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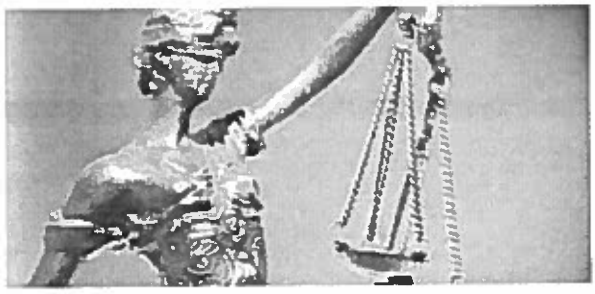

INSURANCE FOR YOUR LAW PRACTICE
What You Need to Know

FACULTY

Robert H. Doud, Esq.
Timothy J. Domanick, Esq.
Robert Zabbia, Allstate Inc.

Program Coordinators

Gerard J. McCreight, Esq., & Sean Campbell, Esq.

May 21, 2019
Suffolk County Bar Association, New York

Robert Zabbia, **Agency Owner**

My dad started working in the insurance industry in 1972 and opened his agency in North Massapequa in 1996 when I started working with him. Watching him interact with people was the reason I got into the business. He got to know so many people in the area, and everyone knew him wherever we went. I took over the agency when he retired in 2001, after 20 years in the business, and I'm proud to now work with the kids and grandkids of the people he helped to insure over the years.

Massapequa is a close-knit community, and my wife, Joey, and I are happy to be raising our twin son and daughter nearby. Most days you'll find me at the office or with my family — especially on various sports fields with my kids. But I also do my best to give back to the community through the Massapequa Chamber of Commerce. I'm a member of the Columbus Lodge of the Order Sons of Italy, and I sponsor scholarships through the group each year. I also support local softball leagues and Plainedge High School football, and I enjoy my time with the Mustang Club of Long Island.

My team and I have been together for a long time, and you'll experience a friendly, customer-oriented feel that comes with a family business. We understand life on the south shore first-hand and are ready to help you protect what matters most — whether you need home, auto or life insurance or are a contractor who needs small business insurance. We're also here to help you prepare for your future, from saving for college to getting ready for retirement. Our office is located at the corner of Broadway and Kings Avenue — please stop in and see us today!

Education
Bachelor of Business Administration-Hofstra University

Civic Services
Massapequa Chamber of Commerce
National Association of the Remodeling Industry
Industry Services
Allstate National Advisory Board
Professional Insurance Agents Association
Allstate Agency Executive Council
New York Allstate Agent Advisory Board

Timothy Domanick, Esq. is an Associate in the Long Island, New York office of Jackson Lewis P.C. He practices exclusively in employment law and has been involved in proceedings before federal and state courts, the American Arbitration Association and administrative agencies.

Mr. Domanick has successfully prepared position statements pleadings, motions, and memoranda of law related to employment law issues such as employment discrimination, harassment, and retaliation. Mr. Domanick also has advised clients on compliance with various state and federal laws, including Title VII, Fair Labor Standards Act, Americans with Disabilities Act, Age Discrimination in Employment Act and New York State and City laws. In addition, he routinely conducts workplace training for management and employees regarding legal compliance issues, and has worked closely with clients through all phases of litigation.

While attending law school, he was the Managing Editor of Staff of the *Hofstra Labor & Employment Law Journal* and received the Jonathan Falk Memorial Scholarship.

Prior to joining the firm, he was an associate at another labor and employment firm in Long Island, New York.

Robert H. Doud

Robert H. Doud is an Attorney at Law and a Certified Public Accountant in the State of New York. He earned his Bachelor of Science from the Tobin College of Business at Saint John's University and his Juris Doctor from the School of Law at Saint John's University.

Since 2000, he has been employed at MetLife, Inc. as a Senior Trial Counsel in the House Counsel section of Legal Affairs. His focus during his tenure at MetLife, Inc. has been state and federal litigation in the New York Metropolitan region. He has presented at internal forums on the subjects including Bad Faith, Motion Practice and Procedure as well as Rescission issues. Prior to his employment at MetLife, Inc.; his practice of law included the representation of accountants, business consultants and lawyers in malpractice actions as well as product liability related litigation.

Since 2002, he has also served as an Adjunct Professor of Accounting and Business Law at the Robert B. Willumstad School of Business at Adelphi University where he has taught courses including the Legal & Ethical Environment of Business and Business Law to graduate and undergraduate students.

His community service has included eight years as a member of the not-for-profit Dominican Foundation in New York City, where he served as Chair of the Audit Committee.

He is presently a member of the Bar Association of Suffolk County as well as the New York State Bar Association.

Sean Campbell, Esq. earned his undergraduate degree from Cornell University. He is a graduate of New York Law School and also attended the Stern School of Business at New York University. He currently serves as a Director for the Suffolk County Bar Association. Prior to founding the Law Offices of Sean Campbell in 2008 he was Senior Counsel for Litigation for a major financial services company. He is admitted to practice in the State of New York and the U.S. district courts for the Eastern and Southern districts of New York. He is also admitted to practice at the United States Supreme Court.

GERARD J. MCCREIGHT, Esq. is admitted to practice law in New York and Rhode Island. He received a B.A. from New York University in 1992 and a J.D. from Touro Law School in 1996, where Gerard was a member of the Touro Law Review. After law school, Gerard was associated with a prominent law firm in Garden City where he worked as a member of the litigation group.

In 1998, he co-authored the Belgium Chapter in International Public Procurement, published by the Center for International Studies, which examined Belgium's compliance with European Community directives to establish uniform standards for the procurement of public contracts throughout the EC.

In 1999, Gerard left the full-time practice of law and became the Chief Legislative Aide to newly elected Suffolk County Legislator, Jon Cooper, in January of 2000. While working for Legislator Cooper, Gerard assisted with the research, drafting and implementation of legislation, including Suffolk County's landmark ban on driving while using a hand-held cell-phone.

In 2000, Mr. McCreight was selected to participate in a leadership and trustee training course offered by the Huntington Chamber Foundation called "Leadership Huntington" and thereafter co-chaired the State of the Town workshop for Huntington's Leadership Council from 2001 through 2004, hosting conferences on topics such as education, parkland preservation and regional planning in Huntington.

In the spring of 2003, Gerard returned to the private practice of law and was engaged primarily in the areas of real estate and commercial transactions, commercial litigation and labor and employment law. Gerard has represented institutional and private lenders, commercial clients and individual clients in related matters.

In February of 2012, Gerard became the Chief Legal Officer for The Matrix Group headquartered in Port Jefferson Station, New York. Gerard provided legal counsel and helped operate over 3 million square feet of Class A office space and 6,000 units of multi-family housing. Gerard drafted and negotiated commercial leases, transactional documents, and business plans. He served as lead counsel for all transactions, conducted local litigations and supervised all outside counsel.

In April of 2017, Gerard opened his own law practice counseling clients in commercial matters and real estate transactions and related litigation.

Gerard is a member of the Board of Directors for the Suffolk County Bar Association and previously served as the Treasurer of the Suffolk Academy of Law, which is the educational arm of the Suffolk County Bar Association. He has lectured on various aspects of real estate and commercial transactions and related litigation.

Insurance Considerations for Attorneys

What you need to know at different stages of your business

Presented by:
Robert Zabbia

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Objectives

- Identify the types of insurance required for Attorneys & Practices
- Identify other types of insurance an Attorney or Practice should consider
- Explain the risks Attorneys & Practices face
- Explain why insurance is important for Attorneys & Practices
- Explain the exclusions that Attorneys & Practices need to be aware of

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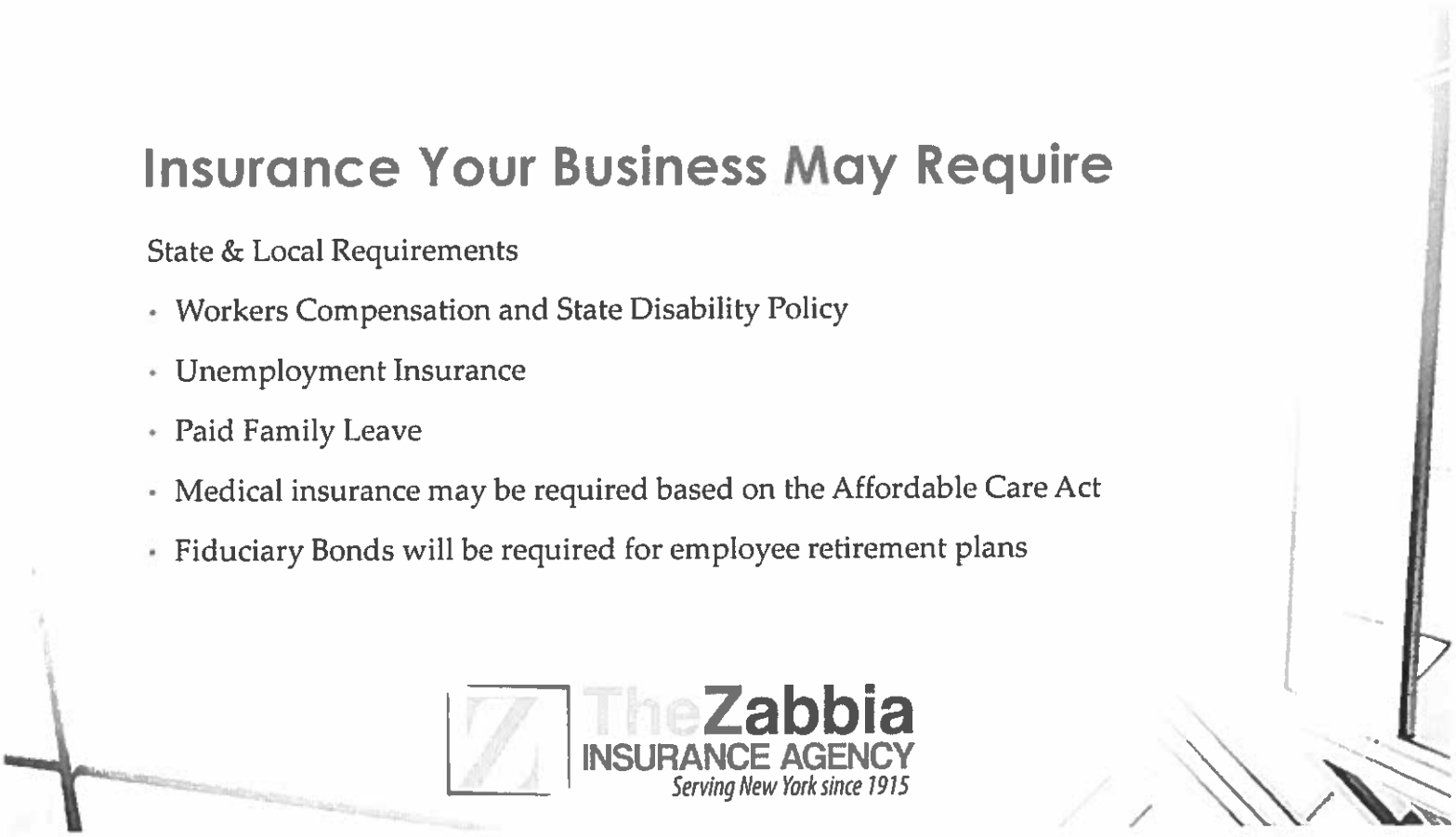
Insurance Your Business May Require

State & Local Requirements

- Workers Compensation and State Disability Policy
- Unemployment Insurance
- Paid Family Leave
- Medical insurance may be required based on the Affordable Care Act
- Fiduciary Bonds will be required for employee retirement plans



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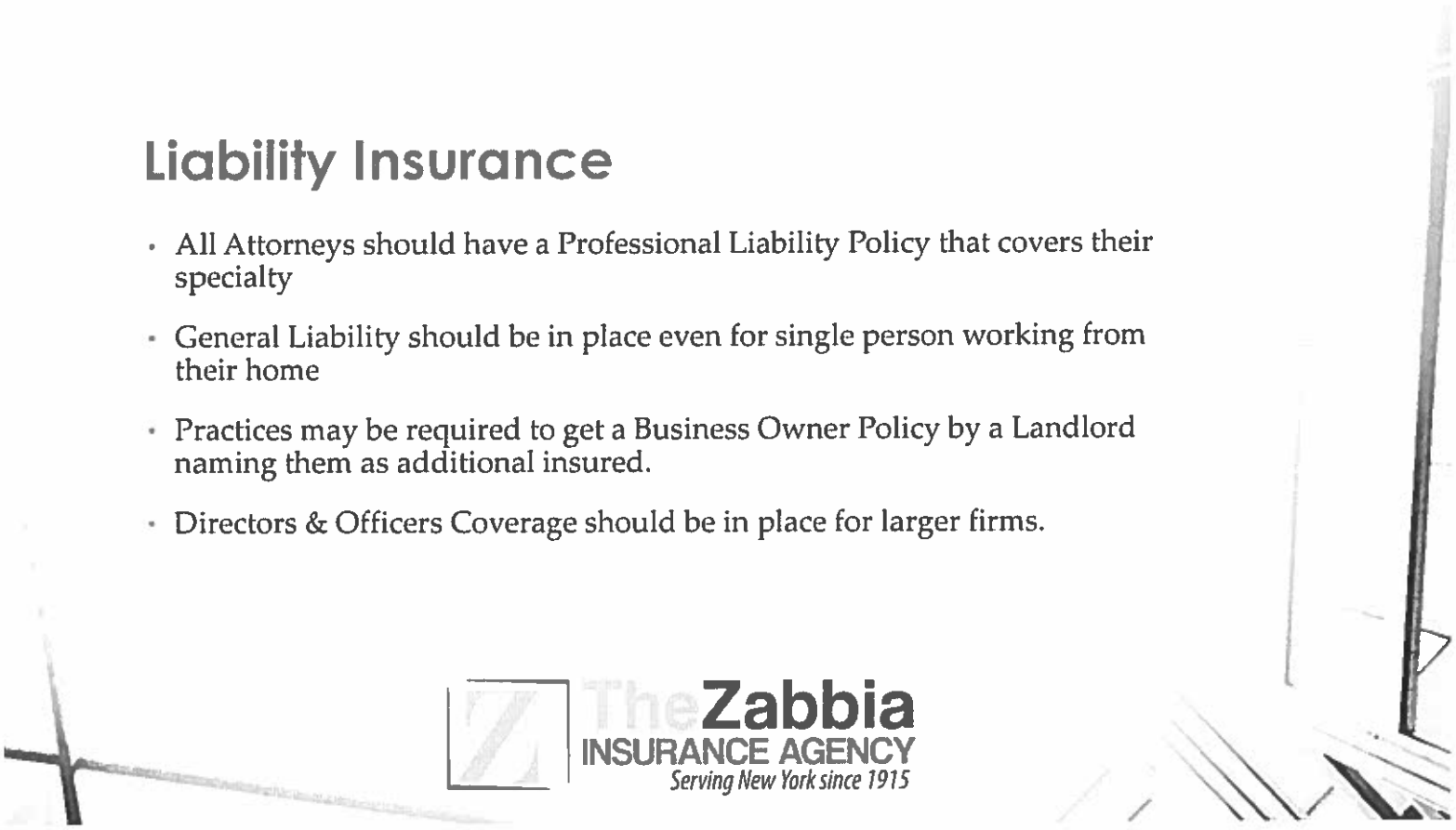
Liability Insurance

- All Attorneys should have a Professional Liability Policy that covers their specialty
- General Liability should be in place even for single person working from their home
- Practices may be required to get a Business Owner Policy by a Landlord naming them as additional insured.
- Directors & Officers Coverage should be in place for larger firms.



