Ethics Overview and Case Law Update

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THE COUNTY ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK
2021 Annual Meeting

CONTINUING LEGAL EDUCATION PROGRAM

Monday ~ September 13, 2021
1:25 p.m. - 2:15 p.m.

The Otesaga
Cooperstown, NY

ETHICS OVERVIEW AND CASE LAW UPDATE

Materials Prepared by and to
Accompany the CLE Presentation of

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ETHICS OVERVIEW AND CASE LAW UPDATE

1:25 PM-1:30 PM Welcome and Introductions

1:30 PM-2:10 PM Recent Attorney Disciplinary Decisions and Professional Misconduct Cases

- Overview of Attorney Discipline System
- Attorney Registration Obligations
- Discipline by Consent
- Indefinite Suspension
- Criminal Convictions
- Foreign Discipline
- Escrow Accounts
- Other Misconduct

Alison M. Coan, Principal Attorney
Anna E. Remet, Principal Attorney

2:10-2:15 PM Questions and Answers

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Overview of the Attorney Disciplinary Process

PURPOSE

A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

- From the Preamble for the New York Rules of Professional Conduct

INTRODUCTION

On December 29, 2015, Judge Lippman, former Chief Judge of the Court of Appeals, announced the promulgation of Rules for Attorney Disciplinary Matters, 22 NYCRR Part 1240, effective October 1, 2016. These rules provide for a harmonized and uniform approach to the investigation, adjudication and post-proceeding administration of attorney disciplinary matters in New York State. In addition, on July 1, 2016, the Rules of the Appellate Division, Third Department (22 NYCRR) Part 806, relating to attorney disciplinary matters were amended, effective October 1, 2016, and again amended, effective November 1, 2018.

JURISDICTION

The Rules for Attorney Disciplinary Matters ("Atty. Disc. Rules") apply to all attorneys who are admitted to practice in the State of New York; all in-house counsel registered in the State of New York; all legal consultants licensed in the State of New York; all attorneys who have an office in, practice in, or seek to practice in the State of New York (including those who are engaged in temporary practice pursuant

to 22 NYCRR Part 523); and the law firms that have as a member, retain, or otherwise employ any person covered by the Rules.

A complaint of professional misconduct shall be filed initially in the Judicial Department encompassing the respondent's registration address on file with the Office of Court Administration and if respondent's address lies outside New York State, the complaint shall be filed in the Judicial Department in which the respondent was admitted to the practice of law or otherwise professionally licensed in New York State. The Attorney Grievance Committee for the Third Judicial Department ("Committee") has jurisdiction over those complaints filed in the Third Judicial Department, which includes the Third, Fourth and Sixth Judicial Districts. The Committee's jurisdiction includes the majority of out-of-state and out-of-country attorney admissions, as they are generally admitted through the Third Judicial Department. The Committee's Chief Attorney or the Appellate Division, Third Judicial Department ("Court") may transfer a complaint or proceeding to an Attorney Grievance Committee in another Judicial Department as justice may require.

THE COMMITTEE AND ITS FUNCTION

The Committee is comprised of twenty-one members (eighteen lawyers and three non-lawyers), all of whom are appointed by the Court. All members serve without compensation as a service to the public and legal profession. The Committee meets monthly to review and determine cases of professional misconduct.

The Court appoints a Chief Attorney and other professional staff for the Committee as it deems appropriate.

In accordance with the Atty. Disc. Rules, the Chief Attorney reviews and takes appropriate action with respect to all complaints concerning conduct by an attorney or entity to whom the Atty. Disc. Rules apply.

INVESTIGATIONS

Committee staff investigates conduct, which might constitute a violation of any of the Rules of Professional Conduct (22 NYCRR Part 1200) ("RPC"), including the violation of any RPC or announced standard of the Court governing the personal or professional conduct of attorneys. Complaints primarily come to the Committee from clients, former clients, attorneys, judges, interested third parties, and members of the public.

Committee staff are authorized to investigate the professional misconduct of an attorney upon the Committee's receipt of a complaint. In the alternative, where the attorney's conduct comes to the Committee's attention from another source, the Committee is authorized to investigate pursuant to a Chief Attorney's Complaint.

When the Committee receives a complaint, the Chief Attorney, after initial screening, can decline to investigate a complaint for several reasons, including, but not limited to: (a) the matter involves a person or conduct not covered by the Atty. Disc. Rules, (b) the allegations, if true, would not constitute

professional misconduct, (c) the complaint seeks a legal remedy more appropriately obtained in another forum, or (d) the allegations are intertwined with another pending legal action or proceeding. In addition, the Chief Attorney may, when it appears that a complaint involves a fee dispute matter, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum. The complainant is notified that the Chief Attorney has declined to investigate the complaint and the complainant may then submit a written request for reconsideration of the Chief Attorney's decision within thirty (30) days.

When the Chief Attorney assigns a complaint for investigation, the Chief Attorney forwards a copy of the complaint to the attorney within sixty (60) days, along with a Notice of Complaint of Professional Misconduct ("Notice"). The attorney is directed to submit a detailed written response to the complaint addressing each allegation contained in the complaint, within twenty-five (25) days. In the event an attorney fails to respond to the initial Notice, a Second Notice is forwarded to the attorney directing them to submit a detailed written response within fifteen (15) days.

Pursuant to Atty. Disc. Rule §1240.7(b), the Chief Attorney is authorized to direct a respondent to provide a written response to a complaint, to appear before the Chief Attorney or a staff attorney for a formal interview or examination under oath, and/or to produce records before the Committee, to interview witnesses, to obtain records, materials and other information necessary to determine the validity of a complaint, to apply to the Clerk of the Court for a subpoena to compel the attendance of a person or the production of books and papers, and to take any other action deemed necessary for the proper disposition of a complaint.

Following the conclusion of the investigation, the case is then presented to the Committee for its review and determination in accordance with Atty. Disc. Rule §1240.7(d)(2). Prior to the case being presented to the Committee, the Chief Attorney provides the attorney with the opportunity to review "all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent", and a Notice of Disclosure is forwarded to the attorney. Committee staff do not determine nor vote on cases presented to the Committee, but provide recommendations based on the facts and circumstances of each case, and any mitigating and/or aggravating factors related thereto, to assist the Committee in making its determination.

COMMITTEE ACTION

1. **Dismissal**
2. **Letter of Advisement or Admonition**
3. **Review**

1. Dismissal

If Committee staff recommends that a case be dismissed because there is no evidence or insufficient evidence of professional misconduct, it is placed on the Committee's monthly "Dismissal Agenda", which is reviewed and determined by the Committee. If no Committee member requests that a specific case be removed for discussion or further investigation, the cases are dismissed with letters

notifying the complainants and the attorneys. The complainant may submit a written request for reconsideration of the Committee's determination to dismiss the complaint within thirty (30) days.

2. Letter of Advisement

If Committee staff recommends action other than dismissal on a particular complaint, the case is placed on the Committee's monthly "Chair Agenda". The Committee, by majority vote, determines what action should be taken on each case. The standard of proof which must be established for the Committee to make a finding of professional misconduct is a fair preponderance of the evidence.

Under the Atty. Disc. Rules, non-disciplinary action can be imposed by the Committee by the issuance of a Letter of Advisement, when the attorney has engaged in conduct requiring comment that, under the facts of the case, does not warrant the imposition of discipline. Within the Letter of Advisement, the Committee will bring to the attention of the attorney the conduct which warrants comment and refer to a particular RPC. A Letter of Advisement is confidential, does not constitute discipline, and is maintained in the records of the Committee. In addition, a Letter of Advisement may be considered by the Committee or the Court in determining action to be taken or discipline to be imposed upon a subsequent finding of misconduct.

Under the Atty. Disc. Rules, private disciplinary action can be imposed by the Committee by the issuance of a written Admonition. The Committee considers an Admonition to be the highest form of private discipline and discipline of a most serious nature. Within the written Admonition, the Committee will clearly state the facts forming the basis for its finding, and the specific RPC(s) or other announced standard(s) that was violated. An Admonition constitutes private discipline, is an official finding of professional misconduct, and shall be maintained in the records of the Committee. In addition, an Admonition may be considered by the Committee or the Court in determining the action to be taken or the discipline to be imposed upon a subsequent finding of misconduct. If the Committee wants to impress upon the attorney the seriousness of the misconduct and the severity of the possible consequences should the attorney engage in further misconduct in the future, the Committee may determine to deliver the Admonition to the attorney by personal appearance before the Committee or its Chair.

Taken into consideration by the Committee when making determinations as to the appropriate action are both mitigating and aggravating factors, such as whether the attorney has a prior disciplinary history, harm to the client or others, degree of cooperation with the Committee's investigation, depth of the attorney's professional or life experience, and a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues.

All Committee action is confidential pursuant to Judiciary Law §90(10) and Atty. Disc. Rule §1240.18. Where an attorney has been issued a Letter of Advisement or an Admonition pursuant to Atty Disc. Rule §1240.7(d)(3), the complainant must be provided with a brief description of the basis for any disposition of a complaint by the Committee. In balancing both confidentiality and the need for limited disclosure to the complainant, the Committee informs a complainant that action has been taken with respect to the attorney's conduct.

3. Review

Letter of Advisement

Where an attorney receives a Letter of Advisement, they may file a written request for reconsideration with the Chair of the Committee within thirty (30) days. Reconsideration provides the attorney with an opportunity to explain why they believe the Committee's determination was incorrect. The Chair has the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

Within thirty (30) days of the final determination denying a request for reconsideration, an attorney may seek review of a Letter of Advisement by submitting an application to the Court upon a showing that the issuance of the Letter of Advisement was in violation of a fundamental Constitutional right.

Admonition

Prior to the imposition of an Admonition on an attorney, the Committee gives the attorney twenty (20) days' notice by mail of the Committee's proposed action, and the attorney has the opportunity within fourteen (14) days to request reconsideration of the proposed Admonition. A request for reconsideration is considered by the Executive Committee, and if it is determined by a majority of the Executive Committee that reconsideration is warranted, the case is resubmitted to the full Committee. Reconsideration provides the attorney with an opportunity to explain why they believe the Committee's determination was incorrect.

