Matter of Cissi, 202 AD2d 139, 617 NYS2d 104 (4th Dept 1994); Matter of Lewis, 159 AD2d 854, 553 NYS2d 861 (3rd Dept 1990).*

17 Gross, Marjorie E., *Amendments to the New York Code of Professional Responsibility*, 1990.

18 *Matter of Cerbone, 295 AD2d 66, 742 NYS2d 110 (2nd Dept 2002).*

an attorney who endorses a settlement check on behalf of the client must promptly comply with the notice, record keeping and disbursement requirements of DR 9-102.[19]

However, the use of a retainer agreement incorporating an unconditional power of attorney authorizing the attorney to endorse the client's name to settlement checks received in the course of representation is improper and an authorization should only be used in those rare cases where the circumstances require it.[20]

Checks which in part or in whole include funds due a client or third party should be deposited into an escrow account in the first instance. The check should not be deposited into the attorney's operating account for the purpose of separating out the attorney's fee.[21]
Notification and payment to clients. Clients or third parties should be timely notified by the attorney of receipt of funds they have an interest in and payment should be promptly made.[22]

Payments from escrow account. An attorney may not make disbursements against a deposit until the funds have been collected.[23] Funds from an earlier transaction may not be used as a float to cover payments against uncollected funds.[24] The use of post-dated checks is a practice fraught with danger, as is giving checks to clients and asking them

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19 NYSBA Ethics Opinion #760.

20 *Matter of Hausen, 108 AD2d 206, 488 NYS2d 742 (2nd Dept 1985).*

21 *Matter of Venezia, 219 AD2d 310, 640 NYS2d 898 (2nd Dept 1996).*

22 *Matter of Strauss, 228 AD2d 782, 644 NYS2d 78 (3rd Dept 1996); Matter of Sorid, 189 AD2d 377, 596 NYS2d 125 (2nd Dept 1993); Matter of Murdock, 186 AD2d 312, 588 NYS2d 432 (3rd Dept 1992); Matter of Cholakis, 179 AD2d 862, 578 NYS2d 671(3rd Dept 1992).*

23 *Matter of Rosenberg, 3 AD3d 52, 770 NYS2d 405 (2nd Dept 2003); Matter of Rudin, 280 AD2d 200, 719 NYS2d 919 (4th Dept 2001).*

24 *Matter of Tepper, 286 AD2d 79, 730 NYS2d 498 (2nd Dept 2001); Matter of Sullivan, 253 AD2d 999, 678 NYS2d 169 (3rd Dept 1998); Matter of Elefterakis, 238 AD2d 7, 667 NYS2d 55 (2nd Dept 1997); Matter of Joyce, 236 AD2d 116, 665 NYS2d 430 (2nd Dept 1997).*

to hold them until the deposit clears.[25]

Escrow accounts may not carry overdraft privileges and the account may not be associated or linked with any other account for the purpose of covering a shortage.

An escrow account may contain sub-accounts for the benefit of individual clients. However, the attorney should protect against commingling or inadvertent or technical conversion where one of the sub-accounts is the attorney's. Care must also be taken when transfer to a checking sub-account is required in order to disburse funds.

Payments from an escrow account may only be made to a named payee by check or, with the prior written approval of the party entitled to the proceeds, by bank or wire transfer. Checks may not be issued payable to cash.[26]Cash withdrawals or transactions using an ATM card are also prohibited.[27]

Funds due an attorney should be disbursed from an escrow account by check payable to the attorney. They should not be withdrawn by checks payable to third parties in satisfaction of personal obligations or business expenses unrelated to the particular matter.[28]

It is no defense to a conversion charge that the client for whom an attorney was holding funds would have consented to the attorney taking fund from the escrow account in the form of a loan.[29]

Attorney's Fees. Earned attorney's fees should not be deposited in an escrow

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25 *Matter of Ampel, 196 AD2d 105, 608 NYS2d 438 (1st Dept 1994).*

26 *Matter of McCann, supra; Matter of Rudin, supra; Matter of Bishop, 235 AD2d 53, 663 NYS2d 241 (2nd Dept, 1997); Matter of Ocasio, 223 AD2d 339, 646 NYS2d 327 (1st Dept 1996).*

27 *Matter of Williams, 290 AD2d 111, 735 NYS2d 204 (2nd Dept 2001); Matter of Butler, 285 AD2d 344, 729 NYS2d 744 (2nd Dept 2001); Matter of Fitzgerald, 279 AD2d 160, 705 NYS2d 603 (2nd Dept 2000).*

28 *Matter of Friedman, 279 AD2d 147, 717 NYS2d 240 (2nd Dept 2000); Matter of Nicotera, 268 AD2d 881, 702 NYS2d 425 (3rd Dept 2000).*

29 *Matter of Neufeld, 268 AD2d 1, 704 NYS2d 579 (1st Dept 2000); Matter of Munzer, 261 AD2d 87, 697 NYS2d 49 (1st Dept 1999).*

account.[30]They are the property of the attorney and their deposit constitutes commingling of personal funds with those of clients and third parties.[31] Similarly, upon disbursing funds to the client, the attorney's fee should also be disbursed. An unearned fee should be withdrawn promptly when earned and leaving these funds in the account constitutes commingling.[32]

There is no reason why payment of an attorney's fees should precede payment to the client. In most instances they should occur at the same time.[33]

Where an attorney's fee is in escrow and a dispute arises, the disputed portion may not be withdrawn until the dispute is resolved.[34]

A conversion of client's funds is not excused by the fact that fees in excess of the amount taken may be due the attorney.[35]

Signatories. Only an attorney admitted in New York may be a signatory on an escrow account. Paralegals, office managers or other non-attorneys may not sign escrow account checks.[36] While an opinion of the New York State Bar Association holds that an attorney may allow a paralegal to use a signature stamp to execute escrow checks in connection with a real property closing, the attorney must supervise the delegated work

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30 *Matter of Williams, supra.*

31 NYSBA Ethics Opinion #570.

32 *Matter of Friedman, 279 AD2d 147, 704 NYS2d 579 (2nd Dept 2000); Matter of Orseck, 262 AD2d 862, 692 NYS2d 766 (3rd Dept 1999).*

33 *Matter of Rosenberg, 3 AD3d 52, 770 NYS2d 405 (2nd Dept 2003); Matter of Allen, 308 AD2d 143, 765 NYS2d 74 (4th Dept 2003); Matter of Perlman, 241 AD2d 203, 670 NYS2d 866 (2nd Dept 1998).*

34 DR 9-102(B)(4) of the former New York State Code of Professional Conduct; *Matter of Morrissey*, 217 AD2d 74, 634 NYS2d 51 (1st Dept 1995).