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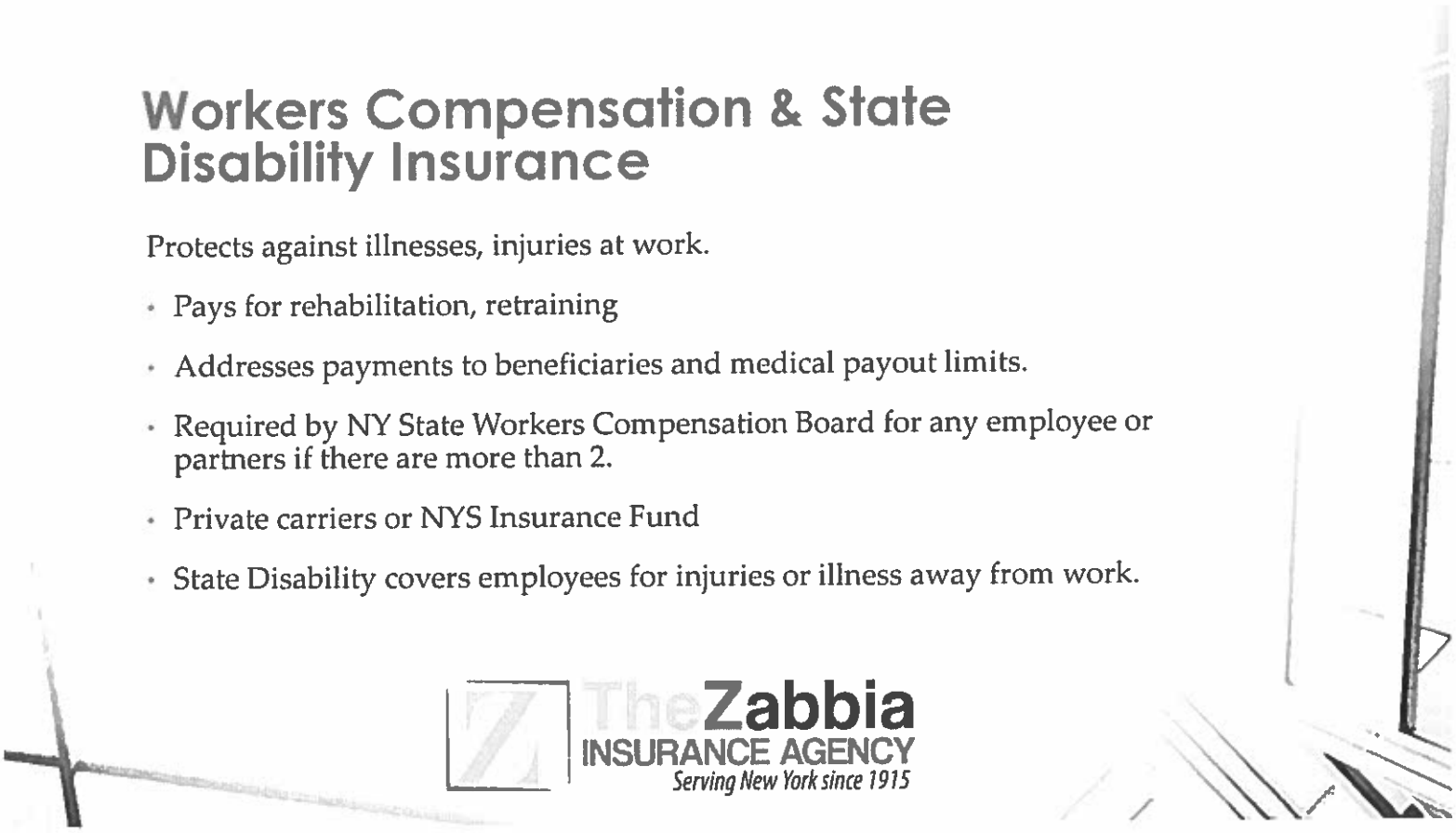
Workers Compensation & State Disability Insurance

Protects against illnesses, injuries at work.

- Pays for rehabilitation, retraining
- Addresses payments to beneficiaries and medical payout limits.
- Required by NY State Workers Compensation Board for any employee or partners if there are more than 2.
- Private carriers or NYS Insurance Fund
- State Disability covers employees for injuries or illness away from work.



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Unemployment Insurance

Benefits those who are unemployed through no fault of their own.

- Willing and able to work, actively searching
- Federally regulated, state administered
- Check with state and Federal Dept. of Labor
- Always make payments, avoid penalties and actions (lien, misdemeanor, felony)

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Paid Family Leave

Most private employers with one or more employees are required to obtain Paid Family Leave insurance. PFL Pays for:

- Bonding with a child: An employee can bond with a newly born, adopted, or fostered child within the first 12 months of birth or placement.
- Caring for a family member: An employee can take time to care for a spouse, domestic partner, child/stepchild, parent/stepparent, parent-in-law, grandparent, or grandchild with a serious health condition.
- Assisting a service member: An employee can take time to assist a spouse, domestic partner, child/stepchild, parent/stepparent or parent-in-law when they are deployed abroad on active military service.

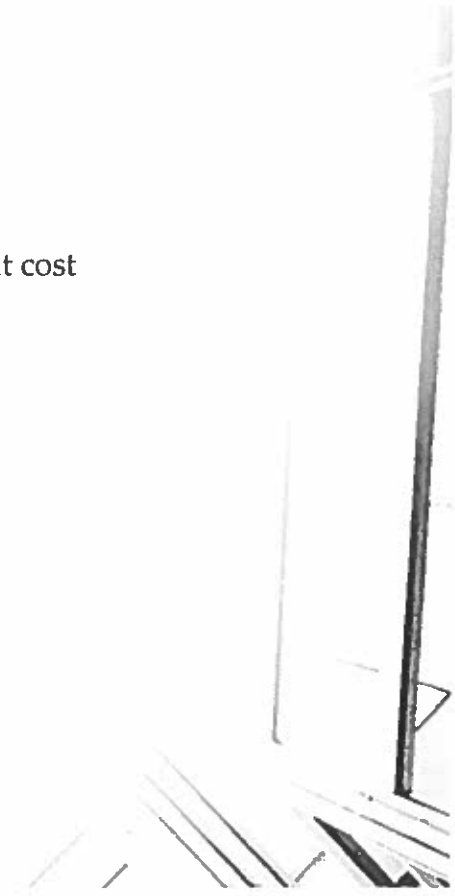
Property Insurance

Building – if you own a building the bank will require replacement cost

- Some leases will require tenant to cover the building
- Improvements of a lease space need to be covered by the tenant

Contents

- Furniture, computers, law books, artwork



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Other Types of Insurance to Consider

- Loss of income
  - Can't operate because of fire, wind, water damage
  - Loss of power
  - Damage to building prevents business from entering the premises
- Employee Practices Liability
  - Discrimination
  - Sexual Harassment
  - Retaliation
  - Wrongful termination
  - Failure to Promote

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Other Types of Insurance to Consider

- Cyber Liability
  - Cyber attack
  - Improper disposal of old computer hardware
  - Phishing attack
- Directors & Officers
  - Mismanagement of the firm
  - Botched acquisition
  - Tortious interference

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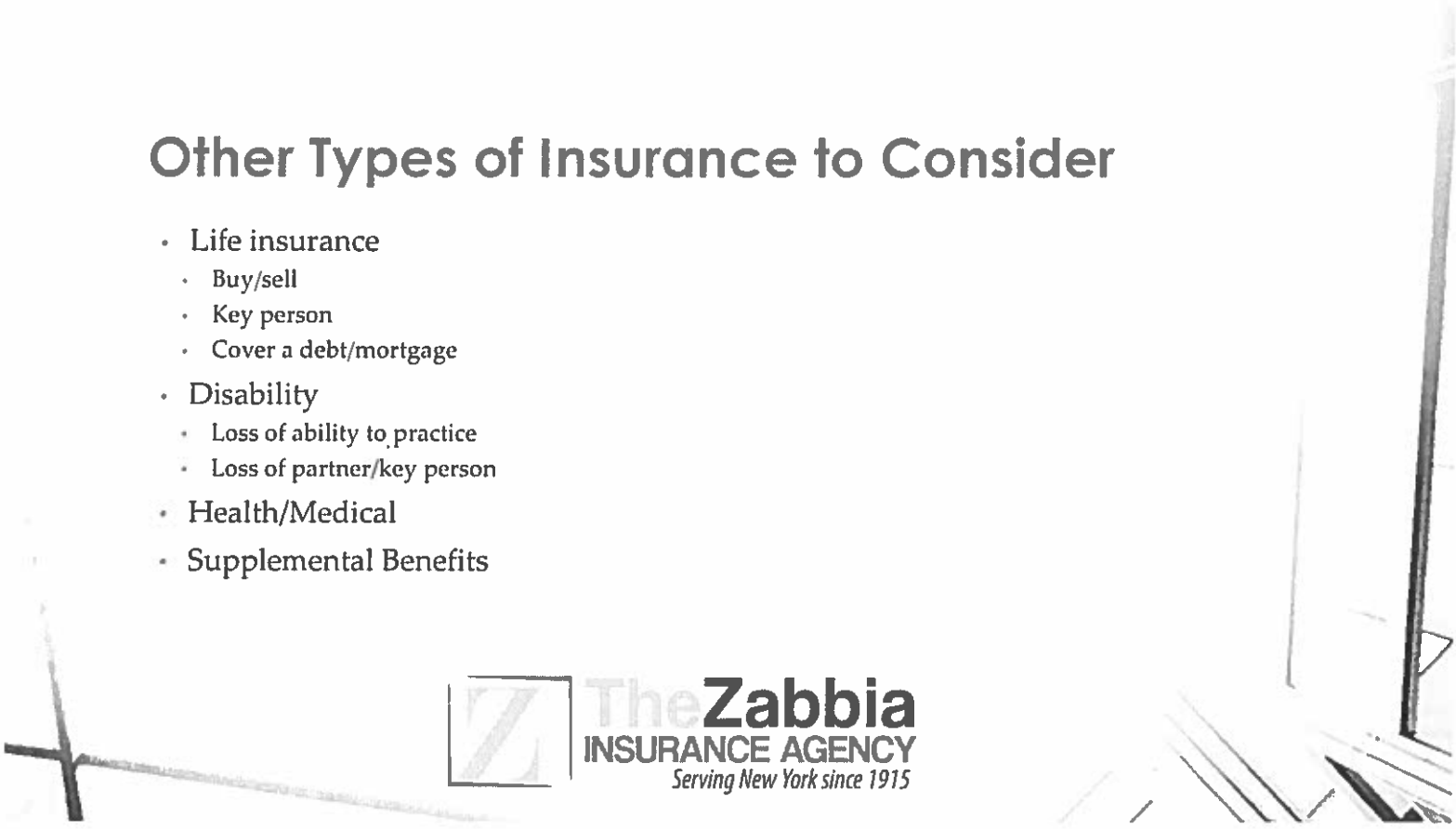
Other Types of Insurance to Consider

- Life insurance
  - Buy/sell
  - Key person
  - Cover a debt/mortgage
- Disability
  - Loss of ability to practice
  - Loss of partner/key person
- Health/Medical
- Supplemental Benefits



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Surety Bond

A surety bond is issued by a third party, known as a surety, as a guarantee the second party will fulfill its obligations or meet certain laws. If the second party fails to do this, the bond covers the damages.

- Required for some licenses or permits
- Protection for consumers & government
- Retirement Bond

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Location-Related Considerations

- Business location affects type of policy
  - Home-based – Add-on to homeowner's or separate
  - Warning: Your traditional homeowner's insurance may NOT cover damage caused by your home-based office!
  - Retail – store fronts have more exposure for higher traffic
  - Commercial/professional – office buildings are lower risk for storm damage

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Risks Attorneys Face

- Client comes to the office and trips and injures themselves
- Client claims you made errors in your recommendation that lead to a loss
- Someone breaks in and steals your computers & equipment
- Pipe Bursts and damages furniture, carpets, computers and files
- Employee accepts payments and doesn't deposit the money
- Fire destroys the roof of the building or unit next store and you can't get into your office

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Risks Attorneys Face

- Your database is breached and your client's personal information is stolen
- Your files are damaged and your billing records are destroyed
- One of your employees makes unwanted comments to another
- A former employee claims that you fired them because of their age, sex, race, religion

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Exclusions to be aware of

The difference between insurance policies may come down to the fine print. Here are common exclusions to be aware of:

- Professional Liability – Malpractice
- Flood
- Hurricane/Wind Deductibles
- Loss of income attributed to direct loss only
- Ordinance or Law
- Cyber Exposures – Data theft, client data exposed

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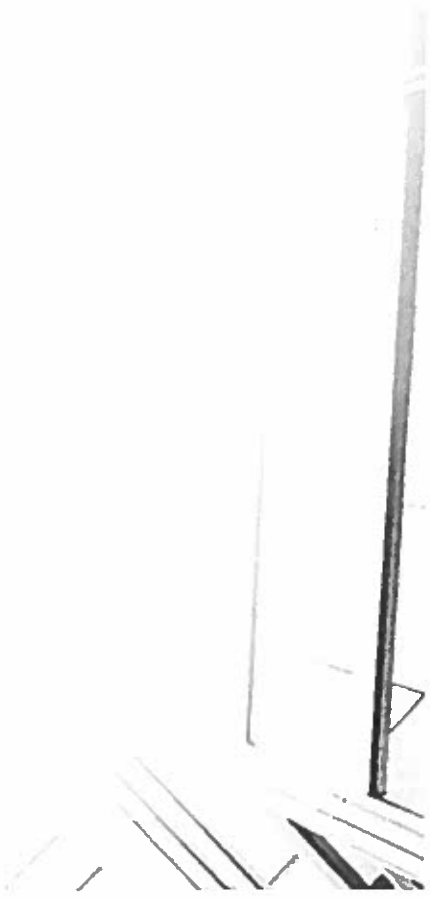
Exclusions to be aware of

- Pollution
- Employers Liability – workers comp, ERISA, discrimination
- Punitive Damages
- Retro Date-Claims Made vs. Occurrence
- Hired & Non-owned autos
- Liquor liability – sale is excluded, but so can hosting a party
- Expected or Intended Actions



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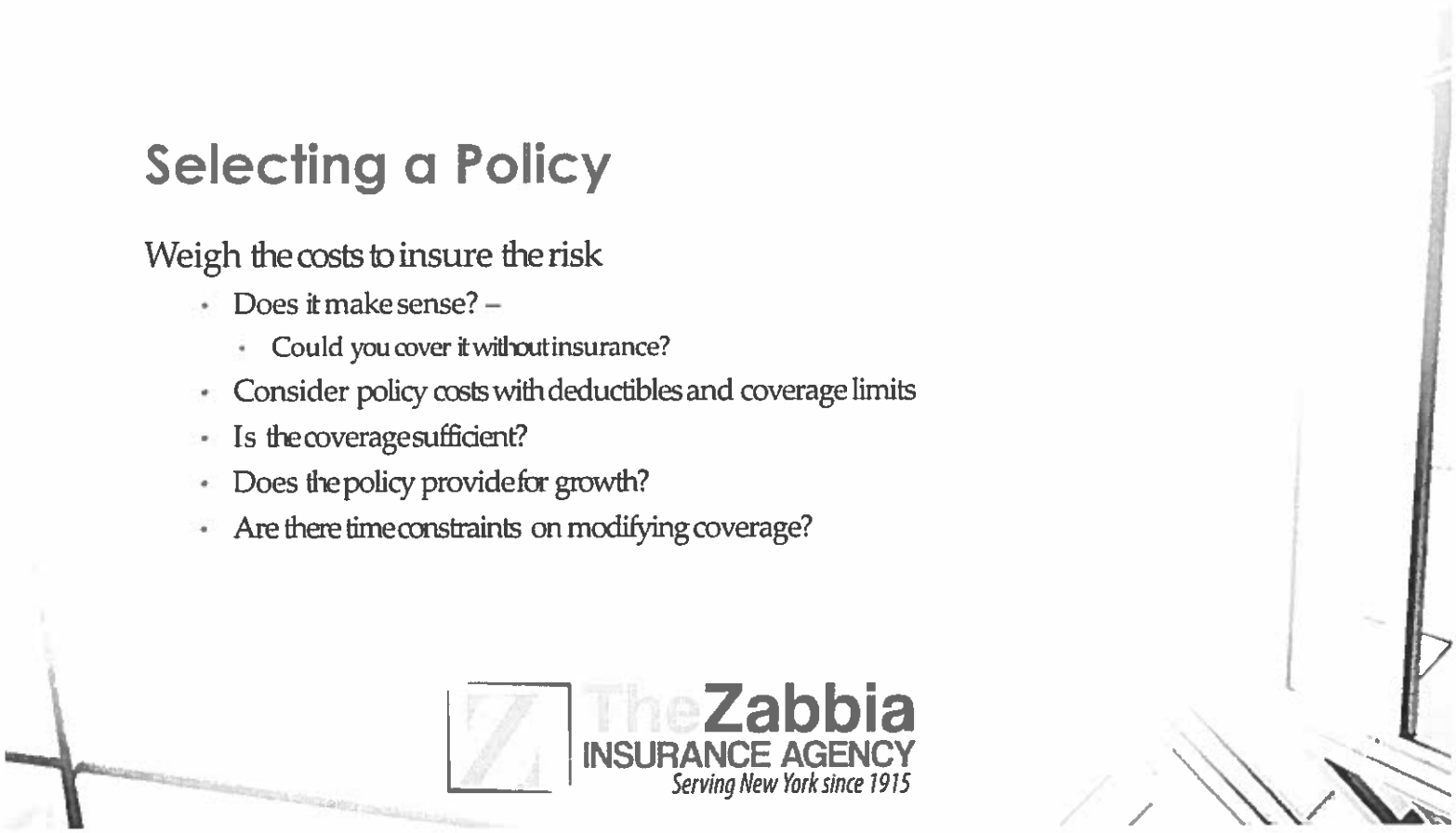
Selecting a Policy

Weigh the costs to insure the risk

- Does it make sense? –
  - Could you cover it without insurance?
- Consider policy costs with deductibles and coverage limits
- Is the coverage sufficient?
- Does the policy provide for growth?
- Are there time constraints on modifying coverage?