Within thirty (30) days of the issuance of an Admonition (whether or not the attorney sought reconsideration of the proposed Admonition), an attorney may make application to the Court to vacate the Admonition. The Court may take whatever action it deems appropriate.

FORMAL DISCIPLINARY PROCEEDINGS

1. **Disciplinary Proceeding**
2. **Discipline by Consent**
3. **Hearings**
4. **Public Discipline**

1. Disciplinary Proceeding

An Admonition, which is private discipline, is not the only form of discipline available where professional misconduct has been found. When the Committee finds that there is probable cause to believe that an attorney engaged in professional misconduct warranting the imposition of public discipline, and discipline is appropriate to protect the public, maintain the integrity and honor of the profession, or deter others from committing similar misconduct, the Committee may authorize a formal disciplinary proceeding before the Court. Committee staff institutes the disciplinary proceeding by the service of a notice of petition and petition on the attorney, on no less than twenty (20) days' notice, which is filed with

the Court. An answer to the petition shall be filed with the Court at least five (5) days before the time at which the petition is noticed to be heard and marked returnable before the Court.

After the pleadings are filed, the Atty. Disc. Rules require disclosure between the parties. Within twenty (20) days after service of respondent's answer, the Committee files a statement of facts identifying those allegations that it contends are undisputed and disputed for which a hearing is required. Within twenty (20) days of the Committee's submission, the respondent responds to the Committee's statement. In the alternative, within thirty (30) days, the parties may file a joint statement of disputed and undisputed facts. Within fourteen (14) days after the filing of a statement of facts, each party provides the other party with disclosure concerning the allegations of disputed facts. Disclosure identifies: (a) the witnesses and a "general description" of information possessed by each witness, and (b) copies of documentary evidence in its possession (or an opportunity to inspect and copy said documentary evidence). In addition, a hearing referee may grant requests for additional disclosure as justice may require.

2. Discipline by Consent

A disciplinary proceeding can be resolved between the parties, with the consent of the Court. After the filing of a petition, the parties may file a joint motion with the Court requesting the imposition of discipline by consent. The joint motion must include: (a) a stipulation of facts, (b) conditional admissions as to the act(s) of professional misconduct and specific rules or standards of conduct violated, c) any relevant aggravating and mitigating factors, including an attorney's prior disciplinary record, if any, (d) agreed upon discipline to be imposed, which may include monetary restitution, and (e) an affidavit of the respondent attorney conditionally admitting the facts set forth in the stipulation, giving consent, freely and voluntarily without coercion or duress, to the agreed upon discipline and stating an awareness of the consequences of consenting to such discipline.

If the motion is granted, the Court will issue a decision consistent with the motion. If the motion is denied, the conditional admissions shall be deemed withdrawn and the disciplinary proceeding will continue.

3. Hearings

If there are disputed facts for which a hearing is required, application is made to the Court for the appointment of a referee for a hearing on any issues the Court deems appropriate. Upon appointment of a referee, a hearing is conducted and the Committee has the burden of proof. The referee may receive evidence regarding any defense or mitigating factor raised by the attorney, and any aggravating factor raised by the Committee. A record of the hearing is made. Following the hearing and the parties' submission of proposed findings of fact, if required by the referee, the referee files a written report with the Court setting forth findings of fact with respect to all issues of fact and making an advisory determination as to whether the Committee has established, by a preponderance of the evidence, each element of the charge or charges of misconduct. The referee does not make a recommendation as to any appropriate sanction. Once the referee's report is received either party may move to confirm or disaffirm the report, in whole or in part. The parties are heard before the Court on the issue of appropriate discipline to be imposed for any misconduct that might be determined by the Court. In addition, the parties may cite any relevant factor, including, but not limited to, the nature of the misconduct, aggravating and mitigating

circumstances, the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions, and applicable case law and precedent.

4. Public Discipline

Upon a finding that an attorney has committed professional misconduct, the Court will issue a decision and may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, maintain the honor and integrity of the profession, and/or deter others from committing similar misconduct. The Court may impose a censure, suspension or disbarment. These decisions of discipline are public.

INTERIM SUSPENSION

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

An order of interim suspension entered by the Court sets forth the basis for the suspension and provides the respondent with an opportunity for a post-suspension hearing. An order and decision of interim suspension is deemed a public record, however, the papers upon which any such order is based is deemed confidential. After the issuance of an order of interim suspension, if a respondent fails to respond to or appear for further investigatory or disciplinary proceedings within six (6) months, the respondent may be disbarred by the Court without further notice.

DIVERSION TO A MONITORING PROGRAM

The Atty. Disc. Rules provide for diversion to a monitoring program in all four judicial departments. When in defense, or as a mitigating factor, in an investigation or formal disciplinary proceeding, the respondent raises a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues, the Court may stay an investigation or proceeding and direct the attorney to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider: (a) the nature of the alleged misconduct, (b) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment, and (c) whether diverting the respondent to a monitoring program is in the public interest. Upon the successful completion of a monitoring program, the Court may: (a) discontinue the investigation or disciplinary proceeding, (b) resume the investigation or disciplinary proceeding, or (c) take other appropriate action. All aspects of a diversion application of an attorney's participation in a monitoring

program and any records related thereto, are confidential and privileged pursuant to Judiciary Law §§90(10) and 499.

CONFIDENTIALITY

Pursuant to Judiciary Law §90(10) and Atty. Disc. Rules §1240.18, all records, papers, and documents associated with the investigation of an attorney are sealed and deemed private and confidential. Upon good cause being shown, the Court, upon application, is empowered in its discretion, to permit to be divulged all or any parts of such records, papers, and documents.

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Selected Attorney Disciplinary Decisions[1]

2019 and 2020 Mass Suspensions

- *In the Matter of Attorneys in Violation of Judiciary Law §468-a*, 172 A.D.3d 1706 (3rd Dept. 2019)

  AGC[2] moved, pursuant to Atty. Disc. Rules §1240.9(a)(5) and Court Rule §806.9 for an order suspending 2,353 respondent attorneys, upon the ground that they had failed to fulfill their respective attorney registration obligations for at least the last two consecutive biennial registration periods. Respondents were noticed of the application by publication pursuant to terms of an order to show cause.

  As explained by the Court, Judiciary Law §468-a and Rules of the Chief Administrator of the Courts (22 NYCRR) §118.1 each require that attorneys admitted to practice in New York file a registration statement with the Office of Court Administration (OCA) on a biennial basis. The obligation extends to all attorneys admitted in New York, "regardless of where they work or reside, and even applies to attorneys who have been suspended or who have retired from the practice of law altogether."

[1] The referenced cases are intended to provide a sampling of attorney disciplinary decisions. Please refer to www.nycourts.gov/ad3/agc for additional attorney disciplinary decisions and information.

[2] **"AGC"** means Attorney Grievance Committee.
"Court" means Appellate Division, Third Judicial Department.
"RPC" means New York Rules of Professional Conduct (22 NYCRR Part 1200).
"Atty. Disc. Rules" means Rules for Attorney Disciplinary Matters (22 NYCRR Part 1240).
"Court Rules" means Rules of Appellate Division, Third Judicial Department (22 NYCRR Part 806).

- *In the Matter of Attorneys in Violation of Judiciary Law §468-a,* 185 A.D.3d 1373 (3rd Dept. 2020)

  AGC moved, pursuant to Atty. Disc. Rules §1240.9(a)(5) and Court Rule §806.9 for an order suspending thirty seven (37) respondent attorneys, upon the ground that they had failed to fulfill their respective attorney registration obligations for at least one biennial registration period between 2015-2016 and 2019-2020. Respondents were noticed of the application by publication pursuant to terms of an order to show cause.

Discipline by Consent: Atty. Disc. Rule §1240.8(a)(5)

- *Matter of Shmulsky*, 186 A.D.3d 1878 (3rd Dept. 2020)

  AGC commenced a disciplinary proceeding alleging that respondent violated several RPCs in connection with his representation of a matrimonial client, including engaging in prohibited sexual relations with the client and utilizing an improper retainer agreement that provided for a non-refundable fee. The parties jointly moved for the imposition of a sanction, not to exceed a one-year suspension, subject to the Court's discretion.

  The Court granted the joint motion and imposed a one-year suspension on the respondent. Factors considered in mitigation included respondent's expressed remorse and steps taken to address emotional and personal issues that had contributed to his actions. In aggravation, the Court considered the vulnerability of the client, who was not only emotionally impacted by the nature of the representation, but also subject to economic pressure due to the disincentive to terminate the representation based on the improper retainer agreement. In addition to the egregiousness of the misconduct itself, the Court noted aggravating factors presented by respondent's history of engaging in similar misconduct, both with respect to his past use of an improper retainer agreement and for having inappropriate sexually-based communications with a client.

- *Matter of Matemu*, 2021 NY Slip Op 04078 (3rd Dept. 2021)

  AGC commenced a disciplinary proceeding alleging that respondent, a North Carolina resident, violated five RPCs in connection with his representation of clients in immigration matters using his New York law license, including by improperly disclosing confidential client information to the disadvantage of a client and failing to promptly return an unearned fee, as well as attempting to deceive AGC during its investigation. The parties jointly moved for the imposition of a sanction, not to exceed a suspension of six months.

  The Court granted the joint motion and imposed the maximum agreed-upon period of suspension. Factors considered in mitigation included respondent's expressed remorse and character references addressing his commitment to service in an underserved community and mentorship of newer immigration law practitioners. In aggravation, the Court considered respondent's disciplinary history, which included multiple prior instances of private discipline.

- *Matter of Rockmacher,* 180 A.D.3d 1318 (3rd Dept. 2020)

  AGC commenced a disciplinary proceeding alleging that respondent violated several RPC, including utilizing an improper retainer agreement, charging a nonrefundable retainer fee, misrepresenting information to AGC, and failing to promptly refund to two separate clients the unearned portion of a retainer fee. Following joinder of issue, the parties jointly moved for respondent's censure.