35 *Matter of Pressment, 118 AD2d 270, 504 NYS2d 398 (1st Dept 1986).*

36 *Matter of Williams, 290 AD2d 111, 735 NYS2d 204 (2nd Dept 2001); Matter of McMahon, 251 AD2d 808, 676 NYS2d 474 (3rd Dept 1998); Matter of Takvorian, 240 AD2d 95, 670 NYS2d 211(2nd Dept 1998).*

closely and exercises complete professional responsibility for the acts of the paralegal.[37] An attorney may not sign blank checks leaving them for a non-attorney employee to complete.[38] Under no circumstances should a client be given access to the attorney's escrow account.[39] All attorneys who are signatories on an escrow account are responsible for the activity in that account. Where client funds are converted by an attorney in a law firm, the failure to oversee or review the firm's books and bookkeeping practices, exposes an otherwise innocent partner to discipline.[40]

Missing clients. Where funds are payable to a client who cannot be located, the attorney should apply for an order directing payment of the attorney's fees and disbursements, with the balance to be delivered to the Lawyers' Fund for Client Protection for safeguarding and disbursement.[41]

Dissolution of law firm. The former partners or members of a dissolved law firm must arrange for one of them or a successor firm to maintain the bookkeeping records.[42]

Deceased Attorneys. When an attorney who is the sole signatory on an escrow account dies, neither the estate representative nor the estate attorney may issue checks from the deceased attorney's escrow account. In such a situation, an application needs to be made to Supreme Court for an order designating a successor signatory.[43]

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37 NYSBA Ethics Opinion #693.

38 *Matter of Cohen, 264 AD2d 94, 704 NYS2d 547 (1st Dept 2000).*

39 *Matter of Bleecker, 242 AD2d 42, 672 NYS2d 885 (2nd Dept 1998).*

40 *Matter of Glazer, 264 AD2d 19, 701 NYS2d 656 (2nd Dept 2000); Matter of Ponzini, 259 AD2d 142, 694 N.Y.S.2d 127 (2nd Dept 1999); reargument granted, 268 AD2d 478 (2nd Dept 2000); Matter of Maroney, 259 A.D.2d 206, 694 N.Y.S.2d 431 (2nd Dept 1999); Matter of Spencer, 259 AD2d 218, 694 N.Y.S.2d 426 (2nd Dept 1999); reargument granted, 268 AD2d 481 (2nd Dept 2000); Matter of Falanga, 180 AD2d 83, 583 NYS2d 472 (2nd Dept 1992).*

41 Rule 1.15(F).

42 Rule 1.15 (H); *See,* **REQUIRED BOOKKEEPING RECORDS,** *infra.*

43 Rule 1.15 (G).

Disabled Attorneys. There are no provisions, similar to those dealing with deceased attorneys, in the event a sole signatory on an escrow account becomes mentally or physically disabled or abandons his or her practice and cannot be located. The rationale for dealing with deceased attorneys may apply in such a situation and Supreme Court or the appropriate Appellate Division may issue an order designating a successor signatory for the purpose of distributing escrow funds to the appropriate parties or directing that the funds be transferred to the Lawyers' Fund for Client Protection for distribution or safeguarding.

Sale of law practice.[44] The sale of an attorney's law practice does not carry with it the seller's escrow account. Funds of clients whose cases are transferred will need to be released from the selling attorney's escrow account by check for deposit into the purchasing attorney's escrow account. Even where an entire practice is purchased the parties may not merely change the title and signatories on the seller's escrow account.

Biennial Affirmation of Compliance. The Rules of the First and Second Department Appellate Divisions require that attorneys affirm on the biennial registration statement provided by the Office of Court Administration,[45] that they have read and are in compliance with Rule 1.15 of the New York Rules of Professional Conduct.[46]That affirmation is available at all times to the Grievance Committee.

Where an attorney converts or otherwise mishandles escrow funds, a charge may be included that the attorney filed a biennial statement containing a false affirmation.[47]

INTEREST ON LAWYER ACCOUNTS (IOLA)

An IOLA account is an unsegregated, interest bearing escrow account.[48] Funds which an attorney would hold in escrow should be deposited in an IOLA escrow account when, in the

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44 Rule 1.17.

45 Judiciary Law 468-a, 22 NYCRR 118.1.

46 22 NYCRR 603.15 & 691.12.

47 *Matter of Humpherys, 291 AD2d 138, 738 NYS2d 857 (2nd Dept 2002); Matter of Butler, 285 AD2d 344, 729 NYS2d 744 (2nd Dept 2001); Matter of Gilde, 276 AD2d 178, 715 NYS2d 751 (2nd Dept 2000); Matter of Steinbach, 228 AD2d 88, 651 NYS2d 523 (1st Dept.1997).*

48 Judiciary Law §497.

judgment of the attorney, they are not expected to generate sufficient interest to justify the expense of administering a segregated account. The obligation rests with the attorney to ensure that the IOLA fund is notified that the account has been established.[49]

The rule of thumb is that if a particular deposit is expected to earn less than $150 in interest while in the attorney's control, the money should be deposited in an IOLA account.[50] Where the attorney determines that sufficient interest will be earned to justify a segregated escrow account for the benefit of a particular client, all interest earned on that account is the property of the client.[51]

Judiciary Law §497(5). Subdivision 5 of Judiciary Law 497 provides the following safe harbor provision:

> No attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys to an IOLA account pursuant to a judgment in good faith that such moneys were qualified funds.