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Selecting a Company & an Agent/Broker

Compare quotes, coverages, deductibles & fine print

- Ask plenty of questions
- Stable and accessible?
  - Check consumer and business reviews, network, ask others in similar situations

Know what's NOT covered!

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What to Do After the Purchase

- Keep policies easily accessible
- Keep phone numbers readily available
- Maintain insurance-related procedures in business continuity plan
- Review policies periodically
- Meet with agent from time-to-time
- Call your agent before making changes

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Questions?

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New York's Sexual Harassment Prevention Initiative Update

May 21, 2019

Timothy Domanick
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Introductory Statement

THE MATERIALS CONTAINED IN THIS PRESENTATION WERE PREPARED BY THE LAW FIRM OF JACKSON LEWIS P.C. FOR THE PARTICIPANTS' OWN REFERENCE IN CONNECTION WITH EDUCATION SEMINARS PRESENTED BY JACKSON LEWIS P.C. ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE.

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Introduction

- Why are we interested?
  - Recent events have shed new light on sexual harassment in the workplace.
  - Employers should address the issue head on and be prepared to respond to complaints regarding sexual or other forms of harassment or discrimination.
  - Compliance with new legal requirements in NYS and NYC.

Sexual Harassment Claims Skyrocket

- FY 2018 vs. FY 2017
  - Total EEOC sexual harassment charges up 13.6%
  - EEOC has 41 sexual harassment lawsuits – more than 50% increase
  - Reasonable cause findings in nearly 1,200 charges – 25% increase
  - $70 million recovered in sexual harassment cases, vs. $47.5 million

REFRESHER: THE LAW ON SEXUAL HARASSMENT

Overview of the Law

- Quid pro quo:
  - Someone in management;
  - Conditions an aspect of employment;
  - Upon submission to a sexual advance or sexual favor.
- Hostile work environment:
  - Unwelcome;
  - Based on sex or sexual in nature;
  - Severe or pervasive;
  - Offensive to a reasonable person;
  - Interferes with ability to work;
  - Creates an offensive, intimidating, or hostile work environment.

Who Can Be a Harasser?

- Managers and supervisors
- Executives
- Co-workers
- Clients or customers
- Vendors, contractors
- Members of the public
- Men or women
- YOU

Where Can Harassment Occur?

- At work or anywhere while working.
- At work-related functions and Company-sponsored social events, even if off-premises.
- At private sites, off-duty (*e.g.,* after-work drinks).
- ANYWHERE.

Standards for Liability

- Standards for potential liability: Depends largely on who is the alleged harasser.
  - Supervisors?
  - Non-supervisor employees?
  - Third parties?

Duty to Act

- Triggered on notice:
  - To those named in complaint procedure;
  - To HR;
  - To ANYONE in management;
  - To those with responsibility to make, influence, or recommend employment decisions.
- Prompt investigation and remedial action.
- Potential for damages exposure kicks in IMMEDIATELY upon "notice."
- Outcome often rises and falls on what happens next.

Individual Liability

- Under the New York State Human Rights Law there is:
  - Individual liability.
  - Aiding & abetting liability.
- Coverage under the New York City Human Rights Law is very broad:
  - Individual liability.
  - Aiding & abetting liability.
  - Strict liability for the conduct of supervisors.

NEW YORK STATE AND CITY LEGISLATION OVERVIEW

NY State Law Overview and Deadlines

- **April 12, 2018**: Signed by Governor Andrew Cuomo.
- **Immediate**: "non-employees," including contractors, subcontractors, vendors, consultants, and other persons providing services pursuant to a contract now protected under the NYS Human Rights law.
- **July 11, 2018**: Prohibitions on use of nondisclosure provisions in settlements or arbitration agreements relating to sexual harassment claims.
- **October 9, 2018**: Deadline by which mandatory, written anti-harassment policies must be distributed, based on guidelines published by NYS Department of Labor and Division of Human Rights.
- **January 1, 2019**: Bids on certain state contracts must contain language affirming that the bidder implemented compliant policies and training.
- **October 9, 2019**: Mandatory training for ALL employees, which is consistent with models developed and published by the NYS Department of Labor and Division of Human Rights.

NYS Expanded Coverage

- Executive Law adds new section, 296-d:
- Effective date: Immediate, April 12, 2018 (date signed by Governor Cuomo).
- Non-employees now covered.
- Employer may be held **liable to a non-employee** who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to sexual harassment.
- When the employer, its agents, or supervisors knew or should have known that such non-employee was subjected to sexual harassment, and the employer failed to take immediate and appropriate corrective action.

NYS Sexual Harassment Policy Requirements

- Every employer shall adopt the model policy or a policy that equals or exceeds minimum standards in the model.
  - The policy must be implemented by **all employers** regardless of how many employees they have.
  - The policy applies to all employees, paid or unpaid interns, and non-employees.

Sexual Harassment Prevention Policy

- Minimum Standards
  - Prohibit sexual harassment consistent with guidance issued by the Department of Labor;
  - Provide examples of prohibited conduct;
  - Include information concerning applicable laws;
  - Include a complaint form;
  - Include a complaint procedure;
  - Inform employees of their rights and identify all available forums;
  - State sexual harassment is misconduct and those engaging in misconduct will be penalized;
  - State (clearly) that retaliation is unlawful.

Sexual Harassment Prevention Policy

- Model Complaint Form
  - Identify the individual the complaint is against – including their relationship (i.e., supervisor, subordinate, co-worker, other);
  - The nature of the alleged conduct and the date it occurred;
  - The names of witnesses or individuals who may have information;
  - Whether the employee previously complained (verbally or in writing) about sexual harassment;
  - Invites employee who has hired an attorney to provide contact information(?);
  - *Note – employees may complete the model complaint form, but if they refuse, employers should complete it with information collected by the employee.

Sexual Harassment Prevention Policy

- Distribution
  - In writing;
  - Can be distributed electronically;
  - Acknowledgment of receipt is not required (but it is in NYC);
  - Recommend obtaining acknowledgments;
  - New York contractors must submit affirmations beginning on January 1, 2019.

Sexual Harassment Prevention Training

- Training Requirement "Minimum Standards"
  - Be interactive;
  - Include an explanation of sexual harassment;
  - Include examples;
  - Include information on the laws and remedies available;
  - Include information on employees' rights of redress and the different forums for pursuing claims;
  - Include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

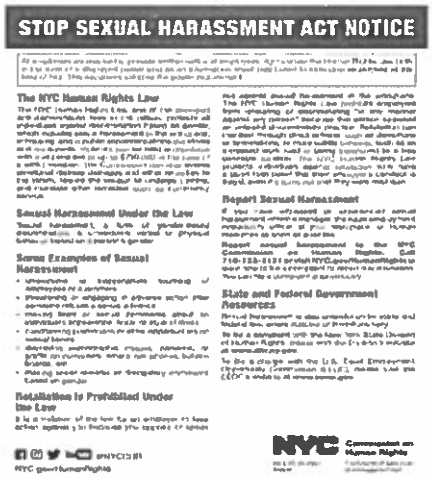
Sexual Harassment Prevention Training

- Training Procedures
  - Employees must be trained at least once per year;
  - New employees: encourages training "as soon as possible";
  - All employees must be trained;
  - The training must be "interactive";
  - This does not necessarily mean in person;
  - Training should be given "in the language spoken by employees";
  - Employers may discipline employees who refuse to train;
  - There is no specified length of the training, provided it is interactive.

A QUICK POINT ON NYC SEXUAL HARASSMENT PREVENTION LEGISLATION

NYC Legislation

- NYC Posting Requirements (Local Law 95 of 2018)
  - Employers must also "conspicuously display" the approved anti-sexual harassment rights and responsibilities notice in both English and Spanish
  - Must also distribute a factsheet to individual employees at the time of hire, which may be included in an employee handbook



STOP SEXUAL HARASSMENT ACT NOTICE

The NYC Human Rights Law

Sexual Harassment Under the Law

Some Examples of Sexual Harassment

Retaliation is Prohibited Under the Law

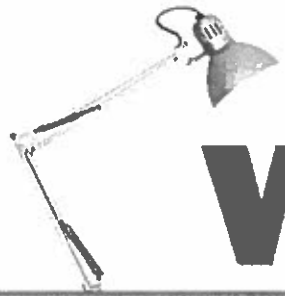
Report Sexual Harassment

State and Federal Government Resources

NYC Commission on Human Rights

Questions?

Thank You!



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Legal Malpractice

Insurance & Liability

Application & Underwriting Considerations

- 1. Firm Composition & Nature of Practice
- 2. Avoiding Potential Legal Malpractice
- 3. Sources of Legal Malpractice Litigation.

The Profile of Legal Malpractice Claims

- Liability ~~of~~ by Practice of Law

- Types of Errors

Administrative	23%
Client Communications & Relations	13%
Intentional Wrongs (Fraud & Theft)	10%
Substantive Errors	54%

  - Misapplication of Law
  - Inadequate Investigation & Discovery
  - Failure to Obtain & Document Client Consent or Lack Thereof

Source:

2016 ABA Study Standing Committee on Professional Liability; 2016: Profile of Professional Legal Malpractice Claims 2012 – 2015.

Elements of Legal Liability

- Duty of Ordinary Reasonable Care
  - NY Professional Conduct Rule 1.1 (a) & (b)
  - Privity & Near Privity Relationship
- Deviation/Breach of the Duty of Reasonable Care
- Proximate Cause/But For Negligence of the Attorney
- Damages Incurred by the Client Due to the Negligence of the Attorney
- Examples

LEGAL MALPRACTICE: INSURANCE & LIABILITY

A. Application & Underwriting Considerations by Carriers

1. The Firm Composition
   (Members/Partners/Associates/Of Counsel)

   a. Solo Practitioner
   b. Partnership
      a. General Partnership
      b. Limited Liability Partnership
   c. Professional Corporation
      /Professional Limited Liability Company.

2. Nature of Professional Services

3. Claims History & Prior Malpractice Coverage

B. Avoiding Potential Claims
   (Future Legal Malpractice Presentation)

C. Sources of Legal Malpractice Litigation & Defense Counsel

1. Liability by Practice of Law - See chart on next page.

2. Types of Underlying Error - See chart on next page.

3. Internal Control Issues

   a. Engagement Retention Letters/Disengagement Letters.
   b. Management Committee oversight.
   c. Peer Review.

4. Duty to Defend & Assignment of Defense Counsel

   a. Appointment of Defense Counsel.
   b. Communication with Defense Counsel.
   c. Protection of Procedures & Methodology
      by Confidentiality Agreements with Adversary Counsel.

B. Avoiding Potential Legal Malpractice Claims.

C. 2016 American Bar Association Study
by ABA Standing Committee on Professional Liability entitled
2016: Profile of Legal Malpractice Claims 2012 -2015

1. Liability by Practice of Law

a. Personal Injury	18%
b. Real Estate	15%
c. Domestic Relations /Family Law	14%
d. Estate, Probate & Trust Law	12%
e. Debt Collection/Bankruptcy	11%
f. Criminal	6%
g. Commercial Transaction	5%
h. Corporate Business Entity	4%
i. Intellectual Property	2%
j. Other Areas of Legal Practice	13%

2. Types of Underlying Error

a. Administrative	23%
b. Client Communications & Relations	13%
c. Intentional Wrongs Examples: Fraud, Defamation	10%
d. Substantive Errors	54%

i. Misapplication of Law
ii. Inadequate investigation & discovery
iii. Failure to obtain & properly document client consent or lack thereof

D. Elements of Legal Liability

1. Duty of Ordinary Reasonable Care

a. *New York Professional Conduct Rule 1.1 (a) & (b)*

A lawyer should not handle a legal matter that the lawyer knows or should know, that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

b. Privity & Near Privity Relationship

<u>General Rule in NYS</u>:

Attorneys are not liable to third parties not in privity or near-privity for professional negligence. Trustees or executors have privity or a relationship approaching privity to maintain a professional malpractice action.

Establish that an attorney-client relationship was in existence.

2. Deviation/Breach of the Duty of Reasonable Care

3. Proximate Cause/*But For* The Negligence of the Attorney

Attributable Expenses caused by error of first attorney in prosecution of the second action.

4. Damages Incurred by Client Due to The Negligence of the Attorney

a. Compensatory Damages.

b. Collectability.

(Note: 2d Dept places burden on P is required to establish collectability of damages.)

c. The Consequences Relative to the Prosecution of an Appeal or Lack Thereof.

The failure of the client to appeal the underlying action bars the legal malpractice action only where the client was likely to have succeeded on appeal in the underlying action. If they were going to lose because the action was now time barred due to attorney inaction, then no need to appeal before bring the legal malpractice action.

d. Fee Dispute & Legal Malpractice Counterclaims

E. Examples of Legal Malpractice Scenarios

Estate Tax Return preparation:
Executrix of the estate retains an Attorney to prepare an Estate Tax Return which requires responding Yes to a specific tax election that would save the Estate significant tax liability.

Attorney testifies that when he proof read the return, he did not pick up the input error by his assistant.

Personal Injury/NYS Labor Law action:

Attorney takes on a personal injury claim where a laborer for a home remodeling company falls through an attic floor and sustains material pelvic and spinal related injuries. The home remodeling contractor never paid any workers' compensation premiums for his laborer employee. Attorney sues homeowner despite one family dwelling exception to NYS Labor Law and fails to sue the employer who failed to secure workers compensation insurance. Evidence subsequently showed that attorney was not diligence in researching lack of liability under NYS Labor Law due to one family dwelling/two family dwelling exception.

Personal Injury action:

Elderly plaintiff trips and falls in parking lot adjacent to her Bank. Parking lot at issue was assumed by the attorney to have been owned by the bank at issue. Despite the raising of the Affirmative Defense by the bank relative to lack of ownership, counsel for plaintiff does not fully investigate the issue until more than one year and ninety days after the fall. Attorney then learns that the County of Suffolk is the owner and operator of the parking lot.

Estate Beneficiaries:

Peter, Paul and Mary are beneficiaries of their mother's estate.

They are advised by their attorneys that the attorney prepared the will on behalf of their mom's estate was negligent based upon the underlying facts then known to the preparer of the will.

The executrix of the estate is the late sister of their mother.

A contingent executrix unrelated to the beneficiaries is named in the will.

The mother of Peter, Paul and Mary predeceased her executrix sister.