  The Court granted the joint motion and censured respondent, noting aggravating factors including the presence of a disciplinary history with two instances of private discipline and two prior public censures.

- *Matter of Parrinello*, 156 A.D.3d 1216 (3rd Dept. 2017)

  Respondent publicly revealed confidential client information about a deceased former client to a news agency. The parties jointly moved for imposition of a public censure and consequently, the allegations of misconduct and applicable rule violations were undisputed. The Court agreed with the proposed discipline of public censure. Aggravating factors considered by the Court included disciplinary history, which contained, among other things, an instance of private discipline, as well as a prior six-month suspension, all for conduct dissimilar to the subject petition of charges. As to mitigation, respondent expressed his remorse and regret for any anguish suffered by his former client's family due to his improvident and improper remarks.

- *Matter of Meagher, Jr.,* 156 A.D.3d 1218 (3rd Dept. 2017)

  After AGC commenced two disciplinary proceedings, the parties jointly moved for imposition of a one-year term of suspension for respondent's multiple acts of misconduct. The Court noted respondent's disciplinary history included private discipline on eight occasions, some of which was similar to the subject charges. The Court granted the joint motion and agreed with the proposed disciplinary sanction.

- *Matter of Hartwich,* 156 A.D.3d 1317 (3rd Dept. 2017)

  The parties jointly moved to censure respondent for his misconduct, stemming from his interference in an attorney's representation of a child in a custodial matter. Respondent's client was involved in the custody matter with her then husband in Supreme Court. Subsequently, respondent was retained by his client to represent her in an unrelated civil matter against her then husband. At some point after he was retained, respondent notified the court-ordered attorney for the client's child (hereinafter, "AFC") in the custodial matter that he represented both his client and her child in a civil matter against his client's husband, and that he would not allow the child to attend a scheduled meeting with the AFC, nor would he allow any further meetings.

  After a hearing, Supreme Court found respondent in contempt of its order concerning appointment of the AFC and ordered respondent to pay a $5,000 sanction to the Lawyers'

Fund for Client Protection within sixty days. Respondent failed to comply with that order and the Court imposed an additional $500 sanction along with a fifteen-day jail sentence. Following his unsuccessful appeal and denial of the motion to stay enforcement, respondent appeared before Supreme Court and was remanded to county jail, which prompted him to pay the sanctions.

The Court noted the magnitude of respondent's misconduct, lack of disciplinary record and his expressed remorse, and found public censure to be an appropriate sanction.

- *Matter of Carey*, 165 A.D.3d 1464 (3rd Dept. 2018)

The parties jointly moved to censure respondent for his misconduct, stemming from his unauthorized preparation of certain real property title insurance reports. Specifically, respondent had been retained to provide title insurance for several real estate transactions and did so while falsely representing that he continued to possess agency authority from the title insurance company to do so despite the agency relationship having been terminated several months prior.

In determining that a public censure was the appropriate disciplinary sanction, the Court considered the severity of respondent's misconduct, which was aggravated by respondent knowingly misleading various persons and entities that were relying on his supposed authority to prepare such documents and acting contrary to his fiduciary duties, his lack of disciplinary history, and that he had repaid all premiums he collected in connection with the subject real estate transactions.

Indefinite Suspension: Atty. Disc. Rule §1240.9

- *Matter of Enekwe*, 186 A.D. 3d 1875 (3rd Dept. 2020)

Respondent was convicted of misdemeanor assault in Washington, DC, and sentenced to 180 days of incarceration with all but nine days suspended, and to a term of supervised probation for one year. During the course of the ensuing disciplinary investigation, AGC found respondent had also defaulted in two civil matters in the D.C. Superior Court, one of which arose out of the same incident that resulted in respondent's criminal conviction. Following the investigation, AGC members determined, by a fair preponderance of the evidence, that respondent had engaged in professional misconduct in violation of RPC 8.4(b) and (d), that an admonition was the appropriate sanction, and that the admonition should be delivered by personal appearance pursuant to Atty. Disc. Rules §§ 1240.2 and 1240.7. However, respondent failed to appear to receive the admonition, as directed by AGC. Pursuant to Atty. Disc. Rule §1240.9(a)(3), AGC sought respondent's interim suspension for lack of compliance with AGC's lawful directive. Respondent did not respond and the allegations of AGC's motion were therefore deemed uncontroverted.

In granting AGC's motion, the Court noted that a respondent may be suspended during the pendency of a disciplinary investigation or proceeding for engaging in conduct immediately threatening the public interest, and that such conduct "may be established by

proof that an attorney has failed to comply with a lawful demand from AGC during the course of an investigation or proceeding...", and that the Court has "...consistently stated that attorneys are obligated to fully comply with the lawful demands of AGC during an investigation or proceeding, and that the failure to do so constitutes misconduct that 'impacts the effectiveness of the attorney disciplinary system'...warrant[ing] the imposition of discipline" (internal citations omitted). The Court suspended respondent on an interim basis pending respondent's cooperation and until further order of the Court, and reminded respondent of his affirmative obligation to respond or appear for further investigatory or disciplinary proceedings before AGC within six months of the suspension order, and that failure to do so may result in disbarment, without further notice.

- *Matter of Enekwe*, 2021 NY Slip Op 03105 (3rd Dept. 2021)

  Respondent failed to respond or appear for further investigatory or disciplinary proceedings following his suspension on an interim basis, and AGC moved for disbarment in accordance with Atty. Disc. Rules §1240.9(b). Although not required to do so, AGC provided notice to respondent by both mail and email. Noting respondent failed to submit a response to AGC's motion, thus "...indicating his lack of interest in his fate as an attorney in this state", the Court determined respondent be disbarred.

- *Matter of Nestler*, 193 A.D.3d 1320 (3rd Dept. 2021)

  AGC moved for respondent's interim suspension pursuant to Atty. Disc. Rule §1240.9(a)(3) and Court Rule §806.9, alleging that respondent failed to comply with AGC's lawful demand(s) and failed to cooperate with AGC's investigation. Respondent opposed, asserting AGC's motion should be denied on the bases that he had provided some cooperation and that his continued practice during the investigation did not present any danger to the public. In rejecting respondent's opposition and granting AGC's motion, the Court noted that despite repeated requests, respondent had only provided one of four items requested in AGC's Notice to Produce Documents and Information, despite his apparent acknowledgment that he was in possession of certain requested bank statements, which he was required to maintain pursuant to RPC 1.15. The Court determined respondent's failure to comply with AGC's lawful demands constituted professional misconduct that immediately threatened the public interest and "unquestionably impacts the effectiveness of the attorney disciplinary system" (internal citations omitted). Respondent was suspended indefinitely pending his full cooperation and compliance with the investigation, including his production of all of the remaining items set forth in AGC's Notice to Produce. In the decision, the Court reminded respondent of his affirmative obligation to respond to or appear for further investigatory or disciplinary proceedings before AGC within six months of the suspension order, and that failing to do so could result in disbarment, without further notice.

- *Matter of Krinsky*, 2021 NY Slip Op 03519 (3rd Dept. 2021)

  AGC moved for respondent's interim suspension pursuant to Atty. Disc. Rule §1240.9(a)(3) and Court Rule §806.9, alleging that respondent failed to cooperate with AGC's

investigations of two separate complaints of alleged misconduct. In his response to the motion, respondent, who concentrated his law practice on the defense of attorneys in professional discipline matters, conceded his failure to cooperate, but assured compliance going forward, and represented that he forwarded answers to the respective complaints on the same day he signed his motion response. In its reply, AGC advised it had not received the answers or respondent's opposition to the motion. Despite also being advised by email that AGC was not in receipt of the documents, respondent failed to respond or offer proof controverting AGC's reply. At respondent's request, approximately four weeks after the submission of AGC's reply, the Court granted him permission and time to submit a surreply to address AGC's statements. Respondent made no additional submission. In rejecting respondent's position that he should not be suspended because the underlying misconduct did not involve misappropriation of client funds, the Court noted that it was respondent's failure to cooperate with AGC, rather than the underlying allegations of misconduct, which justified suspension. Further, in determining to suspend respondent, the Court expressly noted "the act of responding to a motion seeking an attorney's suspension for noncompliance, is insufficient on its own to ward off a suspension; rather, the attorney must rebut the allegations that he has failed to comply."

- *Matter of Burney,* 183 A.D.3d 1005 (3rd Dept. 2020)

  AGC moved for respondent's interim suspension pursuant to Atty. Disc. Rule §1240.9(a)(1) and (3) and Court Rule §806.9, alleging that respondent failed to cooperate with AGC's investigation. On the eve of the return date for the motion, respondent submitted an affirmation which sought to address the allegations in the underlying complaint. The matter was adjourned at AGC's request to allow for respondent's cooperation with AGC's investigation. Thereafter, respondent failed to respond to requests for information and documents and AGC requested that the matter remain on the Court's calendar. The Court suspended respondent on an interim basis, and reminded him that he had an affirmative obligation to respond or appear for further investigatory or disciplinary proceedings before AGC within six months of the suspension order and his failure to do so may result in his disbarment without further notice.

- *Matter of Burney*, 189 A.D.3d 2048 (3rd Dept. 2020)

  Respondent failed to respond or appear for further investigatory or disciplinary proceedings following his suspension on an interim basis, and AGC moved for disbarment in accordance with Atty. Disc. Rules §1240.9(b). Although not required to do so, AGC provided notice to respondent of its application, which respondent then opposed.

  Respondent contended that he was unaware of the order suspending him. The Court found, however, that the affidavits submitted by AGC demonstrated respondent was properly noticed of his suspension, including the affidavit of AGC's office manager which "speaks to the routine office procedures for sending notices of this Court's orders to respondents based on her personal knowledge and involvement in that process" and "specifically attests to sending respondent notice of his suspension by mail and by email to addresses that respondent does not dispute were accurate at the time those notices were sent." The Court

also noted that it twice sent respondent the order suspending him to the same email address that he had routinely used to communicate with AGC and the Court.