That is not to say however that there are no circumstances under which an attorney may be held responsible or that this provision has no limits.

In *Bazinet v. Kluge,* 196 Misc.2d 231, 764 NYS2d 320 (Sup Ct, NY County 2003) the court held that a client stated a malpractice claim against an attorney who represented her in the sale of cooperative apartments, based on an allegation that the attorney drafted sales contacts which provided for the deposit of $2,730,000 in his escrow account maintained at a relatively small Connecticut bank without protection beyond the $100,000 per account deposit insurance provided by the Federal Deposit Insurance Corporation pending the closings. The bank subsequently failed. The client also stated a malpractice claim based on the allegation that the attorney deposited these funds in a non-interest bearing IOLA account, since such a significant sum did not appear to constitute "qualified funds" as defined by the IOLA statute. The allegations, however, did not state a gross negligence claim.

On appeal the Appellate Division, First Department reversed (2005 WL 22693, NYAD 2005), finding that there was no allegation that the attorney violated any statute or

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49 Judiciary Law §497(6)(a).

50 21 NYCRR 7000.10.

51 *Matter of Gross, 281 AD2d 67, 723 NYS2d 51 (2nd Dept 2001); Matter of Summer, 238 AD2d 86, 667 NYS2d 150 (4th Dept 1997); Matter of Mattone, 195 AD2d 91, 606 NYS2d 322 (2nd Dept 1994); Matter of Stella, 193 AD2d 235, 602 NYS2d 636 (2nd Dept 1993).*

regulation, much less that he breached the escrow provisions of the contract. The court held there was no requirement imposed by law that an attorney-escrow agent place escrow funds in an account fully insured by the FDIC (citing General Business Law § 778-a[52] and DR 9-102(B)(1)) and there are no allegations that the attorney knew the bank was in danger of closing. The proximate cause of the plaintiff's injury, if any, was the bank's unforseen demise.

In *Takayama v. Schaefer,* 240 AD2d 21, 669 NYS2d 656 (2nd Dept 1998), Judiciary Law §497(5) was relied upon to exonerate an attorney who held a $12,000 deposit in an IOLA account during four years of litigation, although two dissenting judges concluded that a breach of fiduciary duty occurred when the attorney failed to deposit the funds in an interest bearing account when it became evident that the funds would have to remain in escrow pending the outcome of the litigation. The majority conceded that there are circumstances where subdivision 5 would not provide protection to an attorney employing an IOLA account.

In *Mann v. Skidmore,* 193 Misc 2d 340, 749 NYS2d 379 (Nassau Dist Ct 2002) where the escrow deposit involved was $85,000 the court distinguished Takayama and found that the retention of this sum for a year and a half in an IOLA account exceeded the limits of the statutory safe harbor provision.

On appeal the judgment was reversed and the action dismissed. (2 Misc 3d 50, 774 NYS2d 252 [App Term 2nd Dept 2003]). The court held that the plaintiffs failed to establish that the attorney lacked good faith, either in depositing the funds in a non-interest-bearing attorney IOLA account in the first instance, or in failing to transfer the funds to an interest-bearing account at some later time. The plaintiffs complained only of the attorney's poor judgment in depositing the proceeds into an IOLA account. This was held to be insufficient to establish lack of good faith and in fact represents the very questioning of professional judgment that Judiciary Law §497(5) was intended to forestall. The inquiry into the attorney's initial determination as to whether the funds were "qualified" was prospective and his assertion that he expected the funds to be disbursed within two or three months was unrebutted.

Finally, while an attorney may not be held liable for monetary damages or be the subject

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General Business Law § 778-a(4) (Contracts requiring down payments in escrow) provides in part:

Unless the contract provides otherwise, an escrow agent shall not be required to deposit the down payment in an interest-bearing bank account.

If the escrow agent is an attorney admitted to practice in this state, a bank account authorized by section four hundred ninety-seven of the judiciary law shall be a lawful depository for down payments held by the attorney in escrow.

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of a disciplinary proceeding based upon a good faith decision to deposit funds into an IOLA account, the failure to maintain such an account has been held to constitute misconduct.[53]

Non-interest bearing escrow accounts. There is no such thing as a non-interest bearing escrow account. Funds must either be deposited in an interest bearing escrow account with the interest credited to a specific client or an IOLA account. Even short term special funding accounts established for mortgage transactions on behalf of financial institutions fall within these rules.

REQUIRED BOOKKEEPING RECORDS

Records of all financial transactions must be accurate and are to be made at or near the time of the events recorded.[54] These record keeping requirements apply to all accounts associated with an attorney's practice, not just escrow accounts. For a period of seven years attorneys must maintain the following documentation:

> A record of all deposits and withdrawals identifying the date, source and description of each deposit, and date, payee and purpose of each withdrawal or disbursement.
>
> A record for escrow accounts, showing the source of all funds deposited, the names of all persons for whom the funds are held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.[55]
>
> All original checkbooks, check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.[56]

Other non-banking documents relating to the attorney's representation of a client must

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53 *Matter of Raymond, 210 AD2d 694, 620 NS2d 165 (3rd Dept 1994); Matter of Ford, 287 AD2d 870 (3rd Dept 2001).*

54 Rule 1.15; *Matter of Panara*, 241 AD2d 78, 670 NYS2d 644 (4th Dept 1998); *Matter of Madsen*, 230 AD2d 275, 654 NYS2d 501 (4th Dept 1997); *Matter of Rolnick*, 171 AD2d 29, 574 NYS2d 369 (2nd Dept 1991).