OTHER PEOPLE'S MONEY

ETHICAL & LEGAL RESPONSIBILITIES WITH RESPECT TO CLIENT FUNDS

Fiduciary Relationship

- The Fiduciary Relationship between Our Client and Ourselves as Attorneys
  - Biennial Registration Form Affirmation & Certification
  - Transparency
  - Segregation of Funds to Protect Clients' Funds
  - Thou Shalt Not Comingle Client Funds

Entities Supporting Our Protection of Client Funds

- Interest on Lawyers Fund of the State of NY
- The NY Lawyers' Fund for Client Protection of the State of New York
- FDIC/NCUA Insurance

Bank With A Digital Paper Trail

- Types of Accounts
- Accountability of the Attorney
- Enforcement
- Examples
  - Responsibility for Thorough Supervision of the Acts of our Agents & Employees
  - Attorney Misappropriation of Funds

LEGAL MALPRACTICE: INSURANCE & LIABILITY

A. Application & Underwriting Considerations by Carriers

1. The Firm Composition
(Members/Partners/Associates/OfCounsel)

   a. Solo Practitioner
   b. Partnership
      a. General Partnership
      b. Limited Liability Partnership
   c. Professional Corporation
   /Professional Limited Liability Company.

2. Nature of Professional Services

B. Avoiding Potential Claims
(Future Legal Malpractice Presentation)

C. Sources of Legal Malpractice Litigation

   a. General
   b. Commercial
   c. Estate & Trust

3. Internal Control Issues

   a. Engagement Retention Letters/Disengagement Letters.
   b. Management Committee oversight.
   c. Peer Review.

4. Claims history & Prior Malpractice Coverage

5. Duty to Defend & Assignment of Defense Counsel

   a. Appointment of Defense Counsel.
   b. Communication with Defense Counsel.
   c. Protection of Procedures & Methodology
   by Confidentiality Agreements with Adversary Counsel.

B. Avoiding Potential Legal Malpractice Claims.

C. 2016 American Bar Association Study by ABA Standing Committee on Professional Liability entitled *2016: Profile of Legal Malpractice Claims 2012 -2015*

1. Liability by Practice of Law

a. Personal Injury	18%
b. Real Estate	15%
c. Domestic Relations /Family Law	14%
d. Estate, Probate & Trust Law	12%
e. Debt Collection/Bankruptcy	11%
f. Criminal	6%
g. Commercial Transaction	5%
h. Corporate Business Entity	4%
i. Intellectual Property	2%
j. Other Areas of Legal Practice	13%

2. Types of Underlying Error

a. Administrative	23%
b. Client Communications & Relations	13%
c. Intentional Wrongs Examples: Fraud, Defamation	10%
d. Substantive Errors	54%

i. Misapplication of Law
ii. Inadequate investigation & discovery
iii. Failure to obtain & properly document client consent or lack thereof

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OTHER PEOPLE'S MONEY: ETHICAL & LEGAL RESPONSIBILITIES WITH RESPECT TO CLIENT FUNDS

A. Fiduciary Relationship between Attorneys & Our Clients.

1. 22 NYCRR Part 1200 Rule 1.15 of the New York Rules of Professional Conduct.

   a. The Appellate Divisions for the First Judicial Department and the Second Judicial Department in our Biennial Registration Form require us to affirm and certify our familiarity with this rule when we file with the Office of Court Administration.

   b. Transparency is at the Heart of This Rule with Attorney Accountability for Client Funds and Recordkeeping for the purpose of Protecting Client Assets and To Avoid the Appearance of Impropriety.

   c. Segregation of Funds to Protect Clients' Funds.

   d. No comingling of funds.

B. Entities That Help Us Protect Our Clients' Funds

1. Interest On Lawyers Fund of the State of New York.

   a. The IOL Fund is a an agency of the State of New York which uses interest generated from IOLA Accounts to fund not-for-profit agencies that provide legal services in civil cases to the poor and not-for-profit agencies seeking to improve the administration of justice.
   b. The IOLA account is designated for short-term and nominal client deposits; which in the discretion of the handling attorney are not the type of client deposit expected to generate significant income for the client net of bank service and accounting fees.
   c. For more information, please see www.iola.org or contact the IOL Fund at 11 East 44th Street – Suite 1406; New York, NY 10017. 800-222-IOLA.

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

   a. **Established in 1982, this NYS Court of Appeals Board for the public good is authorized to reimburse clients of lawyers for misappropriated money and/or property up to $400,000 per client loss.**
   b. **The reimbursement must be for misuse of client funds and/or property by an attorney during representation by an attorney at law.**
   c. **The reimbursement is made after the attorney has been disbarred from the practice of law.**
   d. **Reimbursements include payments for theft of trust & estate assets, proceeds and down payment reimbursements in real property transactions; personal injury settlements and debt collection proceeds.**
   e. **Reimbursements are not for resolution of attorney-client fee disputes, compensation for negligence and legal malpractice compensation.**
   f. **$60 from your Biennial Registration Fee is assigned to the NY Lawyers Fund for Client Protection.**
   g. **Average annual disbursements amount to $8 million.**

3. **Federal Deposit Insurance Corporation(FDIC) /National Credit Union Administration(NCUA)**

   a. **These government insurance entities protect deposits for accounts up to and including $250,000 after that you are a creditor of the failed financial institution.**
   b. **Avoid exposure to civil liability in malpractice litigation for failure to consider the relative safety of a financial institution.**
   c. ***Bazinet v. Kluge*; 14 A.D.2d 324; 788 N.Y.S.2d 77 (1st Dept.2005).**

C. **Banking with a Paper Trail**

1. **Types of Accounts**

   a. **General Operating Account**
      i. **Use for Receipt or Earned Fees.**
      ii. **Use for the Receipt of Other Income**
      iii. **Use for Disbursement of Firm Expenses**

   b. **IOLA Account (IOLA=Interest On Lawyer Funds)**

   c. **Unearned Fees Account**

   d. **Escrow Management Accounts with a Fiduciary Institution serves as a single Escrow Account with Subaccounts for each client or each client manner. The financial institution will issue separate IRS Form 1099 interest statements to the client not the law firm.**

2. **Accountability of the Attorney**

   1. **At your Biennial Registration as an Attorney practicing in the Appellate Divisions of the Supreme Court of the State of New York in the First & Second Judicial departments you are certifying to the Court that you are Familiar with and in Compliance with 22 NYCRR Part 1200 Rule 1.15.**

   2. **So what are you agreeing to every two years:**

      a. **Prohibition against Commingling & Misappropriation of Client Assets.**

      b. **Separate Accounts.**
         1. **Dishonored Check Reporting system compliance.**
         2. **Proper Identification of IOLA and Special Accounts**
         3. **Maintain a nominal balance to cover account charges.**

      c. **Notification of Receipt of Property; Safekeeping; Rendering Accounts & Payment/Delivery of Property**

      d. **Required Recordkeeping**
         ***Seven year retention*:**
         i. **Books of account affecting all attorney trust & office operating accounts;**
         ii. **Original checkbooks, bank statements, cancelled check images and duplicate deposit slips.**

iii. All retainer and compensation agreements. Include copies of all retainer and closing statements filed with the Office of Court Administration.
iv. Copies of client disbursements
v. Copies of client invoices.

3. Enforcement

a. §90 of the Judiciary Law provides for professional discipline in the event of a violation by an attorney of the Rules for Professional Conduct.
b. An attorney who does not maintain and keep accounts and records as specified under Rule 1.15; or who does not produce any such records pursuant to this rule shall be deemed in violation of these rules and subject to disciplinary rules.

c. Dishonored Checks for Insufficient Funds

1. Depository Institution *MUST REPORT* Dishonored Checks on Attorney Trust Accounts to The Lawyers Fund for Client Protection.
2. The Lawyers Fund for Client Protection will then forward the issue to the appropriate Attorney Grievance Committee.
3. If the Dishonored Check was due to a failure by the Depository Institution, said institution has only ten days to report their error and withdraw their report of a dishonored check.
4. Curing the problem by the attorney and or their law firm by itself will not constitute a reason for withdrawal of the Dishonored Check Notice.

d. Examples:

1. Inadequate Reconciliation of Client Funds and <u>Supervision of Subordinates within the Firm</u>

Facts & Outcome:

a. Attorney designates Office Administrator to provide handling and accountings of client funds received in course of practice.
b. The authorized signatories on the account are the two general partners of the law firm.

c. Office Administrator improperly embezzles client escrow funds through improper transfers during the period June 23, 2004 through January 17, 2007 and covers embezzlement by using other client fund accounts to mask the embezzlement.
d. On a monthly basis, the supervisory partner receives account reconciliations from his Office Administrator that reflects the alleged account status.
e. Absent from those reconciliations were copies of the bank statements and/or records that would serve as independent confirmation of the bank reconciliations reviewed by the partner.
f. Office Administrator confesses to the Office of the District Attorney that by his conduct he committed Larceny in the 1st Degree, ten counts of forged instruments.
g. He is ordered to serve a prison term of 2.5 years to 7.5 years and make restitution of $2 million.
h. The law firm and its partners fully cooperated with prosecution and the Office of District Attorney verified said cooperation in a letter to the grievance Committee.
i. The Grievance Committee and the Appellate Division Second Judicial Department that the responsibility for vigilance and accountability rests with the Attorney and the failure of the attorney to have proper internal accounting controls(ie.looking at the bank statements) warranted the imposition of the Suspension from the Practice of Law effective March 5, 2013 with leave to petition for reinstatement on September 5, 2014. The attorney was ultimately restored to the rolls of admitted attorneys.
j. The Court of Appeals affirmed the findings as consistent with existing standards of fiduciary care with the lawyer having stating that the Supervising Attorney had a contractual duty for the protection of client funds and a fiduciary relationship.
Matter of Peter J. Galasso, 19 N.Y.3d 688; 954 N.Y.S.2d 784 (2012).affirming 94 A.D.3d 30; 940 N.Y.S.2d 88(2d Dept.2012).

2. **Attorney Misappropriation of Client Funds**

Facts & Outcome:

a. **Personal injury Attorney is the subject of several client complaints alleging professional misconduct in the form of failing to safeguard client litigation proceeds and checks issued from his attorney trust accounts were dishonored when presented for payment due to insufficient funds.**
b. **Attorney conceded that he would be unable to successfully defend himself from said charges and as a result he tendered his resignation as an attorney and counselor-at law.**
See *Matter of Paul G. Vesnaver*; 141 A.D.3d 205; 33 N.Y.S.3d 753(2d Dept. June 29, 2016).
c. **In a related criminal case prosecuted by the Office of District Attorney for the County of Nassau, the attorney received settlement proceeds in the amount of $287,500 by check made payable to his client and his law office dated September 4, 2015.**
d. **After disbursements and fees of $189,000, a balance of $12,000 was due the client and $177,000 was held in escrow to pay off the $177,000 lien.**
e. **The client learned that instead of paying off the lien, the attorney used the funds for other purposes.**
f. **The attorney was later arrested and pled guilty to Third Degree Larceny by misappropriating the sum of $177,000 and he ordered to pay restitution of the full amount and he provided $20,000 restitution at his sentencing.**

D. Resources

1. ***Attorney Trust Accounting & Recordkeeping: A Practical Guide*; The New York Lawyers' Fund for Client protection of the State of New York; January 2015.**

2. ***Primer on Trust Accounts-Don't Use Money & Do Keep Records*; McShea, Sarah Diane; NY Ethics Reporter; April 2001.**

3. **Online: IOLA Fund of the State of New York**

    a. **A Lawyer's Guide to Opening an IOLA Account**

    Step One: Choose a Participating Bank from Approved List.

    Step Two: Go to the Bank and open up the IOLA with the IOLA Tax Identification Number.

    Step Three: Account Name must include your firm name; the IOLA Acronym and a phrase that clearly identifies what the account is used for.
    ***Note*: IOLA Fund will pay for Regular Monthly Bank Service Fees not check printing costs stop payment fees or overdraft charges.**

    Step Four Submit Your Online Enrollment Form.

NEW YORK RULES OF PROFESSIONAL CONDUCT

Effective April 1, 2009
As amended through June 1, 2018
With Commentary as amended through June 1, 2018

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RULE 1.1:
COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Reserved.]

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, of a lawyer retains an outside lawyer or law firm to work under the lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

RULE 1.2:
SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Comment

Allocation of Authority Between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule 1.4(a)(2).

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyer from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. *See* Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

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," "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.

(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.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts,

including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will or may be paid. A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed to the lawyer. However, a lawyer may not withhold the client's share of the funds to coerce the client into accepting the lawyer's claim for fees. While a lawyer may be entitled under applicable law to assert a retaining lien on funds in the lawyer's possession, a lawyer may not enforce such a lien by taking the lawyer's fee from funds that the lawyer holds in an attorney's trust account, escrow account or special account, except as may be provided in an applicable agreement or directed by court order. Furthermore, any disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds is to be distributed promptly.

[4] Paragraph (c)(4) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

(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;

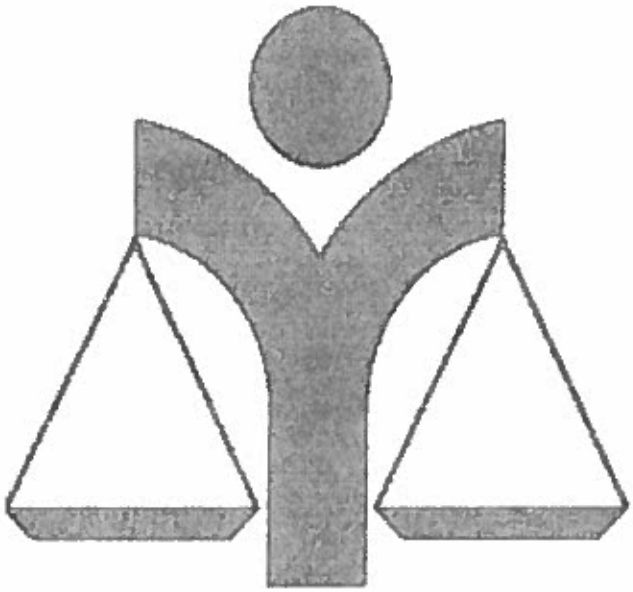
(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(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;

Attorney Trust Accounts and Recordkeeping

A Practical Guide



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

January 2015

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 eighth edition is prompted by judicial decisions and rule changes that have occurred since the last publication in January 2009.

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

Eric A. Seiff, Chairman

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 banks may be used only with the

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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.*

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

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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)).

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 reasonably sufficient to maintain the account, including bank service charges.[7]

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.[8]

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-

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

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

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

7 22 NYCRR Part 1200 (Rule 1.15(b)(3)).

[8] Judiciary Law §497.

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.[9] 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.[10]

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. 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

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

[10] 21 N.Y.C.R.R. 7000.2(e).

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.[11]

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.[12]

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.[13]

In that case, prudence suggests that a lawyer consult with the client or other ben-

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

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

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

eficial owner. And when dealing with large deposits and escrows, lawyers and clients should be mindful of federal bank deposit insurance limits.[14]

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.[15]

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.[16] A "dishonored" instrument is a check which the lawyer's

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

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

[16] 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.

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 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.[17]

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.[18]

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

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

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.[19]

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.[20]

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

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

[20] 22 NYCRR Part 1200(Rule 1.16 (e)).

which commenced on or after January 1, 2002 when the disputed amount is between $1,000 and $50,000.[21] Fee arbitration is also mandatory in fee disputes in domestic relations matters.[22]

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.[23] To preserve client funds, the Lawyers' Fund will accept deposits under $1,000 without a court order.[24]

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.[25]

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[21] 22 NYCRR Part 137

[22] 22 NYCRR Part 136

[23] 22 NYCRR Part 1200 (Rule 1.15 (f)).

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

[25] 22 NYCRR Part1200 (Rule 1.15 (g)).

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.

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.

Attorneys or firms who engage the services of non-lawyer bookkeepers maintain personal responsibility to supervise non-lawyer employees and exercise reasonable management and supervisory authority for the appropriate handling of the firm's attorney escrow accounts. This supervision includes regular review, audit and reconciliation by the attorney of those client fund accounts.[26]

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26 *Mtr. Galasso*, 19 N.Y.3d 832, 968 N.E.2d 998, 945 N.Y.S.2d 642 (2012).

What bookkeeping records must be maintained?