Respondent argued that his single response to AGC, submitted at the eleventh-hour on AGC's motion seeking to suspend him, warranted the discontinuance of any further investigation into his alleged misconduct. The Court held, "an attorney's bare statement that he or she is willing to comply is insufficient to demonstrate actual compliance .... It is well established — as this Court specifically reiterated in its suspension order — that a respondent has an affirmative obligation to reach out to AGC to offer compliance following an order suspending him or her pursuant to Rules for Attorney Disciplinary Matters (22 NYCRR) §1240.9". The Court determined respondent had not taken action to offer his compliance and disbarred respondent.

- *Matter of Wolfe,* 185 A.D.3d 1347 (3rd Dept. 2020)

Respondent was indefinitely suspended for failing to cooperate with AGC's investigation of a complaint (*Matter of Wolfe*, 176 A.D.3d 1302 [3rd Dept. 2019]). Upon respondent's subsequent demand for a post-suspension hearing, AGC commenced a disciplinary proceeding. After respondent responded in the matter, AGC sought an order declaring that no factual issues were raised by the parties' pleadings. The Court held that, "both respondent's answer and statement of disputed and undisputed facts raise no other issue than his conclusory claim that he did not receive any of the multiple notices sent by petitioner to the confirmed address that respondent provided to the Office of Court Administration, Attorney Registration Unit. However, the mere denial of the receipt of this documentation, without more, 'is insufficient to overcome the presumption of delivery which attaches to a properly mailed letter' (citations omitted). Inasmuch as petitioner has presented undisputed proof that it properly mailed these notices to respondent at the appropriate address, there is nothing in the record showing that the presumption of proper delivery was in any way rebutted."

Respondent's suspension was confirmed to continue until AGC's disciplinary investigation was concluded and until respondent submitted a meritorious reinstatement application.

- *Matter of Basch,* 175 A.D.3d 1772 (3rd Dept. 2019)

Respondent was suspended on an indefinite basis for failing to cooperate with AGC's investigation into complaints of misconduct. Following the commencement of a second complaint of misconduct, respondent provided no response to various correspondence from AGC directing him to address the allegations in the client's complaint. Respondent also failed to provide any of the requested documents in a notice of examination and failed to appear for the scheduled examination. Based upon that conduct, the Court concluded that respondent had engaged in conduct immediately threatening the public interest and suspended him.

The Court noted, pursuant to Atty. Disc. Rules §1240.9(a), a respondent may be suspended during the pendency of a disciplinary investigation upon a showing that he or she "has

engaged in conduct immediately threatening the public interest." Proof that a respondent has "'defaulted in responding to a notice to appear for formal interview, examination or pursuant to subpoena, or has otherwise failed to comply with a lawful demand of any attorney grievance committee in the course of its investigation'" is sufficient to establish such conduct.

- *Matter of Basch,* 183 A.D.3d 1224 (3rd Dept. 2020)

  In the order suspending respondent, this Court advised respondent that he had an "affirmative obligation to respond or appear for further investigatory or disciplinary proceedings before AGC within six months of" the order. Respondent failed to respond or appear for further proceedings for a period of six months and was disbarred by the Court.

- *Matter of Tan*, 164 A.D.3d 1537 (3rd Dept. 2018)

  Respondent, the subject of an investigation relating to his escrow account, denied wrongdoing and provided certain records requested by AGC. He was served with a Notice to Appear for Examination on a scheduled date, along with a demand for documentation. Respondent acknowledged receipt of this notice, however, asserted that he was opposed to appearing at the examination and, in any event, could not attend because of a medical appointment. Respondent did not appear for the examination or provide documentation. AGC moved for an order suspending him during the pendency of its investigation. Respondent opposed the motion, claiming that he had sufficiently complied with AGC's demands and, therefore, AGC's request for an examination and the production of records demonstrated AGC's bias against him and violation of his rights.

  In granting AGC's motion, the Court held that the requirement to fully cooperate in a grievance committee investigation "is not limited by that attorney's view of what the scope of such inquiries should be." The Court found that respondent's defiant conduct immediately threatened the public interest and "clearly imperils the effectiveness of the attorney disciplinary system."

- *Matter of Tan,* 171 AD3d 1443 (3rd Dept. 2019) [Suspension Confirmed.]

- *Matter of Hessberg,* 166 A.D.3d 1283 (3rd Dept. 2018)

  Respondent was the subject of an investigation of professional misconduct regarding allegations that he misappropriated client funds in connection with his representation of clients in various estate and trust matters. As alleged by AGC, respondent failed to cooperate with lawful requests for information or substantively respond to its inquiries regarding information that AGC had received alleging that respondent engaged in serious professional misconduct. AGC moved for an order pursuant to Atty. Disc. Rule §1240.9(a)(3), (4) and (5). Respondent did not formally respond or submit a denial to the allegations; however, he cross-moved for leave to resign. AGC opposed the cross-motion, arguing that respondent's affidavit to resign failed to fully comport with the requirements of Atty. Disc. Rule §1240.10. The Court denied the cross-motion on sufficiency grounds.

The Court found that AGC had submitted sufficient evidence establishing respondent's failure to substantively cooperate in its investigation, as well as proof of respondent's failure to pay money owed to clients and other professional misconduct, and respondent failed to controvert or deny such proof. Concluding that the respondent's conduct immediately threatened the public interest and imperiled the effectiveness of the attorney disciplinary system, the Court granted AGC's motion and suspended respondent during the pendency of AGC's investigation and until further order of the Court.

- *Matter of Hessberg,* 173 A.D.3d 1549 (3rd Dept. 2019)

  Respondent was disbarred for failing to respond or otherwise appear for further investigatory or disciplinary proceedings within six (6) months from the date of his indefinite suspension (see above).

Disciplinary Resignation: Atty. Disc. Rule §1240.10

- *Matter of Stacy*, 186 A.D.3d 918 (3rd Dept. 2020)

  Respondent was convicted in Ohio of pandering sexually oriented material involving a minor, a second-degree felony. Upon application by the AGC to strike his name from the roll of attorneys in New York due to his felony conviction, respondent cross-moved to resign while disciplinary charges were pending. The AGC did not oppose the cross-motion.

  In granting respondent's motion to resign with disciplinary charges pending, the Court noted "[a]n attorney may resign from the practice of law in the face of a disciplinary proceeding provided that he or she acknowledges the nature of the charges or allegations at issue and attests that he or she cannot successfully defend against the same." The resigning attorney must also attest to the voluntary nature of the proposed resignation and his or her understanding that upon acceptance of the application, the attorney will be disbarred." Upon accepting respondent's disciplinary resignation, he was immediately disbarred.

- *Matter of Hayes*, 162 A.D.3d 1393 (3rd Dept. 2018)

  Respondent submitted an affidavit in support of her application to resign as an attorney pursuant to Atty. Disc. Rule §1240.10. Respondent acknowledged in her affidavit that she was the subject of an investigation by ACG, which investigation included allegations concerning a dishonored check and her failure to keep proper records of her attorney escrow account. Respondent conceded that she could not successfully defend herself against these allegations.

  The Court noted that, while AGC's investigation did not specifically concern allegations of misappropriation or misapplication of money, because of the existence of a dishonored check from her attorney escrow account, respondent acknowledged, and the Court required, that respondent's resignation be submitted subject to any future application that

may be made by AGC for an order, pursuant to Judiciary Law § 90 (6-a), directing that she make restitution or reimburse the Lawyers' Fund for Client Protection, and that she consent to the Court's continuing jurisdiction to make such an order.

Criminal Convictions: Atty. Disc. Rule §1240.12

- *Matter of Nickol, 183 A.D.3d 1105* (3rd Dept. 2020)

  Following a jury trial, respondent was found guilty of two counts of assault in the third degree, a class A misdemeanor, relating to two separate incidents of physical assault of his then-girlfriend. At respondent's trial, the victim testified that in one incident, respondent slapped her in the face following an argument, and months later, whipped her leg with a television cord. Respondent was sentenced to three years of probation on each count, to run concurrently.

  In the disciplinary proceeding, AGC moved for an order declaring that no factual issues were raised by the pleadings and that respondent's misconduct had been established. Respondent did not oppose, and the motion was granted in a confidential decision. After considering aggravating and mitigating factors, the Court suspended respondent for six months, holding that "acts of domestic violence such as the ones at issue are gravely serious, diminish confidence in the legal profession and warrant an appropriate serious sanction."

- *Matter of Werther*, 193 A.D.3d 1228 (3rd Dept. 2021)

  In February of 2020, respondent pleaded guilty to two counts of felony DWI. AGC's motion, pursuant to Judiciary Law § 90(4)(a) and (b) and Atty. Disc. Rules §1240.12(a), for an order striking respondent's name from the roll of attorneys *nunc pro tunc* was granted on the basis that respondent had been automatically disbarred due to his felony conviction.

- *Matter of Dawson*, 133 A.D.3d 1083 (3rd Dept. 2015)

  Respondent pleaded guilty to DWI as a class E felony due to a prior misdemeanor DWI conviction. AGC moved to strike respondent's name from the roll of attorneys based on his felony conviction. Respondent opposed, contending that the Court lacked subject matter jurisdiction over the matter since he was not an attorney licensed to practice law at the time of the conviction, because respondent had self-certified as retired. The Court disagreed, noting that respondent's self-certified retired status precluded him from practicing law for a fee and entitled him to a waiver of the biennial registration fees, but did not preclude him from providing legal services *pro bono*. The Court held: "Retirement from practice and resignation from the bar are not synonymous concepts. Resignation from the bar, like admission to the bar, requires an order of this Court and may be accomplished only by sworn affidavit application. Once the application to resign has been granted, the former attorney's name is formally stricken from the roll of attorneys and he or she is prohibited from practicing law in any respect . . . ".