55 *Matter of Siddiqi, 231 AD2d 150,658 NYS2d 668 (2nd Dept 1997).*

56 *Matter of Ryan, 264 AD2d 128, 703 NYS2d 247 (2nd Dept 2000); Matter of Connolly, supra.*

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also be retained. These are detailed in Rule 1.15.

Where copies are permitted an attorney may satisfy the requirement of maintaining records through original records, photocopies, microfilm, optical imaging or any other medium that preserves an image of the document that cannot be altered without detection.[57]

Attorneys are required to maintain a running balance of trust account activity and complete periodic reconciliations.[58] While an attorney may delegate bookkeeping activities to non-attorneys, the ultimate responsibility and duty to verify that funds are properly preserved

rests with the attorney.[59]

Attorney registration certification. All attorneys subject to the jurisdiction of the First and

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57 Rule 1.15; NYSBA Ethics Opinion #758.

58 *Matter of Warkow, 242 AD2d 102, 673 NYS2d 437 (2nd Dept 1998); Matter of Capobianco, 219 AD2d 179 (4th Dept 1996).*

59 *Matter of Rosenberg, 3 AD3d 52, 770 NYS2d 405 (2nd Dept 2003). See also, Bimbaum v,. Citibank, N.A., 97 A.D.2d 392, 467 N.Y.S.2d 213 (2nd Dept 2003) where the bank mistakenly credited an attorney's escrow account for $4,400 and $250. The attorney could not reconcile his account balance with that reported by the bank but was advised by a bank officer that the error was his and not the bank's. After four months of being unable to trace the source of the unaccounted for funds, the attorney transferred them into another escrow account at another bank so as to segregate the unaccounted for funds.*

He subsequently received notice that his account was debited in the amounts of $4,400 and $250 because the account had been credited in error. Upon receipt of this notice, the attorney notified the bank that he would incur injury and damage if any checks drawn on his escrow account were returned because of insufficient funds. He thereafter received notice escrow account checks had been returned from the bank for insufficient funds.

The attorney sued Citibank for $28,000,000 as a result of its unilaterally debiting his account. The court denied the bank's motion to dismiss finding that inasmuch as the bank had been notified of the questionable credit, but at that time found no error, and, over a period of time, continued to carry the credit on the attorney's account, his reliance on the bank's assurance that the credit was not erroneous may be justifiable. Accordingly, under the facts and circumstances presented, the complaint stated a cause of action in wrongful dishonor pursuant to UCC §4-402.

Second Judicial Departments are required to affirm as part of their biennial registration that they have read and are in compliance with Rule 1.15. This requirement has formed the basis of an additional charge in a disciplinary proceeding alleging conversion that the attorney made a false affirmation in the registration statement.[60]

DISHONORED CHECK REPORTING RULE

The Dishonored Check Reporting Rule[61] provides that a report must be issued by a bank whenever a check from an attorney's escrow account is returned for insufficient funds.

Compliance with rule. Escrow accounts may only be maintained in a bank which agrees to provide reports pursuant to the Dishonored Check Reporting Rule.[62]All New York attorneys are deemed to have consented to the rule and the obligation rests with the attorney to make certain that the account is in compliance.

Report of dishonored check. A report is required from the depository bank whenever a properly payable instrument is presented against an escrow account which contains insufficient available funds, and the bank dishonors the instrument. This is not an overdraft rule. The check must in fact be dishonored.

Processing of report. A dishonored check report is mailed to the Lawyers' Fund for Client Protection within five banking days after the date of presentment. The Lawyers' Fund holds the report for ten business days to enable the bank to withdraw the report. The report may only be withdrawn if it was issued by inadvertence or mistake. The curing of an insufficiency by the deposit of funds is not a basis for withdrawing a report. In the absence of such a withdrawal, after ten days, the Lawyers' Fund forwards the report to the appropriate grievance committee for investigation.

INVESTIGATION BY GRIEVANCE COMMITTEE

Commencement. Most investigations that result in an audit of an attorney's escrow account do not begin with a complaint that the attorney has misused or misappropriated

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60 *Matter of Humpherys, 291 AD2d 138, 738 NYS2d 857 (2nd Dept 2002); Matter of Butler, supra; Matter of Gilde, 276 AD2d 178, 715 NYS2d 751 (2nd Dept 2000).*

61 22 NYCRR 1300.

62 *Matter of Darden, 240 AD2d 844, 658 NYS2d 718 (3rd Dept. 1997); Matter of Teig, 235 AD2d 626, 651 NYS2d 728 (3rd Dept 1997).*

funds. Rather, they begin with a complaint that the attorney neglected the client's case or failed to respond to requests for information.

An investigation will be commenced and an audit is likely to occur when a notice is received in accordance with the Dishonored Check Reporting Rule. Upon receipt of the notice, the grievance committee routinely directs the attorney to provide escrow account records for the preceding six month period.

Production of records. Rule 1.15 requires that an attorney's escrow account records be available to the grievance committee at the principal New York office of the attorney and that the records be produced in response to a notice or subpoena duces tecum. All such books and records remain confidential except for the particular proceeding. The failure to produce these records may result in suspension from the practice of law until the attorney complies.[63]

Where the required records have not been maintained, the attorney, upon direction of the grievance committee, may be required to secure microfiched records directly from the bank. This can be an expensive proposition for the attorney.

Rule 1.15 provides that an attorney who does not maintain required records, or who does not produce them as directed, shall be subject to a disciplinary proceeding.

AUDIT PROCESS

Records. When an audit is conducted, the attorney is requested to produce bank statements, canceled checks, deposit slips, and ledgers for a specified period of time. That time period could be as short as six months or could encompass years. The request is not limited to the records of a specific client but includes all persons or parties for whom the attorney is or was holding funds. Since the records are kept confidential, an attorney cannot decline to provide escrow account records because they contain transactions on behalf of clients unrelated to the complaint that gave rise to the audit.