Every lawyer and law firm must preserve[27], 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[28]

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.[29]

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[27] 22 NYCRR Part 1200 (Rule 1.15 (d)).

[28] 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.

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

Lawyers have an ethical duty to maintain a client's confidential information.[30] Lawyers employing "cloud" based or electronic storage of client records are cautioned to consider whether such technology is reliable and provides reasonable protection of clients' confidential information.[31]

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 in the First and Second Judicial Departments 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 $375 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.[32] 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

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30 22 NYCRR Part 1200 (Rule 1.6).

31 See, NYSBA Ops. 842 (2010), 940 (2012) and, *The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations*, NYCBA Committee on Small Law Firms, (November 2013).

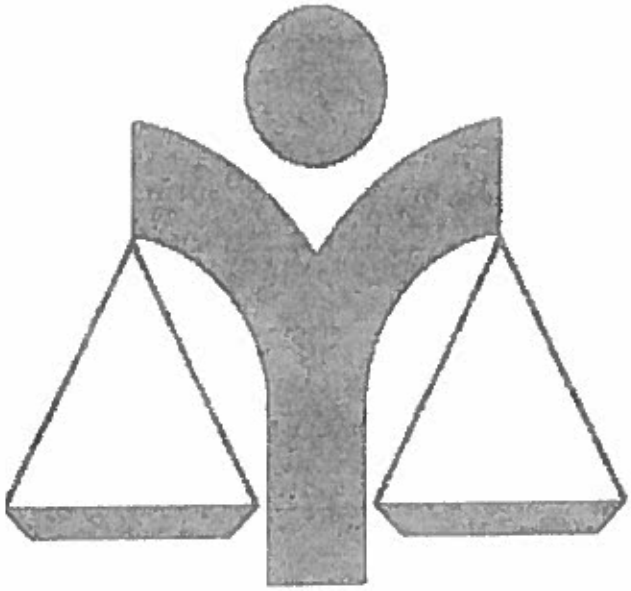
32 Judiciary Law, §468-b; State Finance Law, §97-t.

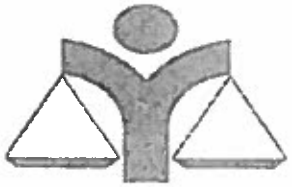
that is misappropriated by a member of the New York bar in the practice of law. Awards are made after a lawyer's disbarment, and in situations where the lawyer is unable to make restitution. The Fund's current limit on reimbursement is $400,000 for each client loss.

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.*





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

119 Washington Avenue • Albany, New York 12210

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

ORIENTATION TO THE PROFESSION

Program Materials

Prepared by the Office of the Executive Director for Attorney Matters
Revised February 16, 2017

Ver 20170216

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judgment for the protection of the client, then the terms of the transaction and client consent thereof, must be confirmed in writing. The lawyer must also advise the client in writing of the right to consult independent counsel. (*See* RPC 1.8[g]).

F. Solicitation of gifts

RPC 1.8(c) sets forth a per se prohibition on the solicitation of any gift from a client, including testamentary gifts, for the lawyer or a relative of the lawyer.

VIII. Fiduciary Obligations and Recordkeeping Requirements

A. An escrow agent is a fiduciary

An attorney who comes into possession of funds or property of a client or a third party, incident to the practice of law, is a fiduciary and must safeguard the funds or property. Preserving or safeguarding client or third party funds is a sacred fiduciary responsibility and all lawyers are obligated to be familiar with the provisions of RPC 1.15, and in fact so certify every time they sign and submit their biennial attorney registration statement.

1. Things a fiduciary MUST DO

- notify a client or third party whenever the lawyer receives any funds or property on their behalf (*see* RPC 1.15[c][1]);
- promptly deposit funds payable to a client or third party into an attorney special account in a banking institution which agrees to provide dishonored check reports to the New York Lawyers' Fund for Client Protection (*see* RPC 1.15[b][1]);
- ensure that there are sufficient available funds in the special account prior to making a disbursement;
- promptly disburse all funds and property to the client or third party (*see* RPC 1.15[c][4]);
- make all withdrawals payable to named payees (*see* RPC 1.15[e]);
- promptly withdraw earned fees (*see* RPC 1.15[b][4]);
- timely provide the client or third party with complete accountings of trust money or property (*see* RPC 1.15[c][3]);
- maintain accurate and contemporaneous records of all deposits and disbursements (*see* RPC 1.15[c][3]; [d][1], [2]);
- maintain the required records as detailed below for seven years (*see* RPC 1.15[d][1]).

Caveat: Even an unintentional failure to preserve escrow funds may result in discipline. An improper invasion of funds occurs whenever the balance in the escrow account is less than the client's or third party's interest in the account (*see Matter of Iverson*, 51 AD2d 422 [4th Dept 1976]).

2. *Things a fiduciary MUST NOT DO*

- commingle business or personal funds with client or third party funds in a special account (*see* RPC 1.15[a]);
- use a special account to pay personal debts or as a shelter from creditors or taxing authorities—however, an attorney may maintain funds in the special account sufficient to pay bank account charges on that account (*see* RPC 1.15[a], [b][3]);
- misappropriate funds or property belonging to a client or third party (*see* RPC 1.15[a]);
- make cash withdrawals, including ATM withdrawals (*see* RPC 1.15[e]).

B. Mandatory account maintenance

Funds received incident to the practice of law must be maintained in a special account in the name of the attorney or law firm entitled "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and checks and deposit slips should bear that name (*see* RPC 1.15[b][1], [2]).

The special account must be maintained in a banking institution that agrees to provide dishonored check reports to the New York Lawyers' Fund for Client Protection in accordance with part 1300 of the joint rules of the Appellate Divisions (*see* 22 NYCRR 1300.1[a]; *see also* RPC 1.15[b][1]). Either a single account for all clients, or individual accounts for specific clients or third parties, may be maintained. All signatories on a special account must be lawyers licensed to practice law in New York State (*see* RPC 1.15[e]).

The attorney must maintain the special account separate from any business or personal account in a New York bank which agrees to comply with the dishonored check rule (*see* Rule 1.15[b]). The special account may not carry overdraft privileges and may not be linked with any other account for the purpose of covering an overdraft or to pay personal or business debts.

C. IOLA accounts - Judiciary Law § 497

IOLA is an acronym for "interest on lawyer's account." It is an unsegregated interest bearing checking account. The interest generated on IOLA accounts is used to fund non-profit organizations, which provide legal services for the poor and programs to improve the administration of justice (*see* 21 NYCRR Part 7000). Attorneys that receive "qualified funds" must participate in IOLA and maintain an eligible IOLA account (*see* 21 NYCRR 7000.8). It is within the attorney's judgment whether funds are "qualified funds" (*see* 21 NYCRR 7000.8). Generally, if the funds are too small in amount or are expected to be held for a relatively short period to generate sufficient income to justify the expense of administering a segregated account, they are "qualified funds" and require deposit into an IOLA account (*see* 21 NYCRR 7000.2[e]; 7000.8).

D. Interest-bearing accounts

If the amount of funds entrusted to a lawyer is in a large amount or the funds are expected to be held for a long period of time such that the interest generated upon the funds exceeds the expense of opening and administering a segregated account, the lawyer should discuss with the parties whether they wish the lawyer to open a segregated interest bearing special account for the benefit of the parties. If a segregated account is opened, a lawyer may not retain the interest on the special account. All interest generated on a segregated special account belongs to the interested parties to the deposit. A lawyer may charge a reasonable fee for administering the segregated special account (*see* NY State Bar Assn Comm on Prof Ethics Ops 582 [1987], 532 [1981]; Assn of Bar of City NY Op 81-68 [1981]).

E. Attorney fees

Funds in which the lawyer and the client have a present or potential shared interest are also required to be deposited into a special account. Once the deposited funds become available, the client should be promptly paid their share (*see* RPC 1.15[c][4]). The lawyer's share of the funds should be withdrawn as soon as it is earned or due, unless the client disputes payment of the fee. In that event, only the disputed portion of the funds should remain intact in the special account until the dispute is resolved (*see* RPC 1.15[b][4]).

New York does not require an advance payment of an attorney's fee to be treated as client funds absent an agreement with the client to the contrary (*see* NY State Bar Assn Comm on Prof Ethics Op 570 [1985]).

F. Dishonored check reporting rule - 22 NYCRR part 1300

Pursuant to 22 NYCRR 1300.1(a), the special accounts required by RPC 1.15 shall be maintained only in banking institutions which have agreed to provide dishonored check reports to the New York Lawyers' Fund for Client Protection. If a check presented against an attorney special, trust, or escrow account is dishonored for insufficient available funds, the banking institution is required to generate a "dishonored check report" to the New York Lawyers' Fund for Client Protection (*see* 22 NYCRR 1300.1[c], [e]). The Fund is required to wait 10 business days to enable the bank to withdraw a mistaken report before taking further action (*see* 22 NYCRR 1300.1[f]). If the Fund does not receive a notice of mistake within 10 business days, it is required to forward the dishonored check report to the attorney disciplinary committee having jurisdiction over the account holder (*see* 22 NYCRR 1300.1[g]).

G. Required bank and bookkeeping records

All lawyers in New York are bound to abide by the recordkeeping requirements set forth in RPC 1.15. In addition to records relating to special accounts, the rule applies to any other bank account that concerns or affects a lawyer's practice of law, including the office business account (*see* RPC 1.15[d][1][i]). Records of all financial transactions must be accurate and are to be made at or near the time of the events recorded (*see* RPC 1.15[d][2]). The Rules of Professional Conduct mandate that lawyers make accurate entries and maintain *for seven years after the events that they record,* the following:

1. records for any special account or "any other bank account that concerns or affects the lawyer's practice of law," i.e., a business or operating account specifically identifying the date, source, and description of each item deposited, withdrawn, or disbursed (*see* RPC 1.15[d][1][i]);

2. copies of all retainer and compensation agreements with clients (*see* RPC 1.15[d][1][iii]);

3. copies of all statements to clients or others showing disbursements (*see* RPC 1.15[d][1][iv]);

4. copies of all client bills (*see* RPC 1.15[d][1][v]);

5. copies of all records showing payments to lawyers, investigators, or other persons not in the lawyer's regular employ, for services performed (*see* RPC 1.15[d][1][vi]);

6. copies of all retainer and closing statements filed with the Office of Court Administration (*see* RPC 1.15[d][1][vii]);

7. o*riginals* of all check books, check stubs, bank statements, pre-numbered cancelled checks and duplicate deposit slips (*see* RPC 1.15[d][1][viii]).

Note: The use of the word "copies" contemplates technological advances and includes microfilm, optical imaging, and "any other medium that preserves an image of the document that cannot be altered without detection" (RPC 1.15[d][3]); however, this does not obviate any rule mandating the preservation of original records.

H. Reconciliation and supervision

Duties regarding special accounts may be delegated; however, lawyers remain ultimately responsible to ensure that special accounts are properly maintained. Lawyers should train and supervise all employees appropriately and should regularly review and reconcile all bank accounts (*see* RPC 5.1[c], 5.3). Paralegals, office managers, or other non-attorneys may not sign escrow checks (*see* RPC 1.15[d][3]).

I. Third-party liens

A lawyer entrusted with funds in which third-party lienors have an interest is a fiduciary and must comply with the fiduciary obligations contained in RPC 1.15. The pertinent provisions are as follows:

RPC 1.15(c) states:

> 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;
>
> * * *
>
> (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.

NY State Bar Assn Comm on Prof Ethics Op 717 (1999) and Bar Assn of Nassau County Comm on Prof Ethics Op 96-13 (1996), found that a lawyer's failure to properly discharge his or her responsibilities regarding a valid third-party lien constitutes a violation of Code of Professional Responsibility DR 9-102(c) (22 NYCRR former 1200.46[c]; now RPC 1.15[c]). In short, an attorney must:

- notify the client and the holders of valid liens and assignments when recovery is received (*see* RPC 1.15[c][1]);
- pay the lien holder if the lien is not disputed by the client (*see* RPC 1.15[c][4]);
- remit any undisputed portion of the funds to the lien holder and, if the client disputes the lien, hold any disputed portion in escrow pending resolution of the dispute.

The Court of Appeals has cautioned that a lawyer may be liable for failing to honor a lien or assignment (*see Leon v Martinez*, 84 NY2d 83 [1994]).

J. File preservation and disposition

A lawyer's fiduciary responsibilities extend to the preservation and disposition of client files. The length of time a lawyer is required to preserve client files on closed matters generally is not prescribed by the Rules of Professional Conduct. A specific rule does exist for personal injury matters and condemnation or change of grade proceedings; an extensive array of records and documents related to such matters must be preserved for seven years after the matter is concluded (*see* 22 NYCRR 691.20[f]). In other kinds of matters, the commentators suggest that lawyers are bound to exercise reasonable, sound judgment regarding the preservation of client files, including consideration of the foreseeable needs of the client (*see* NY State Bar Assn Comm on Prof Ethics Ops 690 [1996], 623 [1991]; NY County Lawyers' Assn Op 725 [1998]).

Unless otherwise governed by agreement between the lawyer and client, a client is presumptively entitled to the entire file upon request. The lawyer may impose a reasonable charge for assembling and delivering the file, but bears the expense of retaining copies for his or her own file (*see Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 [1997]; NY State Bar Assn Comm on Prof Ethics Ops 780 [2004], 766 [2003]; *cf. Moore v Ackerman*, NYLJ, Mar. 19, 2009, at 27, col 1[Sup Ct, Kings County, Battaglia, J.]).

K. Attorney registration certification

Each time a lawyer in the First and Second Judicial Departments files a biennial registration statement with the Office of Court Administration, he or she affirms on the registration form that he or she has read RPC 1.15 and is in compliance therewith. Failure to maintain the records mandated by that section may subject the attorney to discipline (*see* RPC 1.15[j]).

L. Lawyers' Fund for Client Protection

Established in 1982, the Lawyers' Fund for Client Protection is authorized to reimburse law clients for money or property that is misappropriated by a member of the New York bar. The Fund is financed by a share of each lawyer's biennial registration fee. To qualify for reimbursement, the loss must involve the misuse of a client's money or property in the practice of law. The Fund cannot settle fee disputes, nor compensate clients for a lawyer's malpractice or neglect.

No attorney shall charge a fee or accept compensation for representation of a claimant against the Fund except as approved by the trustees of the Fund (*see* 22 NYCRR 691.24).

Information, forms, and materials published by the Lawyers' Fund for Client Protection may be accessed at www.nylawfund.org.

IX. Duties as a Notary

A. Generally

An attorney admitted to practice law in New York State may be appointed a notary public without an examination by submitting an application to the New York Department of State, Division of Licensing Services. General information. an application form, and a publication entitled *Notary Public License Law* published by the New York Department of State, Division of Licensing Services, may be found at www.dos.state.ny.us/lcns/professions/notary/notary1.htm.

> A notary public who is an attorney at law regularly admitted to practice in this State may, in his [or her] discretion, administer an oath or affirmation to or take the affidavit or acknowledgment of his [or her] client in respect of any matter, claim, action or proceeding (Executive Law § 135).

B. Acknowledgments and affidavits

"Technically, an *'acknowledgment'* is the declaration of a person described in and who has executed a written instrument, that he [or she] executed the same." (NY State Dept of State, Div of Licensing Servs, *Notary Public License Law* [last updated January 2007], at 14 [hereinafter *Notary Law*]). A notary must not take an acknowledgment unless he or she knows or has satisfactory evidence that the person making it is the person described in and who executed the instrument (*Notary Law* at 15). The instrument need not be signed in the presence of the notary (*Notary Law* at 15).

An affidavit is a signed statement, duly sworn to, by the maker thereof, before a notary public or other officer authorized to administer oaths (*Notary Law* at 15).

> The distinction between . . . an acknowledgment and an affidavit must be clearly understood. In the case of an acknowledgment, the notary public certifies as to the identity and execution of a document; the affidavit involves the administration of an oath to the affiant (*Notary Law* at 16).

IOLA FUND OF THE STATE OF NEW YORK

A Lawyer's Guide to Opening an IOLA Account

1. PICK A PARTICIPATING BANK FROM OUR LIST

You can view a list of Participating banks on our website at www.iola.org/BANKS. There are approximately 200 participating banks in New York, and you're free to choose any one of them.