The Court held that respondent was disbarred by operation of law upon his guilty plea to a felony. The Court's sole ministerial obligation was to publicly confirm his disbarred status by striking his name from the roll of attorneys *nunc pro tunc* to the date of his guilty plea.

- *Matter of Tendler*, 131 A.D.3d 1301 (3rd Dept. 2015)

  Respondent pleaded guilty to one count of aggravated driving while intoxicated, a felony. AGC moved, pursuant to Judiciary Law § 90(4)(a) and (b), to strike respondent's name from the roll of attorneys. Respondent opposed the motion on the ground that she was not convicted of a felony as defined in Judiciary Law §90(4)(a) and (e). Alternatively, respondent requested that AGC's motion be held in abeyance for four months pending completion of her interim probation.

  The Court held that respondent was automatically disbarred and ceased to be an attorney by operation of law when she entered her guilty plea to a felony, which, for attorney discipline purposes, served as the equivalent of a conviction. AGC's motion to strike respondent's name from the roll of attorneys was a formality which merely confirmed her disbarred status. The Court further held that the terms of respondent's underlying plea agreement did not mandate a different result. An attorney's disbarment upon a plea of guilty to a felony is automatic, the fact that respondent's plea agreement contemplated the subsequent withdrawal of her felony guilty plea upon successful completion of a period of interim probation, leaving only a plea to a misdemeanor, would not serve to automatically restore her to the bar, and respondent would have to move for reinstatement.

- *Matter of Tendler*, 145 A.D.3d 1314 (3rd Dept. 2016)

  Respondent successfully completed a term of interim probation and, in accordance with her plea agreement, County Court vacated her felony guilty plea and permitted her to enter a guilty plea to a misdemeanor count of DWI. Respondent made an application for reinstatement to the bar. The Court denied it as deficient, citing, among other things, that respondent failed to offer proof establishing that she had taken and passed the Multistate Professional Responsibility Examination.

- *Matter of Reddington*, 189 A.D.3d 2044 (3rd Dept. 2020)

  Respondent was arrested in Virginia for solicitation of a prostitute. Thereafter, respondent told the police and prosecutor that he was not the person who had been arrested, and that someone else must have used his name (when respondent was arrested, he was not required to produce identification). Initially, the solicitation charge was dropped based on respondent's assertions. However, an investigation revealed respondent was in fact the person arrested. Respondent pleaded guilty to soliciting a prostitute and obstruction of justice, both Virginia misdemeanors, and served six of a twelve-month jail sentence. After considering aggravating and mitigating factors, the Court censured respondent and ordered him to complete three credit hours of continuing legal education in ethics and professionalism.

- *Matter of Sherwood*, 164 A.D.3d 1539 (3rd Dept. 2018)

  Respondent pleaded guilty to grand larceny in the second degree, a class C felony. The Court granted AGC's motion for an order striking respondent's name from the roll of attorneys *nunc pro tunc* to the date he pleaded guilty, on the basis that respondent had been automatically disbarred due to his felony conviction.

Foreign Discipline: Atty. Disc. Rule §1240.13

- *Matter of Spark*, 2021 NY Slip Op 04183 (3rd Dept. 2021)

  Disbarment based on Florida disbarment following respondent's criminal conviction for Florida felony and misdemeanor crimes related to respondent's illegal conduct in which he used his status as an attorney to gain access to attorney/client visitation rooms in two correctional facilities where he solicited sexual acts from incarcerated female inmates, who were not his clients. The criminal investigation revealed respondent offered money to the inmates in exchange for making contraband recordings of their sexual encounters on his personal tablet device.

  In disbarring respondent, the Court found that he had not established any of the available defenses to the imposition of discipline based upon discipline in a foreign jurisdiction, and rejected respondent's conclusory allegations of a lack of due process in the underlying proceedings, particularly given the full hearing before a referee in the Florida disciplinary matter, and respondent's decision not to appeal the Florida discipline or criminal conviction. The Court also expressly noted respondent's pattern of misconduct, habit of minimizing his own responsibility, and "continued refusal to acknowledge the impropriety and harmfulness of his actions in ignoring his obligations as an officer of the court by exploiting and attempting to exploit prison inmates for his own sexual gratification and possible future financial gain."

- *Matter of Harmon*, 191 A.D.3d 1149 (3rd Dept. 2021)

  Disbarment based on indefinite suspension in New Jersey and disbarment in Pennsylvania following respondent's failure to cooperate in the respective disciplinary matters. In New Jersey, respondent's underlying misconduct included failing to make any effort to protect her client's interests and improperly attempting to withdraw from a proceeding on the day of trial, ultimately resulting in a mistrial. In Pennsylvania, respondent was disciplined following a criminal investigation for misconduct including filing a frivolous civil rights lawsuit in an attempt to harass her former landlord against whom she had engaged in a "campaign of vengeance and harassment", as well as filing "retaliatory and frivolous court actions against perceived enemies and filing fraudulent tax filings intended to intimidate others", and engaging in the unauthorized practice of law following an earlier administrative suspension.

  In determining the appropriate sanction, the Court considered multiple aggravating factors, respondent's "misguided belief that she herself was a victim and that she was not obligated

to conform her conduct to the ethics rules of any state", and found that respondent's misconduct, "in terms of both its severity and abundance, cannot be overstated."

- *Matter of Yudkin*, 185 A.D.3d 1139 (3rd Dept. 2020)

  Respondent, who had been indefinitely suspended in New York for his longstanding failure to comply with attorney registration requirements, was disbarred by the Third Department based on his stipulation in a Connecticut disciplinary proceeding that he practiced law in Connecticut while not admitted to practice in that State.

  In disbarring respondent, the Court noted that respondent's professional misconduct was aggravated by his longstanding attorney registration delinquency and his decade-long suspension in New York, both of which evinced his blatant disregard for his fate as an attorney in New York.

- *Matter of Hoines*, 185 A.D.3d 1349 (3rd Dept. 2020)

  Respondent was censured by the Third Department based on his thirty-day suspension in Florida for engaging in a conflict of interest in representing siblings in a probate matter. After the Florida disciplinary proceeding, respondent returned $25,000 in attorney's fees that he had received, and paid costs associated with the Florida disciplinary proceeding.

  While the Court considers the sanction imposed by a foreign jurisdiction, it is not bound by that decision in determining the proper sanction in this State.

- *Matter of Petigara*, 186 A.D.3d 940 (3rd Dept. 2020)

  Respondent was suspended in New Jersey for failing to cooperate with the investigation of a client complaint. He eventually cooperated in the New Jersey proceeding and the matter was dismissed. Respondent was reinstated in New Jersey 16 months after being suspended.

  In response to AGC's motion seeking reciprocal discipline, respondent asserted that the imposition of public discipline would be unjust based on the fact that the New Jersey proceeding was ultimately dismissed. Citing *Matter of Hoines, supra*, the Court found that respondent's failure to cooperate with disciplinary authorities in New Jersey would constitute misconduct in this state and determined that censure was appropriate under the circumstances.

- *Matter of Lynum*, 186 A.D.3d 970 (3rd Dept. 2020)

  Respondent was suspended by the Third Department for seven months, and until further order of the Court, based on his two suspensions in Florida. Respondent was initially suspended in November 2019, for failing to comply with a subpoena to testify before Florida disciplinary authorities, for which he was also held in contempt of court. He was suspended a second time in March 2020, for 180 days, for discourteous, dishonest and disrespectful conduct towards members of the bench and bar.

In determining the appropriate disciplinary sanction, the Court considered that respondent did not respond to AGC's motion and therefore the allegations were deemed admitted, his failure to advise AGC or the Court of the 2020 Florida suspension, and his failure to acknowledge the impropriety of his misconduct.

- *Matter of Krapacs*, 189 A.D.3d 1962 (3rd Dept. 2020)

  Disbarment based on Florida disbarment for using online social media to make disparaging remarks about a member of the Judiciary and engaging in an extensive and unjustified public attack, including threatening behavior, against two attorneys.

  Respondent asserted that her actions were justified and that she was somehow exempt from the disciplinary rules. The Court found that, "the First Amendment does not grant an attorney the right in this state to advance unsubstantiated and baseless criticisms of the Judiciary (*see Matter of Holtzman,* 78 N.Y.2d 184, 192–193 [1991], *cert denied* 502 U.S. 1009 [1991]), nor are licensed attorneys permitted to use social media to harass and falsely attack others." *See e.g. Matter of Zappin,* 160 A.D.3d 1, 3 (1st Dept. 2018), *appeal dismissed* 32 N.Y.3d 946 (2018), *lv denied* 32 N.Y.3d 915 (2019); *Matter of Keegan,* 95 A.D.3d 1560 (3rd Dept. 2012).

- *Matter of Berglund*, 183 A.D.3d 1178 (3rd Dept. 2020)

  Disbarment based on California disbarment for making misrepresentations and breaching duties of loyalty and confidentiality with regard to a former matrimonial client, who was a psychologist. Specifically, after respondent was discharged by the client, he filed an answer in her divorce matter, and filed two complaints to the California Board of Psychology, wherein he revealed confidential information disclosed by the former client during his representation of her, and made numerous false and disparaging statements about her.

Child Support Arrears

- *Matter of Parham*, 180 A.D.3d 1320 (3rd Dept. 2020)

  By order dated December 17, 2019, the Family Court of St. Lawrence County determined that respondent had an existing child support obligation of $661.90 per month and was in arrears with regard to this obligation in the amount of $36,944.03. The Court directed that a hearing subcommittee of the AGC be convened for a hearing pursuant to Judiciary Law §90(2-a) and Court Rule §806.25(a). A hearing was held, and respondent personally appeared and introduced certain documents into evidence. Thereafter, the subcommittee reported to the Court that respondent had failed to submit proof of payment required by Judiciary Law §90(2-a),(b). The Court suspended respondent from the practice of law, effective immediately, until further order of the Court and until such time as respondent made full payment of all child support arrears.