The audit, which usually begins with a review of an attorney's escrow account, may require the production of operating and personal accounts if the tracking of deposits and withdrawals involves the use of these accounts.[64]

Analysis. Once the records are received, an in-depth analysis is undertaken. This consists

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63 *Matter of Lazaroni, 12 AD3d 17 (1st Dept 2004); Matter of Nagoda, 238 AD2d 667, 656 NYS2d 694 (3rd Dept 1997); Matter of Roberts, 224 AD2d 801,637 NYS2d 944 (3rd Dept 1996).*

64 *Matter of Albanese, 274 AD2d 284, 710 NYS2d 594 (1st Dept 2000).*

of posting all transactions to a ledger. Minimum client balances are determined for particular dates, which in total, are compared to the actual balance in the account. A negative balance in the account is not required to establish a conversion of client's funds. If the minimum client balance exceeds the actual balance, a prima facie case of conversion has been established.

An attorney must be able to establish that on any given day, all funds needed to be held on behalf of all clients were on deposit in the account. The ability to pay one client is not sufficient and is commonly characterized as "taking from Peter to pay Paul."[65]

Items looked for in the audit include whether:

1. All required funds are on deposit;

2. Checks have been issued against insufficient funds;[66]

3. The attorney utilized overdraft privileges on the escrow account;

4. Funds of one or more clients were used on behalf of another client;

5. Funds have been improperly transferred between accounts (check kiting);[67] and

6. Improper or unauthorized wire transfers have occurred;[68]

Findings. In addition to determining if a shortage has occurred, the audit will look for other violations of Rule 1.15, such as:

1. Commingling;

2. Writing checks to cash;

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65 *Matter of Field, 200 AD2d 205, 613 NYS2d 922 (2nd Dept 1994).*

66 *Matter of Raphael, 216 AD2d 788, 628 NYS2d 846 (3rd Dept 1995); Matter of Pantoja, 200 AD2d 110, 613 NYS2d 387 (1st Dept 1994).*

67 *Matter of Sanders, 152 AD2d 163, 547 NYS2d 797 (4th Dept 1989).*

68 *Matter of Rapoport, 229 AD2d 1, 652 NYS2d 607 (1st Dept 1997).*

3. Failure to produce or maintain records;[69]

4. Failure to maintain proper or accurate records;[70]

5. Improper signatories;

6. Improperly titled accounts;

7. Failure to maintain or utilize an IOLA account;

8. Issuing payment before the corresponding deposit has cleared;[71]

9. Failure to maintain an account in accordance with the Dishonored Check Reporting Rule;

10. Failure to satisfy liens, or improperly satisfying a lien;[72]

11. Unnecessary delay in the release of funds to the party entitled to receive them.

12. Payment of the attorney's fees before funds are released to the client.

13. Whether the attorney had authority to endorse a client's name to a settlement draft and if the endorsement was in proper form.[73]

14. Withdrawals from escrow account by ATM card.[74]

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69 *Matter of Agrillo, 194 AD2d 16, 604 NYS2d 171 (2nd Dept 1993).*

70 *Matter of Schutz, 299 AD2d 41, 747 NYS2d 43 (2nd Dept 2002); Newbould, 277 AD2d 697, 716 NYS2d 126 (3rd Dept 2000).*

71 *Matter of Jones, 7 AD3d 101, 777 NYS 2d 504 (2nd Dept 2004); Rosenberg, 3 AD3d 52, 770 NYS2d 405 (2nd Dept 2003).*

72 *Matter of Perlman, supra; NYSBA Ethics Opinion #717.*

73 *Matter of Dean, 147 AD2d 133, 541 NYS2d 555 (2nd Dept l989).*

74 *Matter of Butler, supra.*

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Where the analysis of records produced either by the attorney or through a subpoena served upon a bank, presents uncontroverted evidence of conversion, the grievance committee may seek the attorney's immediate suspension from the practice of law pending conclusion of a disciplinary proceeding.[75]

CONSEQUENCES OF ESCROW IRREGULARITIES

Where a grievance committee's investigation discloses escrow account irregularities, the outcome may be an educational or disciplinary letter if the errors are primarily bookkeeping in nature. Where, however, the conduct goes uncorrected or it involves conversion, significant commingling or other serious misconduct, the probable result will be a disciplinary proceeding. Needless to say, an attorney's misconduct can be significantly exacerbated where it is found the false or fraudulent information was provided to the grievance committee.[76]

For disciplinary purposes, misconduct by an attorney relating to escrow funds need not be the same as conduct which would constitute grand larceny under the Penal Law. The burden of proof in a disciplinary proceeding is a fair preponderance of the evidence, not guilt beyond a reasonable doubt, or even clear and convincing evidence.[77]

Although intent may be relevant on the issue of an appropriate sanction, it is not a necessary element of a disciplinary charge. The absence of venal intent is not a defense to a charge of conversion. Intent only comes into play where a conversion charge is coupled with a charge under Rule 8.4(c) which requires a showing of intent to defraud, deceive or misrepresent.[78]

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75 **1st Department** - 22 NYCRR 603.4(e)(1); *Matter of Downing*, 237 AD2d 71, 667 NYS2d 49 (1st Dept 1997); *Matter of Prounis*, 230 AD2d 55, 654 NYS2d 131 (1st Dept 1997); **2nd Department** - 22 NYCRR 691.4(l); *Matter of LoPresto*, 239 AD2d 30, 668 NYS2d 215 (2nd Dept 1998); **3rd Department** - 22 NYCRR 806.4[f]; *Matter of Van De Loo*, 225 AD2d 885, 639 NYS2d 147 (3rd Dept 1996); **4th Department** 22 NYCRR 1022.20(e); *Matter of Golkin*, 218 AD2d 375, 638 NYS2d 371 (4th Dept 1996).