We urge you to select a bank from our list of Platinum Partners. These banks have made a special commitment to helping the poor by offering competitive rates on IOLA accounts and/or by waiving fees.

2. GO TO THE BANK AND OPEN UP AN ACCOUNT

Any attorney licensed to practice in New York State may open an IOLA account at a participating bank using IOLA's EIN (13-3246797). A bank should not create obstacles to opening your account.

3. MAKE SURE YOUR ACCOUNT IS TITLED PROPERLY WITH YOUR ADDRESS

There are rules governing the title of your account. It must contain these three elements:

The Attorney or Firm's **Name**	the acronym: **IOLA**	One of the following phrases: **Attorney Trust Account** **Attorney Escrow Account** **Attorney Special Account**

For Example: John Smith Attorney Trust Account/IOLA; Sam Spade, Esq IOLA Attorney Escrow Account

To ensure compliance with NYS ethics rules on required bookkeeping records, set up the account with your (or your firm's) address. The IOLA Fund should not receive and takes no responsibility for your monthly bank account statements.

4. MAKE AN ARRANGEMENT TO PAY ANY SPECIAL FEES

The IOLA Fund pays any regular monthly service and maintenance charges on your IOLA account.
You (or your firm) are responsible for paying all check-book printing fees.
You (or your firm) are responsible for paying all other charges, including:
wire transfers, stop payments, and overdraft or non-sufficient funds (NSF) fees.

If you (or your firm) maintain an operating account at the same bank, it may be possible to arrange to have fees and charges for the IOLA account deducted from your operating account. Ask your bank. Otherwise, you can deposit operating funds into the IOLA account to cover such fees and charges as they arise, subject to New York State ethics rules.

5. SUBMIT YOUR ONLINE ENROLLMENT FORM

Click the icon below to enroll your account with the IOLA Fund.

IOLA Attorney Enrollment Form

The undersigned, in accordance with New York Judiciary Law §497, State Finance Law §97-v and 21 NYCRR Part 7000 has established an IOLA account with interest payable to the IOLA Fund of the State of New York with the financial institution listed below.

PLEASE NOTE: The amount of space available to type in is unlimited.

Name of Financial Institution(*)

-- Select one --

Date Opened(*)

Previous Month (March 2019)April 2019Next Month (May 2019)

Su	Mo	Tu	We	Th	Fr	Sa
31	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	1	2	3	4
5	6	7	8	9	10	11

NYS OCA Attorney Registration #(*)

If you do not know your attorney registration number click here.

Account Title(*)

Please enter account title.

Account Number(*)

Please enter account number.

Name of Signatory(*)

Firm Address(*)

City(*)

State(*)

Zip(*)

Phone Number(*)

Email Address(*)

List attorneys who are signatories on the IOLA account (if applicable)

Signature(*)

Submit | Reset

By choosing to transmit this form with an electronic signature, you agree that by typing your name above, this constitutes your electronic signature in lieu of a physical signature for all legal purposes.

The New York Lawyers' Fund for Client Protection
119 Washington Avenue
Albany, New York 12210
800-442-FUND

APPROVED BANKING INSTITUTIONS FOR ATTORNEY FIDUCIARY ACCOUNTS

(Pursuant to 22 NYCRR Rule 1.15 (b)(1), Part 1300)
*March 2019

Abacus Federal Savings Bank
ABN-AMRO, Bank N.V.
Access Federal Credit Union
Adirondack Trust Company
Adirondack Bank, N.A.
Alden State Bank
ALMA Bank
Alpine Capital Bank
Alternatives Federal Credit Union
Amalgamated Bank of New York
Amerasia Bank
American Community Bank
AmeriCU Federal Credit Union
Apple Bank for Savings
Asia Bank, N.A.
Astoria Bank
Ballston Spa National Bank
Banco Popular
Bank Asiana (NJ)
Bank Hapoalim B.M.
Bank Leumi
Bank of Akron
Bank of America (IL)
Bank of America, NA
Bank of Castile
Bank of Cattaraugus
Bank of Greene County
Bank of Holland
Bank of Milbrook
Bank of New York
Bank of Oklahoma (OK)
Bank of Richmondville
Bank of the Ozarks (AR)
Bank of Utica
Bank on Buffalo (div. of CNB Bank)
Bank United, N.A.
Berkshire Bank
BNY Mellon, N.A. (PA)
Boston Safe Deposit & Trust Company (MA)
Bridgehampton National Bank
Broadway National Bank (NJ)
Brooklyn Cooperative Federal Credit Union
Brown Brothers Harriman & Co.
Canandaigua National Bank & Trust Co.
Capital Communications, FCU
Capital One Bank, N.A.
Carthage Federal Savings Bank
Carver Federal Savings Bank
Cathay Bank
Catskill Hudson Bank
Cattaraugus County Bank
Cayuga Lake National Bank
CFCU Community Credit Union
Champlain National Bank
Chemung Canal Trust Company
Chinatrust Bank (USA) (CA)
Citibank, N.A.
Citizens National Bank of Hammond
Citizens Bank
City National Bank (CA)
City National Bank of New Jersey
City National Bank of Florida
Citizens and Northern Bank
Citzens Bank of Cape Vincent
Comerica Bank (MI)
Community Bank, N.A.
Community Federal Savings Bank
Community Mutual Savings Bank
Community National Bank
Connect One Bank (NJ)
Country Bank
Countryside Federal Credit Union
Cross-County, FSB
Cross River Bank (NJ)
CTBC Bank Copr. (USA)
Customers Bank
Delaware National Bank of Delhi

APPROVED BANKING INSTITUTIONS
FOR ATTORNEY FIDUCIARY ACCOUNTS
(Pursuant to 22 NYCRR Rule 1.15 (b)(1), Part 1300)
March 2019

Deutsche Bank Trust Company Americas
Dime Savings Bank of Williamsburgh
Doral Bank
Eastbank, N.A.
Elmira Savings Bank
Emigrant Savings Bank
Empire National Bank
Empire State Bank
Erie Metro Federal Credit Union
ESL Federal Credit Union
Esquire Bank
Evans National Bank
Fairport Savings Bank
Family First of N.Y. Federal Credit Union
Fiduciary Trust Company International
First American International Bank
First Central Savings Bank
First Citizens National Bank (PA)
First Federal Savings of Middletown
First Heritage Federal Credit Union
First National Bank of Dryden
First National Bank of Groton
First National Bank of Long Island
First National Bank of Scotia
First Niagara Bank, N.A.
First Republic Bank
First Trade Union Bank (MA)
Five Star Bank
Flushing Bank
Fulton Savings Bank
Geddes Federal Savings & Loan Assn.
Generations Bank
Genesee Cooperative FCU
Genesee Regional Bank
Glens Falls National Bank & Trust Co.
Global Bank
Gold Coast Bank
Gouverneur Savings & Loan Assn.
Habib American Bank
Hanmi Bank (CA)
Hamlin Bank and Trust Company (PA)
Hometown Bank of the Hudson Valley
HSBC Bank
Hudson City Savings Bank (NJ)
Hudson Valley Bank
Hudson Valley Federal Credit Union
Huntington National Bank
Industrial and Commercial Bank of China
Interaudi Bank
Intervest National Bank
Investors Savings Bank (NJ)
Island FCU
Israel Discount Bank of New York
Jeff Bank
JP Morgan Chase Bank
Key Bank, NA
Lakeland Bank (NJ)
Lake Shore Savings & Loan Association
Lyons National Bank
Mahopac Bank
Manufacturers and Traders Trust Company
Maple City Savings Bank, FSB
Maspeth Federal Savings & Loan Association
Massena Savings & Loan Association
Medina Savings & Loan
Mercantil Commercebank, N.A.
Meridian Bank (PA), (NJ)
Metro City Bank
Metropolitan Commercial Bank
Millennium BCP Bank (NJ)
Modern Bank
M.Y. SAFRA Bank, FSB
NBT Bank
National Bank of Coxsackie
National Bank of Delaware County Walton
National Bank of Egypt
National Bank of New York City
National Union Bank of Kinderhook
National Westminster Bank
NCB, FSB (OH)
NewBank
New Millennium Bank (NJ)
New York Community Bank
Noah Bank (PA)
Nordea Bank, Finland, PLC
North Country Savings Bank
Northeast Savings, F.A. (CT)
Northfield Savings Bank

APPROVED BANKING INSTITUTIONS
FOR ATTORNEY FIDUCIARY ACCOUNTS
(Pursuant to 22 NYCRR Rule 1.15 (b)(1), Part 1300)
March 2019

Northwest Savings Bank (PA)
Ocean First Bank (NJ)
Oneida Savings Bank
Orange County Trust Company
Pacific City Bank (CA)
Pathfinder Bank
Patriot Federal Bank
Patriot National Bank (CT)
People's National Bank (PA)
People's United Bank
Pioneer Savings Bank
Pittsford Federal Credit Union
PNC Bank (NJ)
PNC Bank (PA)
Ponce de Leon Federal Savings Bank
Putnam County National Bank
Putnam County Savings Bank
Quontic Bank
Reliant Community FCU
Republic First Bank (DBA Republic Bank)
Rhinebeck Bank
Rondout Savings Bank
Safra National Bank
Salisbury Bank & Trust
Saratoga National Bank
Savannah Bank, N.A.
Savoy Bank
Sawyer Savings Bank
SEFCU
Self Reliance Federal Credit Union (NY)
Seneca Federal Savings and Loan
Shinhan Bank America
Sidney Federal Credit Union
Signature Bank
Solvay Bank
Southern Chautauqua FCU
Sovereign Bank (MA)
Standard Chartered Bank
State Bank of Chittenango
Sterling National Bank
Steuben Trust Company
Stonegate Bank (FL)
Suffolk County National Bank
Suffolk Federal Credit Union
SUMA (Yonkers) Federal Credit Union
Summit Bank (NJ)
SUN National Bank
Sunnyside Federal Savings & Loan Ass.
SUSSEXBANK (NJ)
TD Bank, N.A.
Tioga State Bank
Tompkins County Trust Company
Treasury Bank, Ltd. (D.C.)
Trustco Bank
Ulster Savings Bank
United International Bank
United Orient Bank
Upstate National Bank
USNY Bank
Valley National Bank (NJ)
Victory State Bank
Wachovia Bank, NA (NC)
Walden Savings Bank
Wallkill Valley Federal Savings and Loan
Watertown Savings Bank
Webster Bank (CT)
Wells Fargo Bank, N.A.
The Westchester Bank
Wilshire State Bank
Woori America Bank

***The information provided in this list, while accurate at time of print, is periodically subject to change as the result of closure, merger or acquisition among banking institutions. Current information about FDIC coverage may be found at www.fdic.gov. Questions may be directed to the New York Lawyers' Fund at 800-442-FUND (3863), or by e-mail at info@nylawfund.org.**

14 A.D.3d 324, 788 N.Y.S.2d
77, 2005 N.Y. Slip Op. 00075

**1 Edward Bazinet, Plaintiff
v
Galina Kluge, Individually and as Executrix of Michael Kluge, Deceased, Respondent, and Samuel J. Reiser, Appellant. (And a Third-Party Action.)

Supreme Court, Appellate Division,
First Department, New York
4647, 4648
January 6, 2005

CITE TITLE AS: Bazinet v Kluge

HEADNOTE

Attorney and Client
Malpractice

Defendant attorney was entitled to dismissal of cross claims against him, in his capacity as escrow agent for defendant real estate buyer, since there is no requirement imposed by law that attorney-escrow agent place escrow funds in account fully insured by FDIC, and there were no allegations that he knew that bank in which he deposited funds was in danger of closing. *325

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered on or about June 5, 2003, insofar as it denied defendant Reiser's motion to dismiss or stay the prosecution of the second and fifth cross claims against him, and order, same court and Justice, entered April 28, 2004, insofar as it, upon reargument, adhered to the prior decision, unanimously reversed, on the law, with costs, and defendant Reiser's motion to dismiss the second and fifth cross claims against him granted.

Defendant Reiser, an attorney, acted as escrow agent for defendant Kluge in successive real estate transactions involving two cooperative apartments at 50 Central Park West in the course of which Reiser deposited $1.45 million and $1.28 million down payments in the New York branch of the Connecticut Bank of Commerce (CBC) where his firm maintained an interest on lawyer account (IOLA). Before the transactions could be concluded, and unbeknownst to any of the parties, CBC was closed and Federal Deposit Insurance Corporation (FDIC) named as receiver. The present action is brought by the first prospective buyer, Bazinet, who seeks a return of his down payment. The present appeal involves the second and fifth cross claims against defendant Reiser by defendant Kluge in which she alleges that Reiser committed legal malpractice by not depositing the escrowed funds in a manner which would have been covered by FDIC insurance or taking other, unspecified steps to ensure protection of those funds. Since the IAS court should have granted Reiser's motion to dismiss, we reverse.

To prevail in a legal malpractice action, the plaintiff must show, inter alia, that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal profession (*see Rubinberg v Walker*, 252 AD2d 466, 467 [1998]). There is no allegation that Reiser violated any statute or regulation, much less that he breached the escrow provisions of the contracts. There is no requirement imposed by law that an **2 attorney-escrow agent place escrow funds in an account fully insured by the FDIC (*see* General Business Law § 778-a; Code of Professional Responsibility DR 9-102 [b] [1] [22 NYCRR 1200.46 (b) (1)]), and there are no allegations that Reiser knew that CBC was in danger of closing. The proximate cause of Kluge's injury, if any, was CBC's unforeseen demise. Concur—Buckley, P.J., Saxe, Sullivan, Nardelli and Gonzalez, JJ. [*See* 196 Misc 2d 231.]

19 N.Y.3d 688
Court of Appeals of New York.

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

No. 170.
|
Oct. 23, 2012.

Synopsis

Background: Grievance Committee moved to confirm report of Arthur J. Cooperman, Special Referee, and to impose discipline on attorney for his misconduct with respect to sake-keeping of client funds, and attorney cross-moved to disaffirm report. The Supreme Court, Appellate Division, 94 A.D.3d 30, 940 N.Y.S.2d 88, granted Committee's motion and suspended attorney for two years. Attorney appealed.

Holdings: The Court of Appeals held that:

[1] attorney failed to maintain vigilance over client funds, and

[2] charge for failure to timely comply with Grievance Committee's lawful demands for information was not supported by record.

Affirmed as modified and remitted.

West Headnotes (5)

[1] **Attorney and Client**
Miscellaneous particular acts or omissions

An attorney is not bound to safeguard client funds solely by the contractual language of an escrow agreement, but also by a fiduciary relationship.

4 Cases that cite this headnote

[2] **Trusts**
Diligence and good faith of trustee

A trustee is held to something stricter than the morals of the market place; not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

1 Cases that cite this headnote

[3] **Attorney and Client**
Misappropriation and failure to account

Attorney, who was partner at firm, failed to maintain vigilance over client funds, resulting in firm's bookkeeper, who was attorney's brother, misappropriating funds, breaching attorney's fiduciary duty to clients, even though attorney did not himself steal the money and his conduct was not venal, where attorney had ceded control to bookkeeper, creating opportunity for misuse of client funds, firm's accountant noticed discrepancies, bookkeeper produced a check from firm's interest on lawyer account (IOLA) when requested to pull check from escrow, attorney signed that check, and escrow statement, which was fabricated, reflected an expenditure in the amount of check, despite no checks being written from that account. N.Y.Ct.Rules, § 1200.46 [DR 9-102](a), (c)(4); Code of Prof.Resp., DR 1–102(a)(7); Rules of Prof.Conduct, Rule 8.4.

4 Cases that cite this headnote

[4] **Attorney and Client**
Weight and sufficiency

Attorney and Client
Factors in mitigation

That an attorney has acted without venality can be a factor considered in mitigation in disciplinary proceedings, but is not probative of whether he has failed to preserve client funds.

2 Cases that cite this headnote

[5] **Attorney and Client**
Deception of court or obstruction of administration of justice

Charge against attorney for failure to timely comply with Grievance Committee's lawful demands for information was not supported by record, where attorney and his counsel were in regular correspondence with Committee and provided copious documentation in response to requests, attorney acknowledged when particular demands could not be immediately met, explained why, and stated intention to provide information at earliest opportunity. Rules of Prof.Conduct, Rule 8.4.