Escrow Violations

- *Matter of Parente*, 152 A.D.3d 958 (3rd Dept. 2017)

  Respondent was censured by the Appellate Division, Third Department, for breaching his fiduciary obligations to safeguard and maintain client escrow funds by abdicating his responsibility to oversee and supervise the escrow account to his former law partner, who then misappropriated $25,000 of respondent's client's money from the escrow account. Respondent represented a client in a 2011 commercial real estate transaction and in connection therewith and pursuant to a written escrow agreement, was the escrow agent holding a portion of the sale proceeds in escrow unless and until certain liens against the property were cleared. Respondent delegated all control of maintaining and reconciling the firm escrow accounts to his partner, who was not the escrow agent. Over a period of six (6) months, the partner misappropriated $25,000. The misappropriation was discovered, and the partner was disbarred. It was not until 2016 that the misappropriated funds were replaced.

  The Third Department found that respondent failed to safeguard client funds that had been entrusted to him, despite the willful misappropriation by his partner. The Court found that respondent violated RPC:

  - 1.15(a) – Failure to safeguard and maintain client funds;
  - 5.1(b)(1) – a lawyer with management responsibilities in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to the Rules of Professional Conduct;
  - 5.1(d)(2)(ii) – a lawyer shall be responsible for a violation of these Rules by another lawyer if in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated; and
  - 8.4(h) – a lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

  In issuing the censure, the Third Department was guided by *Matter of Galasso*, 94 A.D.3d 30 (2nd Dept. 2012), modified and remitted by 19 N.Y.3d 688 (2012), and *Matter of Galasso*, 105 A.D.3d 103 (2nd Dept. 2013), and noted, among other things, that respondent had no venal intent, did not play any role in the misappropriation, did not financially benefit from the misappropriation, ultimately replaced the misappropriated client funds, and had no prior disciplinary history.

  This is the first reported case in the Third Department in which an attorney was found responsible for the willful misappropriation of funds by his/her partner, in violation of RPC Rules 5.1(b)(1) and (d)(2)(ii).

Other Escrow Cases of Note

- *Matter of Galasso*, 19 N.Y.3d 688 (2012), modified and remitted by 19 N.Y.3d 688 (2012), and *Matter of Galasso*, 105 A.D.3d 103 (2nd Dept. 2013)

  Respondent was suspended for two years for failing to safeguard and maintain client funds that were held incident to the practice of law and failing to properly supervise the firm's bookkeeper who stole more than $5 million from the firm's escrow accounts. The respondent's practice was to review financial reports of the escrow accounts prepared by the bookkeeper, rather than the account statements themselves. While the attorney did not steal the money himself and had no venal intent, he ceded an unacceptable level of control over the firm accounts to the bookkeeper which created the opportunity for the misuse of client funds.

- *Matter of Langione*, 131 A.D.3d 199 (2nd Dept. 2015)

  Respondent was suspended for six months for failing to safeguard client funds held by his law firm incident to the practice of law, which allowed the firm's bookkeeper to steal more than $5 million from the firm's escrow accounts. Respondent was Galasso's partner and was a signatory on the escrow accounts from which the bookkeeper stole client funds. While the attorney did not steal the money himself and had no venal intent, he ceded an unacceptable level of control over the firm accounts to the bookkeeper which created the opportunity for the misuse of client funds.

- *Matter of Zucker*, 154 A.D.3d 29 (1st Dept. 2017)

  Respondent and his partner, in a joint motion for discipline, consented to the imposition of a six month suspension from the practice of law and admitted that they failed to properly supervise their non-attorney bookkeeper who misappropriated approximately $2 million from the firm's bank accounts, which included client and/or third party funds.

  Among the aggravating and mitigating factors considered by the court were that while respondents failed to report the theft to law enforcement, their misconduct was nonvenal and was the result of ignorance of applicable disciplinary rules, full restitution was made, no client suffered monetary loss, respondents had no prior disciplinary history, freely admitted their misconduct, and expressed remorse.

- *Matter of Sieratzki*, 186 A.D.3d 85 (1st Dept. 2020)

  Respondent was suspended for two years for improperly depositing money in his escrow account that was not incidental to his practice of law and using said funds to pay his girlfriend's household expenses. In addition, he failed to file tax returns for five years and kept a large legal fee settlement in his escrow account over a five-year period to shield his money from taxing authorities.

Motion for Immediate Disbarment and/or Contempt

- *Matter of Barry*, 176A.D.3d 1474 (3rd Dept. 2019)

  Respondent was suspended in November of 2018 for failure to cooperate with an investigation into his alleged misconduct. Thereafter, AGC moved for an order pursuant to Judiciary Law §§90(2) and 486, disbarring respondent without further proceedings based upon allegations that respondent continued to practice law after he was suspended, or in the alternative, finding respondent in contempt of the Court's suspension order. AGC presented uncontroverted documentary evidence concerning five real estate transactions establishing that respondent engaged in the practice of law after his suspension. Additionally, respondent issued multiple checks from his attorney escrow account and repeatedly utilized his law office email address while communicating with interested parties in the real estate transactions.

  The Court held that, collectively, the respondent's actions fostered the impression that he was a licensed attorney in this state in good standing, and that conduct was in contempt of the specific directive in the Court's November 2018 suspension order. The Court concluded that respondent's contemptuous actions necessarily constituted conduct prejudicial to the administration of justice, and imposed a one-year suspension.

- *Matter of Meagher, Jr.*, 178 A.D.3d 1351 (3rd Dept. 2019)

  In December of 2017, the Court granted a joint motion to impose discipline by consent and suspended respondent for one year. Thereafter, AGC moved for an order pursuant to Judiciary Law §§90(2) and 486, disbarring respondent based on his practice of law while suspended, or in the alternative, for an order pursuant to Judiciary Law §§90(2) and 750, finding respondent in contempt of the Court's December 2017 suspension order.

  Respondent admitted that he had improperly advised his clients that he was merely retired rather than suspended. Further, he improperly identified himself as the attorney of record in forms filed in Surrogate's Court and met with at least one client concerning the filing of a third document. AGC also submitted proof that respondent maintained his law firm website with attorney advertising, identified himself as an attorney, and maintained a Facebook page identifying himself as a "Malpractice Lawyer" and "Property Lawyer." The Court found that respondent's willful conduct was in contempt of the mandate in the Court's order of suspension and disbarred him.

- *Matter of Campito*, 179 A.D.3d 1346 (3rd Dept. 2020)

  Respondent was suspended in 2014 for noncompliance with attorney registration requirements since 2008. AGC moved for an order pursuant to Judiciary Law §§90(2) and 486, disbarring respondent for continuing to practice law after her suspension or, in the alternative, for an order pursuant to Judiciary Law §§90(2) and 750, finding respondent in contempt of the Court's 2014 suspension order.

The Court found that respondent engaged in the unauthorized practice of law and improperly conveyed the impression that she was an attorney in good standing. Respondent admitted to sending letters to a City Court stating she was representing an individual in a traffic matter. Respondent conducted legal research and furnished her opinion to another attorney, and represented clients in real estate transactions both before and after learning she was suspended. Respondent also continued to display signage at her office location identifying herself as an attorney and conveying the impression that she was authorized to practice law, and repeatedly used the designation "attorney at law" in various correspondence. The Court granted that part of AGC's motion seeking to find respondent in contempt and disbarred her.

Other Misconduct

- *Matter of Becker,* 180 A.D.3d 1322 (3rd Dept. 2020)

  The Court suspended respondent for eight months for engaging in conduct adversely reflecting on his fitness as a lawyer, contrary to RPC 8.4(h). The Court found respondent's explicit description of a past matter he had handled as a prosecutor, involving an adult engaging in criminal sex acts with a minor, was unjustified as part of his representation of a child as Attorney for the Child. Respondent's illustration of attorney/client confidentiality utilizing references to the child's hypothetical sexual history, and separate reference to her genitals and physical discomfort, had no justification under the circumstances. Respondent's request that the child not tell anyone about the substance of their conversation because he could be punished for it was inappropriate and served no purpose in advancing the representation. Mitigating factors included respondent's lack of disciplinary history and his cooperation with the AGC. Aggravating factors included the vulnerability of the child and respondent's reluctance to acknowledge the wrongful nature of his conduct.

- *Matter of Castillo*, 157 A.D.3d 1158 (3rd Dept. 2018)

  Respondent was suspended in 2016 for three years for failing to properly maintain client funds and maintain his escrow account, comingling personal funds in his trust account, and for his failure to promptly pay funds to his client to which the client was entitled.

  In subsequent proceedings, AGC alleged additional similar misconduct. Respondent was found to have converted nearly $47,000 of a criminal defense client's money that was intended to be used for the client's bail. Further, he took months to repay the money to his client despite repeated requests. Respondent also admitted to accepting a $5,000 retainer to represent a client on appeal, along with an additional $5,000 payment for transcripts, but performed no work and purchased no transcripts.

  Respondent noted that the alleged misconduct occurred contemporaneously with misconduct for which he had already been suspended. In aggravation, AGC noted respondent had admitted to serious misconduct, including conversion of client funds for

his own personal use. Additionally, respondent had a disciplinary history evidencing a longstanding pattern of grievous misconduct. Respondent was disbarred.

- *Matter of Rain*, 162 A.D.3d 1458 (3rd Dept. 2018)

  Respondent previously served at the District Attorney of St. Lawrence County from 2013 to 2017. In June of 2018, the Court suspended respondent for two years for the following misconduct:

  - Committing numerous and distinct acts of prosecutorial misconduct as District Attorney by making prejudicial remarks during summation;
  - Improperly and fraudulently executing and serving grand jury subpoenas;
  - Consciously disregarding the terms of a court order authorizing a law intern, failing to supervise the intern, and by allowing the intern to improperly conduct a felony jury trial and suppression hearing, and aiding in the unauthorized practice of law;
  - Consciously disregarding the attorney-client relationship of an incarcerated witness and misleading AGC regarding such conduct;
  - Consciously disregarding the obligation to disclose exculpatory evidence and improperly suppressing such exculpatory evidence;
  - Making a false statement to a tribunal and attempting to mislead a trial court regarding the existence of exculpatory evidence, all of which were prejudicial to the administration of justice and adversely reflected on the respondent's fitness as a lawyer.