76 *Matter of Rohrberg, 268 AD2d 180, 705 NYS2d 50 (1st Dept 2000).*

77 *Matter of Capoccia, 59 NY2d 549 (1983).*

78 *Matter of Russakoff, 79 NY2d 520, 524 (1992); Matter of Cohen, supra; Matter of Semple, 225 AD2d 238, 650 NYS2d 146 (1st Dept 1996); Matter of Baumgarten, 197 AD2d 309 (1st Dept 1994); Matter of Altomerianos, 160 AD2d 96, 559 NYS2d 712 (1st*

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While an attorney may not be disciplined solely for asserting the privilege against self-incrimination, the failure to refute uncontroverted evidence of serious escrow violations

will likely result in significant discipline.[79]

The refusal to provide information in a grievance committee's investigation which may support a finding of misconduct but which cannot lead to criminal prosecution is impermissible and may by itself result in discipline for failure to cooperate with the investigation. The privilege against self incrimination cannot be used as a shield against the production of bank records.[80]

Failure to cooperate with the grievance committee's investigation may also result in discipline.[81]

OTHER ATTORNEY ACTIVITIES WITH ESCROW RAMIFICATIONS

Attorneys have been disciplined for the improper handling of funds even though an escrow account may not have been not involved. These situations involved fiduciary responsibilities similar to those attendant to escrow accounts.

A. Estates.

Failing to deposit estate funds into an estate account. *Matter of Rothenberg*, 143 AD2d 479, 532 NYS2d 938 (3rd Dept 1988); *cf , Matter of Abbott*, 191 AD2d 899, 594 NYS2d 855 (3rd Dept 1993), where the court held there is no explicit requirement in the disciplinary rules that estate funds be placed in a separate estate account rather than an escrow account.

Dept 1990).

79 *Spevack v Klein, 385 US 511 (1967); Matter of Kaye, 194 AD2d 99, 604 NYS2d 117 (1st Dept 1993).*

80 former DR 9-102(I); *Zuckerman v. Greason,* 20 NY2d 430, 438 (1967); *Shapiro v. United States*, 335 US 1 (1948).

81 *Matter of Farrell, 218 AD2d 38, 636 NYS2d 55 (1st Dept 1996); Matter of Aaron, 207 AD2d 85, 620 NYS2d 458 (2nd Dept 1994) Matter of Wolfgang, 261 AD2d 14, 697 NYS2d 27 (1st Dept1999).*

Failure to segregate estate funds and account. *Matter of Prunis*, 250 AD2d 155, 680 NYS2d 505 (1st Dept 1998).

Using estate money to cover conversion of funds from another estate and a cemetery association. Forging signature of co-executor to checks to effectuate conversions. *Matter of Cholakis, supra*; *Matter of Argentieri*, 180 AD2d 46, 583 NYS2d 104 (4th Dept 1992).

In attempt to avoid probate, imperiling estate assets by commingling them with attorney's own assets and assets of family members, failing to establish a separate estate account, utilizing a bewildering and unnecessary number of bank accounts and inter-account transfers, and improperly relying on an expired power of attorney. *Matter of Glavin*, 214 AD2d 803, 25 NYS2d 311 (3rd Dept 1995).

Conversion of estate funds by affixing the executrix's signature to checks made payable to the estate without permission of the executrix and depositing these funds into the law office operating account. *Matter of Daly*, 232 AD2d 868, 650 NYS2d 811 (3rd Dept 1996).

Depositing cash proceeds from the sale of a client's house into an escrow account and failing to transfer the funds into an estate account when attorney is named executor and residuary beneficiary of the of the client's estate. *Matter of Cassel*, 154 AD2d 876, 547 NYS2d 427 (3rd Dept 1989).

Embezzling funds from client and from estate following client's death. *Matter of Feely*, 223 AD2d 78, 645 NYS2d 21 (1st Dept 1996).

Issuing forged checks drawn on estate account. *Matter of Feinman*, 182 AD2d 179, 587 NYS2d 652 (1st Dept 1992).

Taking legal fee in an estate matter without obtaining court approval or disclosing same. *Matter of Cerbone, supra*; *Matter of Brashich*, 250 AD2d 71, 680 NYS2d 214 (1st Dept 1998).

B. Escrow agent.

Respondent in his capacity as the seller's attorney, received from the proposed purchaser signed contracts of sale and a down payment check in the amount of $31,500 payable to him as escrowee. Pursuant to the contract of sale, the down payment was to be held in escrow until the closing or the termination of the contract. Respondent failed to turn over any of the $31,500 when another attorney assumed representation of the seller prior to or at closing. Instead, he used it for personal expenses. The transaction concerned respondent's former marital residence, which had previously been deeded to his then-wife. *Matter of Soviero*, 10 AD3d 179, 780 NYS2d 500 (2nd Dept 2004).

Fact that attorney was not acting as counsel for either buyers or sellers in real estate transaction did not preclude determination that his handling of deposit by prospective purchaser was professional misconduct.*Matter of Van De Loo, supra*; *Matter of Hahn*, 195

AD2d 105, 606 NYS2d 933 (4th Dept 1993).

Releaing escrow funds to client without confirmation of authority to do so or notice to other party or attorney. *Matter of Natale*, 307 AD2d 4, 761 NYS2d 255 (2nd Dept 2003).