2 Cases that cite this headnote

Attorneys and Law Firms

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

Gary L. Casella, White Plains (Matthew Lee-Renert, Faith Lorenzo and Antonia Cipollone of counsel), for respondent.

Glenn S. Koopersmith, Garden City, for Nassau County Bar Association, amicus curiae.

Law Offices of Thomas F. Liotti, Garden City (Thomas F. Liotti of counsel), amicus curiae.

***786 *691 OPINION OF THE COURT**

PER CURIAM.

**1255 Petitioner instituted a disciplinary proceeding against respondent attorney Peter J. Galasso alleging 10 charges of professional misconduct. The essence of the petition is that respondent failed to properly supervise the firm's bookkeeper resulting in the misappropriation of client funds and that he breached his fiduciary duty by failing to safeguard those funds. Although we find the bulk of the charges were properly sustained, we modify to dismiss the charge alleging respondent's failure to timely comply with the lawful demands of the Grievance Committee.

At all times relevant to this appeal, respondent has been a partner of the law firm known as Galasso & Langione, LLP (the Galasso Langione firm).[1] Anthony Galasso, respondent's brother, was also employed by the firm and had, over the course of several years, worked his way up from an entry-level position as a file clerk and messenger to become the firm's bookkeeper and office manager.

In June 2004, respondent represented Steven Baron in a matrimonial action commenced by Wendy Baron. The parties and their attorneys entered into an escrow agreement through which *692 respondent was the designated escrow agent for the proceeds from a sale of commercial property owned by Steven Baron. Respondent agreed to hold the sum of $4,840,862.34 in an interest-bearing escrow account, pending **1256 further order of Supreme Court in the matrimonial action. Anthony Galasso, in his capacity as office manager, deposited the funds into an escrow account at Signature Bank (the Baron escrow account). Respondent and fellow partner James Langione were the only authorized signators on the account application. However, Anthony Galasso apparently altered the application to permit electronic fund transfers and to include himself—a nonlawyer—as a signator.

Between June 23, 2004 and January 17, 2007, Anthony Galasso transferred approximately $4,501,571 from the Baron escrow account into six other firm accounts maintained at Signature Bank through the use of roughly 90 Internet transfers. It seems that the Baron funds were used to replace money that Anthony Galasso had already removed from the firm accounts. Transferred funds from the Baron escrow account were then disbursed to respondent, firm employees and other entities in the course of business, all without the knowledge of the firm's principals or the consent of the Barons. In particular, approximately $360,000 in funds transferred from the Baron escrow account were used to finance the purchase of the firm's office condominium. To escape detection, Anthony Galasso had the genuine Baron escrow account statements, generated by the bank, diverted to a post office

box and fabricated false statements for review by the firm. Although the Barons demanded payment of the funds held in escrow, more than $4.3 million remains due and owing to them.

In June 2006, the Galasso Langione firm received $800,000 on behalf of the Estate of George Carroll in settlement of a medical malpractice/wrongful death action and Anthony Galasso deposited the funds into the firm's IOLA (Interest on Lawyer Account) at M & T Bank. The following month, the firm received $175,000 on behalf of Adele Fabrizio in connection with a personal injury action. Anthony Galasso also deposited these funds into the firm's M & T IOLA. Anthony Galasso misappropriated the bulk of these funds by forging the partners' signatures on IOLA checks. ***787 With respect to the IOLA, respondent's practice had been to review monthly financial reports generated by Anthony Galasso, rather than the account statements themselves. To date, despite the clients' demands for the *693 return of their funds, the firm has returned only $85,791.36 to the Estate of Carroll; no funds have been returned to Fabrizio.

Anthony Galasso confessed to the theft of the above funds on January 18, 2007 and ultimately pleaded guilty to two counts of grand larceny in the first degree, 10 counts of falsifying business records in the first degree and 10 counts of criminal possession of a forged instrument in the second degree. He was sentenced to 2 ½ to 7 ½ years' imprisonment, as well as $2,000,000 in restitution. Respondent cooperated fully with the criminal investigation. Indeed, the Nassau County District Attorney's Office submitted a letter to the Grievance Committee providing its conclusions that no one else in the firm had had knowledge of the theft and that nothing in the documents presented to the firm by Anthony Galasso would have raised any suspicion regarding the accounts. Respondent has also commenced civil suits against the banks involved, in an attempt to recover the client funds.

As noted above, the Grievance Committee commenced a disciplinary proceeding against respondent alleging 10 charges of **1257 professional misconduct.[2] The matter was referred to a Special Referee who sustained all 10 charges. The Appellate Division granted the Committee's motion to confirm the Referee's report and denied respondent's cross motion to disaffirm *694 the report (94 A.D.3d 30, 940 N.Y.S.2d 88 [2d Dept.2012]). The Court also suspended respondent from the practice of law for a period of two years. This Court granted respondent leave to appeal, and we now modify.

Few, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds. Rather than establishing a new or heightened degree of liability for attorneys, we find that the Appellate Division's determination is completely consistent with existing standards pertaining to the safeguarding and oversight of client funds. In other words, "a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed" ***788 (*Matter of Holtzman*, 78 N.Y.2d 184, 191, 573 N.Y.S.2d 39, 577 N.E.2d 30 [1991]).

[1] [2] Respondent is not bound to his clients solely by the contractual language of the escrow agreement, but also by a fiduciary relationship. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" (*Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 [1928]; *see Matter of Wallens*, 9 N.Y.3d 117, 122, 847 N.Y.S.2d 156, 877 N.E.2d 960 [2007]). Respondent owed his clients a high degree of vigilance to ensure that the funds they had entrusted to him in his fiduciary capacity were returned to them upon request. To that end, implementation of any of the basic measures respondent has since adopted—personal review of the bank statements, personal contact with the bank and improved oversight of the firm's books and records—likely would have mitigated, if not avoided, the losses.

[3] [4] Here, although respondent himself did not steal the money and his conduct was not venal, his acts in setting in place the firm's procedures, as well as his ensuing omissions, permitted his employee to do so. Moreover, the Baron funds were **1258 used for the benefit of respondent and the firm. That respondent has acted without venality can be a factor considered in mitigation, but is not probative of whether he has failed to preserve client funds (*see e.g. Matter of Wilkins*, 70 A.D.3d 1119, 1119–1120, 895 N.Y.S.2d 552 [3d Dept.2010]; *Matter of Abato*, 51 A.D.3d 225, 228, 853 N.Y.S.2d 660 [2d Dept.2008]).

Unquestionably, Anthony Galasso had devised a relatively sophisticated system and his fraud went undetected by the attorneys and accountant reviewing the

documents he produced. However, respondent ceded an unacceptable level of control over the firm accounts to his brother, thereby creating the opportunity for the misuse of client funds. Had respondent been *695 more careful in supervising the accounts and his employee, he would have been aware of the malfeasance at a much earlier time when he could have substantially mitigated the losses.

It cannot be said that there were no warning signs here. Specifically, a nearly $5,000 "discrepancy" in the escrow account was noted by Baron's accountant, which respondent permitted Anthony Galasso to resolve with the bank. Anthony Galasso then corrected the "discrepancy" on a fabricated account statement by showing an Internet transfer of funds from the firm IOLA to the Baron escrow account. In addition, when asked to obtain a $100,000 check from the escrow account payable to Wendy Baron, Anthony Galasso produced a check from the IOLA, which respondent then signed and provided to Mrs. Baron. The fabricated statement for the escrow account later reflected an expenditure of $100,000 by check number 1738, despite the fact that no checks had been written on the escrow account.

A discrepancy in an escrow account should, at a minimum, be alarming to a reasonably prudent attorney. This is not to say that attorneys are prohibited from delegating certain tasks to firm employees, but any delegation must be made with an appropriate degree of oversight. We stress that it is the ethical responsibility of the attorney—not the bookkeeper, the office manager or the accountant —to safeguard client funds.

To be clear, respondent is not being held responsible for the criminal behavior of his brother. Rather, it is his own breach of his fiduciary duty and failure to properly supervise his employee, resulting in the loss of client funds entrusted to him, that warrant this disciplinary action. We find that charges 1 through 4 and 6 through 10 were properly sustained.

***789 Respondent was also charged with the failure to timely comply with the Grievance Committee's lawful demands for information (charge five) in violation of former DR 1–102(a)(5) and (7) and Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(d) and (h). Petitioner maintains that, between May 12, 2008 and July 22, 2009, it made repeated requests for information to which respondent failed to fully and timely respond and that respondent's conduct impeded and delayed its investigation.[3]

[5] We find the imposition of the separate charge on this basis to be unsupported **1259 by the record. It is difficult to characterize *696 respondent's overall participation in the disciplinary process as anything other than active. Both respondent and his counsel were in regular correspondence with the Grievance Committee and provided copious documentation in response to its requests. When particular demands could not be immediately met, respondent generally acknowledged same, explained why and stated his intention to provide the information at the earliest opportunity. Under these particular circumstances, we find that respondent's level of compliance with this investigation is inconsistent with a sustained charge of failure to timely comply with the Committee's lawful demands. Upon remittal, the Appellate Division should reconsider whether the suspension previously imposed remains an appropriate sanction.

Accordingly, the order of the Appellate Division should be modified, without costs, by dismissing charge five of the petition and remitting the matter to that Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, READ, SMITH, PIGOTT and JONES concur in per curiam opinion.
Order modified, etc.

All Citations

19 N.Y.3d 688, 978 N.E.2d 1254, 954 N.Y.S.2d 784, 2012 N.Y. Slip Op. 07050

Footnotes

1 The firm was subsequently known as Galasso, Langione & Botter, LLP and is currently known as Galasso, Langione, Catterson & LoFrumento, LLP.

2 Charges one, two, seven and nine allege that respondent breached his fiduciary duty to pay or deliver escrow funds, by failing to safeguard client funds and by failing to promptly pay or deliver those funds to the person entitled to them (Code of Professional Responsibility DR 9–102 [a], [c][4]; DR 1–102[a][7] [22 NYCRR 1200.46(a), (c)(4); 1200.3(a)(7)]; now Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.15[a], [c][4]; 8.4 [h]).

Charges 6, 8 and 10 allege that respondent failed to supervise a nonlawyer employee resulting in the misappropriation of client funds (Code of Professional Responsibility DR 1–104[d][2] [22 NYCRR 1200.5(d)(2)]; now Rules of Professional Conduct [22 NYCRR 1200.0] rule 5.3[b][2][i], [ii]).

Charge three alleges that respondent was unjustly enriched by use of the Baron funds for his personal benefit (Code of Professional Responsibility DR 9–102[a]; 1–102[a][5], [7] [22 NYCRR 1200.46(a); 1200.3(a)(5), (7)]; now Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.15[a]; 8.4 [d], [h]).

Charge four alleges that respondent failed to provide appropriate accounts to the Barons with respect to their escrow funds (Code of Professional Responsibility DR 9–102[c][3]; 1–102[a][7] [22 NYCRR 1200.46(c)(3); 1200.3(a)(7)]; now Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.15[a]; 8.4[h]).

Charge five alleges that respondent failed to timely comply with the lawful demands of the Committee (Code of Professional Responsibility DR 1–102 [a] [5], [7] [22 NYCRR 1200.3(a)(5), (7)]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 8.4[d], [h]).

3 In particular, the Grievance Committee took issue with the responses to its requests seeking: (1) a forensic examination conducted by outside accountants to audit all Galasso & Langione firm bank accounts in the relevant time period; (2) an accounting to trace all disbursements from the Baron escrow account; (3) detailed bookkeeping records for the firm's Signature Bank and M & T IOLA accounts; and (4) copies of documents relating to the financing and purchase of the office condominium.

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94 A.D.3d 30
Supreme **Court**, Appellate Division,
Second Department, New York.

In the **Matter of Peter J. GALASSO**,
admitted as **Peter** John **Galasso**,
an attorney and counselor-at-law.
Grievance Committee for the
Ninth Judicial District, petitioner;
Peter J. Galasso, respondent.

Feb. 21, 2012.

Synopsis

Background: Grievance Committee moved to confirm report of Arthur J. Cooperman, Special Referee, and to impose discipline on attorney for his misconduct with respect to sake-keeping of client funds, and attorney cross-moved to disaffirm report.

Holding: The Supreme **Court**, Appellate Division, held that two-year suspension from practice of law was appropriate discipline for attorney who failed to maintain appropriate vigilance over his firm's bank accounts, with result that hundreds of thousands of dollars in client trust funds were misappropriated.

Motion granted; cross-motion denied.

West Headnotes (1)

[1] **Attorney and Client**
Mishandling of trust account or client funds

Two-year suspension from practice of law was appropriate discipline for attorney who failed to maintain appropriate vigilance over his firm's bank accounts, with result that hundreds of thousands of dollars in client trust funds were misappropriated by firm's bookkeeper and by attorney's brother in actual and substantial harm to clients, despite numerous letters of good character submitted on attorney's behalf, despite changes which attorney had made with respect to his business practices, and despite attorney's cooperation in connection with criminal prosecution of his bookkeeper and brother, and his pursuit of lawsuits in effort to recover the misappropriated client funds. N.Y.Ct.Rules 1200.3(a)(5, 7) [DR 1–102(A)(5, 7)], 1200.5[d] [2] [DR 1–104(D)(2)], 1200.46(a, c) [DR 9–102(A, C)] (2008).

1 Cases that cite this headnote

Attorneys and Law Firms

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

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

WILLIAM F. MASTRO, A.P.J., REINALDO E. RIVERA, MARK C. DILLON, DANIEL D. ANGIOLILLO, and ANITA R. FLORIO, JJ.

Opinion

PER CURIAM.

*31 The Grievance Committee for the Ninth Judicial District (hereinafter the Grievance Committee) served the respondent with a petition dated January 21, 2010, containing 10 charges of professional misconduct.

Charge one alleges that the respondent breached his fiduciary duty by failing to promptly pay or deliver funds received pursuant to a written escrow agreement to the person(s) entitled to receive such funds, in violation of Code of Professional Responsibility DR 9–102(c)(4) (22 NYCRR 1200.46[c][4]).

The respondent was a partner of a law firm known as **Galasso** & Langione, LLP, and/or the successor firms known as **Galasso** Langione & Botter, LLP, and

Galasso, Langione, Catterson & *32 LoFrumento, LLP (hereinafter the Galasso Langione firm or the firm). The respondent and the Galasso Langione firm represented Stephen Baron in connection with an action for a divorce and ancillary relief commenced by Wendy Baron in the Supreme Court, Nassau County. Wendy Baron was represented by her own attorney.

Pursuant to a written escrow agreement dated June 8, 2004, the respondent acknowledged the receipt of funds totaling $4,840,862.32 representing the proceeds of the sale of a commercial property owned by Stephen Baron (hereinafter the Baron funds). The respondent executed the foregoing agreement as both the attorney for Stephen Baron and the escrow agent, and agreed to hold the funds on deposit in an interest-bearing escrow account under the social security number of Stephen Baron "subject to further order of the Supreme Court" in connection with the underlying divorce action.

On or about June 11, 2004, the respondent, through his agents and employees, arranged for the funds to be deposited into an interest-bearing account at Signature Bank entitled "Stephen Baron Galasso Langione LLP Escrow Agents" (hereinafter the Baron escrow account). The respondent had a fiduciary duty to safeguard the Baron funds and to promptly pay or deliver the funds, with accrued interest, to Stephen and/or Wendy Baron, following a decision of the Supreme Court, Nassau County, issued in or about November 2006, in connection with the underlying divorce action.

Stephen and Wendy Baron, through their respective attorneys and agents, demanded payment from the respondent of the Baron funds pursuant to the foregoing decision of the Supreme Court, Nassau County. To date, the respondent has failed to deliver or pay more than $4.3 million of the Baron funds to the respective **90 parties to whom such funds are due and owing.

Charge two alleges that the respondent breached his fiduciary duty by failing to safeguard the Baron funds in violation of Code of Professional Responsibility DR 9–102(a) and DR1–102(a)(7) (22 NYCRR 1200.46[a], 1200.3[a] [7]).