  In determining the appropriate disciplinary sanction, the Court considered respondent's contention that much of her misconduct was the result of negligence and not intentional conduct. In aggravation, the Court considered respondent's disciplinary history, which included three prior admonitions and a letter of caution. Respondent's career, the Court noted, demonstrated a long history of public service that was commendable. However, the Court held, "prosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice, and respondent's severe and persistent misconduct while serving in that role damages the reputation and public confidence placed on those in her former role."

Other Misconduct Cases of Note

- *Matter of Friedberg,* 194 A.D.3d 126 (1st Dept. 2021)

  For over two years, respondents' law firm employed a suspended attorney as a paralegal, who dispensed advice through the firm's attorneys who interacted directly with clients. The suspended attorney drafted legal documents and was admittedly possessed of superior legal

knowledge. He even brought former clients to respondents' firm. He "functioned as a senior attorney ... by the exercise of his experience and acumen ... not his services as a paralegal, [and] made major contributions to the resolution of many of the firm's cases." As such, the First Department found that he was engaged in the unauthorized practice of law and that the two respondent attorneys aided and abetted him in doing so. Although the referee recommended censure, the respondents were suspended for eighteen months.

- *Matter of Schlossberg*, 192 A.D.3d 8 (1st Dept. 2021)

  Respondent was charged with professional misconduct following his offensive verbal tirade in a deli. The parties jointly moved for discipline by consent and asked the court to impose a public censure. Additionally, respondent cross-moved, requesting the court seal his personal audio-visual recordings of the subject incident that appeared in the record. The parties stipulated to facts which included respondent's derogatory comments to an employee of the deli who engaged in a conversation in Spanish with a customer, along with respondent's threats to call immigration authorities and have the Spanish-speaking individuals deported. Respondent also made offensive comments to another customer who intervened and told respondent he shouldn't be talking to people that way. After a video recording of the incident was posted to the Internet and widely distributed, including through media coverage, respondent's identity and profession became known and he was subject to adverse consequences for his behavior, which included "...expulsion by his commercial landlord, the resignation of his associate, public denunciation by some of his clients, and a crowd-funded Mariachi band playing outside his apartment house." Approximately a week after the incident, respondent "...posted an online apology stating - "[t]o the people I insulted, I apologize. Seeing myself online opened my eyes - the manner in which I expressed myself is unacceptable and is not the person I am. I see my words and actions hurt people, and for that I am deeply sorry."

  In the joint motion, respondent admitted he engaged in conduct that adversely reflects on his fitness as a lawyer in violation of RPC Rule 8.4(h). The parties stipulated to both aggravating and mitigating factors, including that the deli employee who respondent confronted and threatened was a vulnerable victim in that he had no choice but to remain in his position and endure respondent's behavior, and that respondent had no prior discipline nor had any complaints been made against him following the 2018 incident at issue, that respondent provided his own recording of the incident which was more inculpatory than that obtained by AGC, and that respondent apologized and expressed remorse. The court agreed with the parties' request for the imposition of a public censure as the appropriate sanction. Noting respondent had been subject to threats following the widespread distribution of video of the incident, the court also granted respondent's cross-motion to seal the inculpatory video recording he voluntarily provided to AGC.

State of New York
Supreme Court, Appellate Division
Attorney Grievance Committee
Third Judicial Department

Overview of RPC 1.15

I. 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; Recordkeeping; Examination of Records

A. Duties imposed by RPC 1.15

1. Duty to properly maintain required escrow and business account books and records.

2. Duty to fully account to client for funds or property entrusted to lawyer's care.

3. Duty to notify client promptly upon receipt of funds or property in which a client has in interest.

4. Duty to promptly deliver to the client or third person any funds or other property that the client or third person is entitled to received.

5. Duty to keep client funds separate from lawyer's own property.

6. Duty not to use those funds for any purpose whatsoever, other than as directed by the client.

B. Fiduciary duties

1. From Matter of Galasso, 94 A.D.3d 30 (2nd Dept. 2012) modified and remanded 19 N.Y.3d 688 (2012):

a) 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" (citations omitted).

b) 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 honestly alone, but the punctilio of honor the most sensitive, is then the standard of behavior" (citations omitted).

c) 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 it is the ethical duty of an attorney--not the bookkeeper, the office manager, or the accountant, to safeguard client funds.

II. Rule 1.15(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A. If a lawyer holds another person's funds the lawyer is a fiduciary.

B. Possession of another person's funds must be incident to the lawyer's practice of law.

C. All funds which a lawyer received while acting in a legal representative capacity on behalf of a client or third person must be placed in a special or trust account.

1. Mandatory Deposits: What funds must be deposited to a lawyer's trust account?

a) All funds held on behalf of clients in a legal representative capacity.

b) All funds in which the lawyer and client claim an interest arising out of legal representation.

c) All funds in which the client and a third person have an interest which come into the lawyer's possession during representation of client.

2. Permissive Deposits: What funds may be deposited to a lawyer's trust account.

a) Advance retainer fees:

(1) Generally, advance retainer fees paid to a lawyer are not considered to be client funds, which means retainer fees should not be deposited to a trust account, and instead, should be deposited to the lawyer's or firm's operating account.

(2) However, advance retainer fees may be deposited to a trust account provided the lawyer and client expressly agree, in writing, to treat the retainer fees as client funds for deposit to the lawyer's trust account until the fees are earned through services rendered. In that event, the lawyer must ensure compliance with the specific rules applicable to client funds and trust accounts.

b) Funds of the lawyer that are reasonably sufficient to pay bank charges.

3. Prohibited Deposits: What funds may <u>not</u> be deposited to a lawyer's trust account.

a) The lawyer's personal funds.

b) Business and investment monies of the lawyer.

c) Funds related to the lawyer's business (for example, payroll taxes on employee's wages).

d) Funds coming into the lawyer's hands while acting as executor, guardian, trustee or receiver, or in any other fiduciary capacity.

D. A lawyer must not misappropriate a client or third person's funds.

E. A lawyer must not comingle a client or third person's funds or property with his or her own.

III. Rule 1.15(b) Separate Accounts.

A. Rule 1.15(b)(1):

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 NYCRR Part 1300 ("Dishonored Check Reporting Rule").

2. Banking institution includes a state or national bank, trust company, savings bank, savings and loan association or credit union.

a) Funds may be maintained in a banking institution outside New York State, provided:

(1) The banking institution complies with the "Dishonored Check Reporting Rule"; and

(2) The written approval of the fund's owner is obtained specifying the name and address of the banking institution's branch or office where the funds are maintained.

3. Funds shall be maintained:

a) In the lawyer's own name; or

b) In the name of a firm of lawyers of which the lawyer is a member; or

c) In the name of the lawyer or firm of lawyers by whom the lawyer is employed.

4. Funds shall be maintained in a special account or accounts and separate from any business or personal accounts of the lawyer or lawyer's firm.

a) Funds shall also be maintained separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity.

5. No special account or trust account may have overdraft protection.

B. Rule 1.15(b)(2):

1. A lawyer or lawyer's firm shall identify the special bank account or accounts as an:

a) "Attorney Special Account"; or

b) "Attorney Trust Account"; or

c) "Attorney Escrow Account".

2. A lawyer shall obtain checks and deposit slips that bear one of the above titles.

3. The title to the special bank account may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account from other bank accounts maintained by the lawyer or the lawyer's law firm.

4. If a special bank account is an IOLA (Interest on Lawyer Account) account, the "IOLA" designation is required.

C. Rule 1.15(b)(3):

1. Funds reasonably sufficient to maintain the special bank account or to pay account charges may be deposited therein.

D. Rule 1.15(b)(4):

1. 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.

a) The portion belonging to the lawyer may be withdrawn when due, unless the right of the lawyer to receive such funds is disputed by the client or another person. If the right to receive such funds is disputed, the disputed portion of the funds shall not be withdrawn until the dispute is finally resolved.

IV. Rule 1.15(e) Authorized Signatories.

A. Rule 1.15(e):

1. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

2. All special account withdrawals shall be made by check.

3. All special account withdrawals shall be made only to a named payee and not to cash.

a) ATM withdrawals and cash withdrawals are not permitted.

4. Withdrawals from a special account can be made by "bank transfer", with the prior written approval of the party entitled to the proceeds.

V. Rule 1.15(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A. Rule 1.15(c):

1. A lawyer shall:

a) 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.

b) Promptly upon receipt, identify and label securities and properties of a client or third person and, as soon as practicable, place them in a safe deposit box or other place of safekeeping.

c) Maintain complete records of all funds, securities, and other properties of a client or third person coming into a lawyer's possession and render appropriate accounts to the client or third person regarding them.

d) Promptly pay or deliver to the client or third person as requested by them the funds, securities, or other properties in the lawyer's possession that the client or third person is entitled to receive.

VI. Rule 1.15(d) Required Bookkeeping Records.

A. Rule 1.15(d)(1):

1. A lawyer shall maintain for seven (7) years after the event that they record:

a) The records of all deposits in and withdrawals from any special bank accounts and of any other bank account that concerns or affects the lawyer's practice of law.

(1) These records shall specifically identify:

(a) The date, source and description of each item deposited; and

(b) The date, payee and purpose of each withdrawal or disbursement.

b) A record for special bank accounts showing:

(1) The source of all funds deposited in such accounts;

(2) The names of all persons for whom the funds are or were held;

(3) The amount of such funds;

(4) The description and amounts; and

(5) The names of all persons to whom such funds were disbursed.

c) Copies of all retainer and compensation agreements with clients.

d) Copies of all statements to clients or other persons showing the disbursements of funds to them or on their behalf.

e) Copies of all bills rendered to clients.

f) Copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed.

g) Copies of all retainer and closing statements filed with the Office of Court Administration.

h) All checkbooks and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips.