Respondent deposited a check payable to himself as attorney in the amount of $208,394 into his operating account with respect to his Mr. Green. Respondent testified that he believed that a portion of those funds belonged to him as fees and the remainder belonged to his client. The check from his client was drawn on the account of Regal Abstract. When he received the check, respondent knew that Mrs. Green was to receive approximately $233,000 from the sale of Monck's Realty, and he knew that his client had no assets over $200,000. Respondent disbursed approximately $70,000 of that sum to Mr. Green and used the remainder for personal purposes. He knew or should have known that the $208,394 check he deposited into his operating account was owed to Mrs. Green. Under these circumstances, respondent had a fiduciary duty to inquire of Regal Abstract as to the reason the check was issued to him. *Matter of Davidson*, 11 AD3d 11, 782 NYS2d 110 (2nd Dept 2004)

C. Financial agent.

Accepting $300,000 from a client to be invested for the client and thereafter commingling said funds with own. When the client demanded a return of her money, the attorney failed to do so. *Matter of Perlow*, 97 AD2d 492, 468 NYS2d 13 (2nd Dept 1983); *Matter of Francess*, 39 AD2d 199, 333 NYS2d 294 (1st Dept 1972).

D. Court appointed receiver.

Failure to provide an accounting of funds entrusted to the attorney as court appointed temporary receiver. *Matter of Charles*, 208 AD2d 271, 623 NYS2d 924 (2nd Dept 1995).

E. Guardian ad litem, conservator, or committee.

Misappropriating and converting funds entrusted to attorney as successor committee for incompetent. *Matter of McCormick*, 219 AD2d 230, 634 NYS2d 731 (2nd Dept 1995); *Matter of Casey*, 196 AD2d 246, 609 NYS2d 69 (2nd Dept 1994).

F. Foreclosure referee.

Converting funds in capacity of referee to a foreclosure sale. *Matter of Parker*, 180 AD2d 106, 584 NYS2d 126 (2nd Dept 1992); *Matter of Vetter*, 147 AD2d 75, 542 NYS2d 895 (4th Dept 1989).

G. Power of attorney.

Misappropriation of the assets of elderly clients through a power of attorney. *Matter of Contino*, 205 AD2d 1,617 NYS2d 105 (4th Dept 1994); *Matter of Kohler*, 184 AD2d 39, 591 NYS2d 119 (4th Dept 1992); *Matter of Gallow*, 138 AD2d 803, 525 NYS2d 921 (3rd Dept

1988).

H. Trustee.

Trustee converting funds from the trust. *Matter of Mulderig*, 182 AD2d 85, 586 NYS2d 827 (2nd Dept 1992); *Matter of Singer*, 154 AD2d 122, 552 NYS2d 144 (2nd Dept 1990).

I. Government checks.

Failure to deposit Social Security checks into an account until attorney accumulated a year's worth of checks. *Matter of Glavin*, 180 AD2d 966, 580 NYS2d 545 (3rd Dept 1992). Mistaken deposit of client's Social Security and Veterans Administration checks into attorney's operating account and application of those funds to office expenses. *Matter of Baker*, 184 AD2d 9, 588 NYS2d 502 (4th Dept 1992).

Attorneys forging the endorsement of deceased father as payee on 33 pension checks issued by the New York State Retirement System. *Matter of Gross*, 91 AD2d 1145, 458 NYS2d 366 (3rd Dept 1983).

J. Infant settlement.

Failure to deposit funds received in settlement of a claim on behalf of an infant client in an appropriate guardianship trust account. *Matter of Leonardo*, 197 AD2d 59, 611 NYS2d 404 (4th Dept 1994); *Matter of Swyer,* 143 AD2d 462, 532 NYS2d 936 (3rd Dept 1988).

Guardians retained respondent to contest an alleged Medicaid lien claimed by the DSS against any potential recovery by their son. The action was settled and the court directed that $525,000 be set aside and held in an interest-bearing escrow account pending a motion and determination of the alleged lien held by the DSS.

Respondent deposited that sum into an interest-bearing client sub-account in his law firm's escrow account. He thereafter withdrew $25,000, without the knowledge and consent of the court or other interested parties, for a down payment to purchase a home for the son. The $25,000 was forfeited to the seller pursuant to the term of the contract.

Respondent submitted a motion to Supreme Court to utilize the escrow to purchase a home guardians and their son. In his affirmation in support of the motion, the respondent made the representation that the $525,000 plus interest was in an escrow account. The respondent knew or should have known that this statement was misleading in that it failed to truthfully disclose that $25,000 had already been removed from the escrow account and used as a down payment. *Matter of Robert*, 10 AD3d 9 (2nd Dept 2004)

K. Bankruptcy Trustee.

Conversion of funds received in connection with Bankruptcy proceedings. *Matter of Dussault*, 215 AD2d 843, 626 NYS2d 319 (3rd Dept 1995).

L. Law Firm Employee.

Diverting fees due law firm and providing false closing statements *Matter of Allen*, 274 AD2d 182, 710 NYS2d 389 (2nd Dept 2000).

Altering law firm check for services as per diem attorney. *Matter of Torres*, 290 AD2d 131, 736 NYS2d 239 (2nd Dept 2001).

Submitting falsified expense report and supporting invoices to law firm for business trip. *Matter of De La Rosa*, 290 AD2d 134, 736 NYS2d 371 (1st Dept 2001).

M. Loans.

Inducing a client to loan money which the attorney used to pay personal debts, by misrepresenting that the funds were to be invested in dental equipment. The attorney testified falsely before the grievance committee that he had informed this client that the loan was for his personal use. *Matter of Leff*, 275 AD2d 135, 718 NYS2d 18 (1st Dept 2000).

N. Operating Account.

Respondent over a period of more than four years misappropriated funds in the total amount of $60,582 from his law firm's operating account by issuing checks drawn on the account made payable to his personal credit card account or to petty cash and falsely noting on law firm check request forms that the expenditures were for office expenses and postage. *Matter of Trimboli*, 304 AD2d 282, 762 NYS2d 192 (4th Dept 2003).

Respondent established a checking account entitled "New York Elder Law Group, LLP." (an improper trade name) for the deposit of legal fees, in an effort to prevent his creditors from locating his assets and executing judgments obtained against him. *Matter of Wagshul*, 308 AD2d 248, 765 NYS2d 47 (2nd Dept 2003).