Between June 11, 2004, and mid-January 2007, there were a series of internet transfers of Baron funds, totaling more than $4.3 million, from the Baron escrow account into various accounts maintained by the respondent and the Galasso Langione firm at Signature Bank incident to the respondent's practice of law and/or the Galasso Langione firm's practice of law.

*33 Following the aforementioned transfers, the Baron funds were disbursed to the respondent, other members and employees of the Galasso Langione firm, various third parties, and various business entities. Stephen and Wendy Baron, the parties ultimately entitled to receive the Baron funds, did not consent to, or benefit from, these disbursements of their funds.

Charge three alleges that the respondent has been unjustly enriched by the use of misappropriated Baron funds for his personal benefit, in violation of Code of Professional Responsibility DR 1–102(a)(5) and (7) (22 NYCRR 1200.3[a] [5], [7]).

The respondent knew or should have known that Baron funds transferred from the Baron escrow account into the Galasso Langione firm's Signature Bank escrow account (no. ******1612) in or about September 2004 were subsequently used to finance a $100,000 down payment in connection with the respondent's purchase of a commercial office condominium unit at 377 Oak Street, in Garden City. Moreover, the respondent knew or should have known that Baron funds transferred from the Baron escrow account into the Galasso Langione firm's Signature Bank account (no. ******2636) on or about September 21, 2005, were subsequently used to pay the $241,483.77 balance due and owing from the respondent to the seller in connection with the purchase of the Oak Street condominium unit, and to pay $22,622.60 in related closing costs.

Charge four alleges that the respondent breached his fiduciary duty by failing to provide appropriate accounts to Stephen and Wendy Baron with respect to the Baron funds entrusted to him in violation of Code of Professional Responsibility DR 9–102(c)(3) and DR1–102(a)(7) (22 NYCRR 1200.46[c] [3], 1200.3 [a][7]).

Stephen and Wendy Baron, through their respective attorneys and agents, demanded an accounting from the respondent with respect to the disbursement of their misappropriated funds. The respondent has tendered partial accountings but has failed to fully account to Stephen and Wendy Baron for the disbursements of

misappropriated funds following transfers of the Baron funds from the Baron escrow account to various Galasso Langione firm accounts at Signature Bank.

Charge five alleges that the respondent failed to timely comply with lawful demands for information made by the Grievance Committee in connection with an investigation of his alleged professional misconduct, in violation of Code of Professional Responsibility DR 1–102(a)(5) and (7) (22 NYCRR 1200.3 [a] *34 [5], [7]) and Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(d) and (h).

From on or about May 12, 2008, through July 22, 2009, the petitioner made various requests for information relevant to its investigation of complaints of alleged professional misconduct by the respondent, via correspondence and subpoena.

**91 The respondent failed to timely and fully respond and/or comply with one or more of the following requests:

(a) a written update on the status of the forensic investigation that reportedly was being undertaken by accountants hired by the Galasso Langione firm in 2007 to audit all Galasso Langione firm bank accounts for the preceding three years and to determine, inter alia, what happened to the funds misappropriated from the Baron escrow account, along with copies of any written analysis prepared by such accountants and copies of the documents used to support their findings;

(b) an accounting to trace the disbursement of Baron funds subsequent to the unauthorized transfers from the Baron escrow account to the Galasso Langione firm Signature Bank accounts for the period June 2004 through mid-June 2007;

(c) bookkeeping records for the Galasso Langione firm's Signature Bank IOLA account (no. ******1639) and the Galasso Langione firm's M & T Bank IOLA account (no. ******9485) for the period January 1, 2004, through January 31, 2007, including records identifying the date, source, and description of each item deposited as well as the date, payee, and purpose of each withdrawal or disbursement, along with information identifying whose funds were being held on deposit in the Signature Bank IOLA account as of January 1, 2004, and the amount being held on behalf of each such person or entity; and

(d) copies of documents relating to the purchase of the office condominium located at 377 Oak Street, Unit 101, in Garden City, including the contract of sale, all documents relating to the financing obtained in connection with the purchase, the loan application, and related documents submitted to the lender in connection with the financing and credit reports.

The respondent's failure to timely and fully comply with the Grievance Committee's lawful demands for the above-referenced information impeded and delayed the Grievance Committee's investigation.

Charge six alleges that the respondent failed to supervise a nonlawyer employee of the Galasso Langione firm, resulting in *35 the misappropriation of the Baron funds, in violation of Code of Professional Responsibility DR 1–104(d)(2) (22 NYCRR 1200.5[d][2]).

The respondent directed the Galasso Langione firm's former bookkeeper/office manager (hereinafter the bookkeeper) to open the Baron escrow account and to maintain and reconcile all bank account statements received from Signature Bank with respect to the Baron escrow account as well as all other Galasso Langione firm Signature Bank accounts used in connection with the respondent's practice of law and/or the Galasso Langione firm's practice of law.

The respondent failed to properly supervise the Galasso Langione firm's former bookkeeper and failed to properly review, audit, and reconcile the Galasso Langione firm's Signature Bank accounts used in connection with his practice of law and/or the Galasso Langione firm's practice of law. In the exercise of reasonable management and supervisory authority, the respondent would have been aware of the unlawful and improper transfers and disbursements of the Baron funds so that remedial action could have been taken to avoid or mitigate the misappropriations of same.

Charge seven alleges that the respondent breached his fiduciary duty by failing to safeguard funds belonging to another person or persons that had been entrusted to the Galasso Langione firm incident to the firm's practice of law and by failing to promptly pay or deliver funds, received in **92 his and/or the firm's fiduciary capacity, to the person or persons entitled to receive such funds, in

violation of Code of Professional Responsibility DR 9–102(a), (c)(4) and DR 1–102(a)(7) (22 NYCRR 1200.46[a], [c][4]; 1200.3 [a][7]).

In or about December 2005 or January 2006, the **Galasso** Langione firm received the sum of $800,000 on behalf of the Estate of George Carroll (hereinafter the Estate) in connection with the settlement of a medical malpractice/wrongful death action. The firm's former bookkeeper was instructed to deposit the foregoing funds into an IOLA account maintained by the firm incident to the practice of law. However, the respondent failed to verify that the funds were deposited into the designated IOLA account and failed to ensure that the funds remained safely on deposit in the designated IOLA account until such time as the firm was authorized to disburse the funds to the legal representatives of the Estate.

In or about January 2007, the legal representatives of the Estate received written notice from the firm that the firm's former *36 bookkeeper had misappropriated the funds entrusted to them on behalf of the Estate.

In or about January 2008, the firm disbursed $85,791.36 to the Estate, representing payment of a portion of the total received by the firm that remains due and owing to the Estate. The representatives of the Estate, through their attorneys, have demanded payment of the balance due and owing from the funds entrusted to the firm on behalf of the Estate. To date, neither the respondent nor the firm has paid the balance due and owing to the Estate.

Charge eight alleges that the respondent failed to supervise a nonlawyer employee of the **Galasso** Langione firm, resulting in the misappropriation of funds received on behalf of the Estate, in violation of Code of Professional Responsibility DR 1–104(d)(2) (22 NYCRR 1200.5[d][2]).

The respondent permitted his former bookkeeper to handle the firm's banking and bookkeeping responsibilities and relied on the firm's former bookkeeper to reconcile the firm's IOLA accounts. However, the respondent failed to properly supervise the firm's former bookkeeper with respect to the foregoing, and failed to properly review, audit, and/or reconcile the firm's IOLA accounts. In the exercise of reasonable management and supervisory authority, the respondent would have been aware of the inappropriate handling of the firm's IOLA accounts and the unlawful and improper disbursements of funds received on behalf of the Estate so that remedial action could have been taken to avoid or mitigate the losses suffered by the Estate.

Charge nine alleges that the respondent breached his fiduciary duty by failing to safeguard funds belonging to another person or persons that had been entrusted to the **Galasso** Langione firm incident to the practice of law and by failing to promptly pay or deliver funds received in a fiduciary capacity to the person or persons entitled to receive those funds, in violation of Code of Professional Responsibility DR 9–102(a), (c)(4) and DR 1–102(a)(7) (22 NYCRR 1200.46[a], [c][4]; 1200.3[a][7]).

In or about July 2006, the **Galasso** Langione firm received the sum of $175,000 on behalf of Adele Fabrizio in connection with the settlement of a personal injury action. The firm's former bookkeeper was instructed to deposit the funds into an IOLA account maintained by the firm incident to the practice of law. However, the respondent failed to verify that the funds were deposited into the designated IOLA account and failed to ensure *37 that the funds remained safely on deposit until such time **93 as the firm was authorized to disburse them to Ms. Fabrizio.

In or about January 2007, Ms. Fabrizio received written notice from the firm that the firm's former bookkeeper had misappropriated the funds entrusted to the firm on her behalf. Ms. Fabrizio, through her agents and/or legal representative, has demanded payment of the funds entrusted to the firm that are due and owing to her. To date, the respondent and/or the firm have failed to pay over the funds entrusted to them that remain due and owing to Ms. Fabrizio.

Charge ten alleges that the respondent failed to supervise a nonlawyer employee of the **Galasso** Langione firm, resulting in the misappropriation of funds received on behalf of Adele Fabrizio, in violation of Code of Professional Responsibility DR 1–104(d)(2) (22 NYCRR 1200.5[d][2]).

In the exercise of reasonable management and supervisory authority, the respondent would have been aware of the inappropriate handling of the firm's IOLA accounts, and the unlawful and improper disbursement of funds received on behalf of Ms. Fabrizio, so that remedial action could

have been taken to avoid or mitigate the losses to Ms. Fabrizio.

Based upon the respondent's admissions and the evidence adduced, the Special Referee properly sustained all 10 charges. Accordingly, the petitioner's motion to confirm the Special Referee's report is granted, and the respondent's cross motion to disaffirm the Special Referee's report is denied.

In determining an appropriate measure of discipline to impose, the **Court** notes the respondent's testimony as to the negative impact the conduct of his bookkeeper and brother, Anthony **Galasso**, has had on his personal and professional life; the changes he has made with respect to his business practices; his cooperation in connection with the criminal prosecution of his bookkeeper and brother, Anthony **Galasso**; and his pursuit of lawsuits against, among others, Signature Bank, in an effort to reclaim the misappropriated Baron funds, as well as the funds misappropriated from the Estate and from Adele Fabrizio. In addition, the **Court** considered the 37 letters of good character submitted on the respondent's behalf. However, we find that the respondent failed to maintain appropriate vigilance over his firm's bank accounts, resulting in actual and substantial harm to clients (*cf. Matter of Forman*, 250 A.D.2d 116, 680 N.Y.S.2d 612).

Under the totality of the circumstances, the respondent is suspended from the practice of law for a period of two years.

*38 ORDERED that the petitioner's motion to confirm the Special Referee's report is granted; and it is further,

ORDERED that the respondent's cross motion to disaffirm the Special Referee's report is denied; and it is further,

ORDERED that the respondent, **Peter J. Galasso**, admitted as **Peter John Galasso**, is suspended from the practice of law for a period of two years, commencing March 21, 2012, and continuing until further order of this **Court**. The respondent shall not apply for reinstatement earlier than September 23, 2013. 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,

94 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 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, **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).

MASTRO, A.P.J., RIVERA, DILLON, ANGIOLILLO and FLORIO, JJ., concur.

All Citations

94 A.D.3d 30, 940 N.Y.S.2d 88, 2012 N.Y. Slip Op. 01460

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141 A.D.3d 205
Supreme Court, Appellate Division,
Second Department, New York.

In the **Matter of** Paul G. **VESNAVER**,
admitted as Paul George **Vesnaver**, an
attorney and counselor-at-law, resignor.
(Attorney Registration No. 1906890).

June 29, 2016.

RESIGNATION tendered pursuant to 22 NYCRR 691.9 by Paul G. **Vesnaver**, who was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on March 7, 1984, under the name Paul George **Vesnaver**.

Attorneys and Law Firms

Diana Maxfield Kearse, Brooklyn, NY (Colette M. Landers of counsel), for the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts.

Bracken Margolin Besunder, LLP, Islandia, NY (Harvey B. Besunder and Zachary D. Dubey of counsel), for resignor.

Opinion

PER CURIAM.

*206 Paul G. **Vesnaver** (hereinafter the resignor) has submitted an affidavit sworn to on February 19, 2016, wherein he tenders his resignation as an attorney and counselor-at-law (*see* 22 NYCRR 691.9).

The resignor acknowledges in his affidavit that his resignation is freely and voluntarily tendered, and that he is not being subjected to coercion or duress. He acknowledges that the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts is currently investigating several complaints of professional misconduct against him, which allege, inter alia, that he failed to safeguard client or fiduciary funds, and that checks he issued **754 from his attorney trust accounts were dishonored when presented for payment due to insufficient funds. The resignor acknowledges that if charges were predicated on the misconduct under investigation, he could not successfully defend himself on the merits against such charges. The resignor states that he is fully aware of the implications of submitting his resignation.

The resignor's resignation is submitted subject to any application by the Grievance Committee for an order directing that he make restitution and that he reimburse the Lawyers' Fund for Client Protection pursuant to Judiciary Law § 90(6–a). He acknowledges the continuing jurisdiction of this Court to make such an order, which could be entered as a civil judgment against him. He specifically waives the opportunity afforded him by Judiciary Law § 90(6–a)(f) to be heard in opposition thereto.

The Grievance Committee recommends that this Court accept the proffered resignation.

Inasmuch as the proffered resignation complies with the requirements of 22 NYCRR 691.9, it is accepted, the resignor is disbarred, and his name is stricken from the roll of attorneys and counselors-at-law, effective immediately.

ORDERED that the resignation of Paul G. **Vesnaver**, admitted as Paul George **Vesnaver**, is accepted and directed to be filed; and it is further,

*207 ORDERED that pursuant to Judiciary Law § 90, effective immediately, Paul G. **Vesnaver**, admitted as Paul George **Vesnaver**, is disbarred and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that Paul G. **Vesnaver**, admitted as Paul George **Vesnaver**, shall comply with this Court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, Paul G. **Vesnaver**, admitted as Paul George **Vesnaver**, shall desist and refrain from (1) 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 Paul G. **Vesnaver**, admitted as Paul George **Vesnaver**, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency, and he shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f).

ENG, P.J., RIVERA, DILLON, BALKIN and LaSALLE, JJ., concur.

All Citations

141 A.D.3d 205, 33 N.Y.S.3d 753 (Mem), 2016 N.Y. Slip Op. 05160

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LI Herald website

Rockville Centre attorney sentenced to a year in prison after stealing from client

Posted April 12, 2018

By Ben Strack

A Rockville Centre attorney was sentenced to one year in prison last week after stealing $177,000 from a client in 2015.

Paul Vesnaver, 59, of Long Beach, pleaded guilty on September 21 before Judge Robert Bogle to third-degree grand larceny, a felony. Judge Bogle sentenced him on April 5 to one year in jail, and ordered him to pay restitution in the amount of $157,000. The defendant had paid his former client $20,000 in restitution at the time of his sentencing.

"Lawyers have a duty to represent their client's interests, and when they steal from them, we will hold them criminally accountable," Nassau County District Attorney Madeline Singas said.

Singas said Vesnaver, whose practice was in Rockville Centre, represented a client in a personal injury case in August 2015. When the matter was settled, a settlement check for $287,500 was made payable to the client and the defendant. A letter from the defendant to the client — dated September 4, 2015 — stated the amount due to his client after attorney fees and disbursements was $189,000. The letter also stated there were third party liens against the proceeds, which totaled $177,000, leaving about $12,000 for the client. A check for that amount was enclosed with the letter.

The client later discovered the lien parties were never paid, and the defendant kept the $177,000 for himself. The defendant said he was withholding the money from the victim in order to pay the lien holders, but actually used it for fees and settlement proceeds for attorneys in unrelated cases. By February of 2016, there were no funds left in the account.

Vesnaver was disbarred on June 29, 2016 for reasons unrelated to this case. The Nassau County D.A.'s office received the case in August of that year, and investigators arrested the defendant on Feb. 24, 2017.