B. Rule 1.15(d)(2):

1. A lawyer shall make accurate entries, at or near the time of the act, condition, or event recorded, 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.

C. Rule 1.15(d)(3):

1. "Copies" may be maintained by maintaining any of the following:

a) Original records;

b) Photocopies;

c) Microfilm;

d) Optical imaging; or

e) Any other medium that preserves an image of the document that cannot be altered without detection.

VII. Rule 1.15(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

A. Rule 1.15(i):

1. The financial records required by Rule 1.15 shall be located or made available at the principal New York State office of the lawyer.

2. Such financial 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 Attorney Grievance Committee or shall be produced at the direction of the appropriate Appellate Division before any person designated by it.

3. All books and records produced 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.

VIII. Rule 1.15(f) Missing Clients.

A. Rule 1.15(f):

1. Whenever a sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court for an order directing payment to the lawyer of any fees or 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.

a) If an action was commenced in the unified court system, the lawyer shall apply to the court in which the action was brought.

b) If no action was commenced in the unified court system, the lawyer shall apply to the Supreme Court in the county in which the lawyer maintains an office for the practice of law.

IX. Rule 1.15(j) Disciplinary Action.

A. Rule 1.15(j):

1. A lawyer shall be deemed in violation of the Rules of Professional Conduct and shall be subject to disciplinary proceedings, if he or she does not maintain and keep the accounts and records specified and required by Rule 1.15 or if he or she does not provide any such records pursuant to Rule 1.15.

X. Dishonored Check Reporting Rule: 22 NYCRR Part 1300.

A. Banking Institutions in New York State which offer fiduciary accounts to attorneys are required to report all instances of overdrafts and/or dishonored checks on attorney trust, special and escrow accounts.

B. The reports are forwarded to the New York Lawyers' Fund for Client Protection, which serves as a statewide clearing house for these reports.

C. Banks have ten (10) days to withdraw reports that have been issued in error. If not withdrawn, the reports are sent to the appropriate Attorney Grievance Committee for investigation.

D. An Overdraft and/or Dishonored Check Report generally triggers an audit of a lawyer's trust, special or escrow account. *[iola.org]*

XI. Interest On Lawyer Account ("IOLA"): Judiciary Law §497 and 21 NYCRR Part 7000.

A. New York lawyers who hold "qualified funds" in trust for a client or third-party beneficial owner are subject to the IOLA Fund's New York State statutes and regulations and must open and maintain an IOLA escrow account.

B. Funds held in trust by a lawyer that are too small in amount or are reasonably expected to be held for too short a time to generate sufficient income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner are "qualified funds" and are appropriate for deposit in an IOLA account.

C. A determination whether funds are "qualified funds" is made solely in the judgment of the lawyer who holds funds in trust. New York State has a statutory hold-harmless provision. New York lawyers shall neither be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of monies into an IOLA account, pursuant to the attorney's good-faith judgment that such monies were "qualified funds". *[iola.org]*

XII. Key Concepts in Attorney Trust Accounting.

A. Separate clients are separate accounts

1. Each client's funds must be looked at as separate from those of all other clients.

2. You can never use one client's funds to satisfy the obligations of another client.

B. You can't spend what you don't have

1. You cannot disburse more for a client than you have on deposit to that client's credit.

2. The total amount of other clients' funds available is irrelevant.

C. Timing is everything

1. You cannot disburse deposits made on behalf of a client until the checks which comprise the deposits "clear" (are "collected" in bank parlance) and are credited to your trust account.

2. Know your bank's closing times for crediting of deposits.

D. Always maintain an audit trail

1. An audit trail is the combination of (1) bank records, such as bank statements, deposit slips, canceled checks, etc., (2) your records showing all deposits and disbursements; and (3) your entries recorded in the general ledger and client ledgers, that together make it possible to trace what happened to client funds handled by a lawyer.

2. On every deposit slip the client name or file number should appear next to the amount being deposited on the client's behalf.

3. Similarly, the client name or file number should appear on every disbursement check.

E. Trust accounting is zero based accounting

1. Proper trust account management requires the periodic review (at a minimum, monthly) of your check stubs and/or check register, general ledger and client ledgers, your records of deposits and disbursements, bank statements, and the monthly reconciliation of the trust account, with a view towards properly zeroing-out client accounts.

2. Earned fees should be promptly removed.

3. Circumstances surrounding outstanding checks should be reviewed and resolved.

4. Mathematical errors should be corrected.

F. There is no such thing as a "negative balance"

1. In trust accounting all balances must either be positive (while funds are being held for clients) or zero (when the matter is closed and no funds remain for the client in the trust account).

2. A negative balance for a client means that other clients' funds have been misappropriated.

G. You can't play the game unless you know the score

1. An individual running balance of each individual client, on that client's ledger must be maintained at all times.

2. Similarly, a general running balance for the entire trust account must be maintained at all times; this is usually done on the checkbook stubs, but if a one-write or computerized system is used, it may be done by keeping a check register showing the running balance of the trust deposits and disbursements.

Attorney Trust Accounts and Recordkeeping

A Practical Guide

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

April 2021

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 ninth edition is prompted by judicial decisions and rule changes that have occurred since the last publication in January 2015.

 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 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 notices

[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.*

of overdrafts or dishonored checks pursuant to statewide court rules.[2] In addition, court rules prohibit attorneys from carrying overdraft protection on attorney trust, special and escrow accounts.

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. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. [4] A lawyer may not issue a check from an attorney escrow account drawn against a bank or certified check that has not been deposited or has not cleared.[5] 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.[6]

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.[7] An attorney is also permitted to electronically sign escrow checks provided the attorney reviews and approves issuance of an escrow account check with his/her digitized signature.[8]

A lawyer or law firm may authorize non-legal staff members to open escrow sub-accounts and to transfer funds from sub-accounts to master accounts provided the lawyer/law firm exercises close supervision. Withdrawals, however, may only be authorized by an admitted attorney. The attorney maintains professional responsibility for the conduct of non-lawyer staff.[9]

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.[10]

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[2] 22 NYCRR Part 1200 (Rule 1.15 (b)(1)). The Dishonored Check /Overdraft Notice Reporting Rules, effective xxxJanuary 4, 2021, are reported at 22 NYCRR Part 1300.

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

4 22 NYCRR Part 1200 (Rule 1.15 (e)).

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

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

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

8 See, NYSBA Op. 1114 (2017)

9 See, NYSBA Op. 1060 (2015)

10 22 NYCRR Part 1200 (Rule 1.15(b)(3)).

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.[11]

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

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

What is IOLA?

IOLA is the acronym for the Interest On Lawyer Account Fund and program.[12] 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.[13]

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 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.[14]

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.[15]

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.

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[11] Judiciary Law §497.

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

[13] 21 N.Y.C.R.R. 7000.2(e).

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

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

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.[16]

In that case, prudence suggests that a lawyer consult with the client or other beneficial owner. And when dealing with large deposits and escrows, lawyers and clients should be mindful of federal bank deposit insurance limits.[17]

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.[18]

Am I permitted to maintain overdraft protection on my Attorney Trust, Special or Escrow Account?

No. Effective April 1, 2021, Court Rules prohibit overdraft protection on attorney trust, special or escrow accounts.

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

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

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

What happens if a trust account is overdrawn or a check bounces?

An overdraft or bounced check on an attorney trust account is a signal that law client funds may be in jeopardy. Banks in New York State report overdrafts/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' Overdraft/Dishonored Check Notice Reporting Rules.[19] A "dishonored" instrument is a check which the lawyer's bank refuses to pay because of insufficient funds in the lawyer's special, trust, or escrow account. An overdraft occurs when there are insufficient funds in an account to cover a draft, but the bank extends credit to the depositor to cover the account deficiency.

The Lawyers' Fund holds each overdraft/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 an overdraft/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.

[19] 22 NYCRR Part 1200 (Rule 1.15 (b)(1)). The Overdraft/Dishonored Check Notice Reporting Rules, effective January 4, 2021, are reported at 22 NYCRR Part 1300.

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.[20]

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.[21]

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.[22]

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.[23]

It is good business practice to deposit advance legal fees in a non-escrow fee account and draw upon the deposit only when legal fees are earned. This practice will ensure that a lawyer will be able to fulfill the professional obligation to refund unearned legal fees.

In the event of a fee dispute, court rules provide that a client may elect mandatory fee arbitration in most civil representation which commenced on or after January 1, 2002 when the disputed amount is between $1,000 and $50,000.[24] Fee arbitration is also mandatory in fee disputes in domestic relations matters.[25]

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.[26]

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

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

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

[23] 22 NYCRR Part 1200(Rule 1.16 (e)).

[24] 22 NYCRR Part 137

[25] 22 NYCRR Part 136

[26] 22 NYCRR Part 1200 (Rule 1.15 (f)).

To preserve client funds, the Lawyers' Fund will accept deposits under $1,000 without a court order.[27]

In 2017, the New York Lawyers' Fund amended its Regulations to authorize the Trustees to utilize, for the benefit of victims, unclaimed missing client and deceased attorney escrow deposits held by the Lawyers' Fund for over five years, and such deposits held for unknown clients, pursuant to Rules 1.15 (f) and 1.15 (g) of the Rules of Professional Conduct.[28]

What happens if 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.[29]

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.[30]

What bookkeeping records must be maintained?

Every lawyer and law firm must preserve[31], 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[32]

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

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

28 22 NYCRR Part 7200.4 (a)

[29] 22 NYCRR Part1200 (Rule 1.15 (g)).

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

[31] 22 NYCRR Part 1200 (Rule 1.15 (d)).

[32] 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.

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.[33]

Lawyers have an ethical duty to maintain a client's confidential information.[34] 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.[35]

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.

33 See, NYSBA Ops. 680 (1996), 758 (2002).

34 22 NYCRR Part 1200 (Rule 1.6).

35 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).

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.[36] The Trustees provide approximately $8 million in reimbursement each year to victims of dishonest conduct in the practice of law.

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

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

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

119 Washington Avenue • Albany, New York 12210