O. Fraud.

Attorney fabricated will, forged signature with false notary. He used false documents to probate estate, obtained letters and withdrew $50,000. *Matter of Nolan*, 268 AD2d 164, 706 NYS2d 704 (2nd Dept 2000)

Respondent forwarded to an insurance company a general release bearing his client's signature and the attorney's as notary. The release was in fact not signed by the client. He received a $15,000 settlement draft payable to the client and himself which was deposited into his escrow account. The client never signed the settlement draft. *Matter of Nerenberg*, 2 AD3d 1, 769 NYS2d 53 (2nd Dept 2003).

P. Avoiding Creditors.

A judgment was entered against respondent for approximately $65,000. The creditor

moved to garnish respondent's personal bank account due to his failure to make payment on the debt. As a result, respondent began giving his legal earnings to an associate in his law firm, who then provided the funds to him on an as needed basis. *Matter of McCann, supra.*

Respondent intentionally and deliberately opened two attorney escrow accounts, after his personal bank accounts had been levied upon by various taxing authorities, in order to shield his personal funds and exclusively utilized these accounts for his business and personal funds for approximately two years. *Matter of Goldstein,* 10 AD3d 174, 780 NYS2d 348 (1st Dept 2004)

THE NEW YORK RULES OF PROFESSIONAL CONDUCT

COMMON PROBLEM AREAS FOR ATTORNEYS

Rule 1.3 Diligence

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

This is the verbatim language from the old DR 6-101(A)(3) and is perhaps the most common accusation of misconduct made by clients who contact the Committee on Professional Standards. Although neglect is not defined, review of such allegations center upon the harm to a client resulting from an attorneys failure to properly handle a case on a clients behalf as well as the specific facts of the case. Just because an attorneys practice is busy or due to personal circumstances an attorney cannot attend to a file in a reasonable manner, does not excuse an attorneys responsibility to monitor their work and reasonably attend to tasks. Just because the neglect may be non-deliberate or due to a lack of proper attention may not excuse the attorney from a finding of professional misconduct.

Rule 1.4 Communication

(a) A lawyer shall:

(3) keep the client reasonably informed about the status of a matter.

(4) promptly comply with a clients reasonable requests for information

The operative term as pertains to this rule from disciplinary review is what is reasonable under the circumstances of a case and/or representation. When it is not feasible for the attorney to respond to a clients requests for information, status or documents relating to the representation, an attorney may rely upon his staff to respond so long as the attorney follows up with the client within a reasonable time period. Often, clients requests are unreasonable and it is common for attorneys to explain why such

requests do not serve the client well or advance the best interests of a client. Attorneys are also expected to respond to communications from opposing counsel or other persons involved in a particular case. The decision to find that an attorney violated this rule in a disciplinary context is often based on the length of time it took for an attorney to respond to a client/third person/court and the resulting harm/prejudice that has impacted the case due to the attorneys failure to communicate. These decisions are made on a case by case basis. The attorneys disciplinary history of not responding to clients calls or letters is often a determining factor to impose further discipline.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the cirdcumstances or customary in the professional community

(3) disclosure permitted by (b)

"Confidential information" consists of information gained during or relating to the representation of a client whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or © information that the client has requested be kept confidential.....

(b) A lawyer may reveal or use confidential information to the extent that the lawyer resonably believes necessary

(1) to prevent reasonably certain death or substantial bodily harm

(2) prevent the client from committing a crime.

Rule 3.3 Conduct before a Tirbunal

(a) A lawyer shall not knowingly

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyers client, or a witness called by the lawyer has offered material evidence and the lawyer comes to knwo of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence other than the testimony of a defendant in a criminal matter, that the lawyer reasonably beleives to be

false.

© the duties stated in paragraph (a) and (b) above apply even if complinace requires disclosure of information otherwise protected by Rule 1.6.

Rule 1.6 and 3.3 are two of the most important rules to understand under the New York Rules of Professional Conduct since both rules implicate an attorneys duty of when to disclose information received from a client that the attorney knows is false and the client insists on presenting to a tribunal. For a thorough and excellent explanation of both rules, and the change from the old code of professional responsibility, see Simon's New York Rules of Professional Conduct Annotated, 2012 edition.

Simply stated DR 7-102 stated that in those cases where the attorney was fully aware that the client had presented false testimony before a tribunal or provided false information used by the attorney in the context of a pending case, the rule provided that the attorney may divulge such fraud unless the information provided to the attorney was a client confidence or protected by the attorney client relationship. Typically, the attorneys responsibility was to first seek that the client withdraw such testimony or information provided to the tribunal. In the event the attorney was unsuccessful in convincing the client to withdraw such information, DR 7-102 would prevent the attorney from further disclosure.

The rule has now changed with adoption of the New York Rules of Professional Conduct effective April 1, 2009. Now, disclosure is an option even if the information imparted to the attorney from the client is clearly a client confidence or protected by the attorney client relationship as a privileged communication. For a complete analysis of the rule the following are cases that should be reviewed.

People v Andrades, 4 N.Y.3d 355 (2005)

People v Darrett, 2 A.D.3d 16 (2003)

People v DePallo, 96 N.Y.2d 437 (2001)

New York State Bar Association Ethics Opinions #837 (2010) and #831 (2009).

Rule 1.8 Current Clients: Specific Conflict of Interest Rules

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects that lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek, the advice of independent counsel on the transaction; understood by the client

(3) the client gives informed consent, in a writing signed by the client, to the essential tersms of the transaction and the lawyers role in the transaction, including whether the lawyer is representing the client in the transaction.

This rule often can lead to serious discipline. Typically, these cases arise where the attorney takes advantage of the attorney client relationship by entering into a business transaction where the terms of the transaction benefit the attorney. Lawyers who seek to align themselves with clients in business transactions are advised to tell the client to seek independent legal counsel about the terms. Lawyers who seek loans from clients are advised to carefully read this rule.