

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

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A. GAIL PRUDENTI, P.J.  
WILLIAM F. MASTRO  
REINALDO E. RIVERA  
ROBERT A. SPOLZINO  
STEVEN W. FISHER, JJ.

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2007-00123

OPINION & ORDER

In the Matter of James Joseph Quail, an attorney and  
counselor-at-law.

Grievance Committee for the Tenth Judicial District,  
petitioner; James Joseph Quail, respondent.

(Attorney Registration No. 3012267)

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DISCIPLINARY proceeding instituted by the Grievance Committee for the Tenth Judicial District. By decision and order on motion of this Court dated March 9, 2007, the Grievance Committee for the Tenth Judicial District was authorized to institute and prosecute a disciplinary proceeding against the respondent based on a petition dated December 28, 2006, and the issues raised were referred to John P. Clarke, Esq., as Special Referee to hear and report. By decision and order on motion of this Court dated June 14, 2007, the respondent's motion to stay the disciplinary proceeding against him and allow a diversion of that proceeding pursuant to 22 NYCRR 692.4(m), permitting him to complete a monitoring program sponsored by a lawyer's assistance program approved by the Court, was denied.

September 29, 2009

MATTER OF QUAIL, JAMES JOSEPH

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Rita E. Adler, Hauppauge, N. Y. (Mitchell T. Borkowsky of counsel), for petitioner.

Long, Tuminello, Besso, Seligman & Werner, LLP, Bay Shore, N.Y. (David H. Besso and Michelle Aulivola of counsel), for respondent.

The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on January 12, 2000.

The Grievance Committee for the Tenth Judicial District (hereinafter the Grievance Committee) served the respondent with a verified petition containing twenty-eight charges of professional misconduct. After a preliminary conference conducted by telephone and a subsequent hearing, Special Referee John P. Clark sustained charges one through twenty-six. Charges twenty-seven and twenty-eight were withdrawn. The Grievance Committee now moves to confirm the Special Referee's report as to all twenty-six charges which were sustained, and to impose such discipline as the Court deems just and proper. The respondent has cross-moved to disaffirm the report insofar as it sustained charges fourteen, fifteen, and eighteen through twenty-two, and to limit the discipline imposed, if any, so as not to preclude him from continuing with the practice of law.

Charges One to Five: *Worthington* Case

Charges one through five pertain to the respondent's representation of Natalie Worthington, a Suffolk County Police Officer, from January 2002 through February 2005, in a civil rights action entitled *Worthington v County of Suffolk*, in the United States District Court for the Eastern District of New York (hereinafter the *Worthington* case).

Charge one alleges that the respondent is guilty of conduct prejudicial to the administration of justice by ignoring or otherwise violating multiple federal court orders in the *Worthington* case, in violation of Code of Professional Responsibility DR 1-102(a)(5) (22 NYCRR 1200.3[a][5]).

On or about May 29, 2003, United States Magistrate Lindsay issued an order directing the parties to submit statements pursuant to FRCP Rule 56.1 by no later than June 30, 2003, directing the parties to submit a joint pretrial order by July 14, 2003, and scheduling a final conference in the *Worthington* case for July 14, 2003. The respondent failed to submit the FRCP Rule 56.1 counter-statement on behalf of the plaintiff by June 30, 2003, and failed to appear at the conference held on July 14, 2003. Multiple extensions of time were granted to him, which with he also failed to comply.

On or about December 16, 2003, Magistrate Lindsay issued an order granting the respondent one last opportunity to provide the defendants' counsel with a proposed pretrial order by December 26, 2003, and to submit a joint pretrial order by January 14, 2004.

On or about January 9, 2004, the defendants moved for summary judgment. On or about January 14, 2004, the respondent submitted a proposed pretrial order to the defendants' counsel, but failed to file a Rule 56.1 counter-statement for the plaintiff or any opposition papers to the defendants' motion for summary judgment. On or about August 2, 2004, Judge Seybert granted the defendants' unopposed motion for summary judgment dismissing the complaint, except for one claim.

The *Worthington* case was reassigned to the Honorable Dora L. Irizarry, who, by order dated October 13, 2004, scheduled a telephone status conference for November 9, 2004. On or about November 9, 2004, neither the respondent nor opposing counsel appeared for the conference. On or about November 10, 2004, Judge Irizarry issued an order directing the parties to show cause, by filing an electronic affidavit, why sanctions should not be imposed, not later than seven days from the date of the November 10th order. On or about November 16, 2004, opposing counsel complied with November 10th order. On or about December 16, 2004, Judge Irizarry issued an order imposing a \$500 sanction upon the respondent, along with a Notice of Impending Dismissal.

Charge two alleges that the respondent is guilty of conduct which adversely reflects on his fitness to practice law by ignoring or otherwise failing to comply with multiple court orders in the *Worthington* case, as set forth above in the factual specifications contained in charge one, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge three alleges that the respondent is guilty of engaging in conduct adversely reflecting on his fitness as a lawyer by submitting an affidavit containing inaccurate facts, in response to Judge Irizarry's November 10th order, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]). On December 10, 2004, the respondent filed an affidavit containing facts taken verbatim from the affidavit previously submitted by his opposing counsel and which were inapplicable to the respondent.

Charge four alleges that the respondent is guilty of neglecting the *Worthington* case by failing to file a Rule 56.1 counter-statement and papers in opposition to the defendants' motion for summary judgment, failing to appear on July 14, 2003, for a scheduled conference, and failing to

comply with orders and deadlines imposed by the court, in violation of Code of Professional Responsibility DR 6-101(a)(3) (22 NYCRR 1200.30[a][3]).

Charge five alleges that the respondent is guilty of engaging in conduct which adversely reflects on his fitness to practice law by neglecting the *Worthington* case by failing to file a Rule 56.1 counter-statement and papers in opposition to the defendants' motion for summary judgment, failing to appear on July 14, 2003, for a scheduled conference, and failing to comply with orders and deadlines imposed by the court, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

#### Charges Six to Thirteen: Escrow Violations

Charges six to thirteen pertain to a complaint initiated by the Grievance Committee based on a dishonored check for insufficient funds and escrow improprieties which were discovered upon the examination of the respondent's bank statements and bookkeeping records. From November 2000 to November 2002, the respondent practiced as a solo practitioner in East Islip. In connection with his solo practice, he maintained two bank accounts at Citibank: an IOLA account known as the Quail Escrow Account and an operating account known as the Quail Operating Account. In or about November 2002, the respondent formed a law practice under the partnership of Romano, Paszynsky & Quail, P.C., at the same office location in East Islip. The partnership maintained two accounts at Fleet Bank: an IOLA escrow account known as the Partnership Escrow Account, and an operating account known as the Partnership Operating Account.

Charge six alleges that the respondent is guilty of engaging in conduct that is prejudicial to the administration of justice by failing to properly respond to the legitimate demands of the Grievance Committee, in violation of Code of Professional Responsibility DR 1-102(a)(5) (22 NYCRR 1200.3[a][5]).

By letter dated December 1, 2003, sent by regular mail to the partnership's offices, the respondent was advised that the partnership was subject to a sua sponte complaint based upon a notice from the Lawyers' Fund for Client Protection regarding a dishonored check for insufficient funds. The respondent was asked to submit a written explanation within 20 days of receipt of the letter, together with relevant bank and bookkeeping records for the previous six months. The respondent was the sole partner responsible for managing and maintaining the partnership escrow account records. The respondent failed to submit the requested explanation and records within the

time provided.

On or about January 7, 2004, upon telephone inquiry, the respondent faxed a letter, dated and purportedly previously faxed to the Grievance Committee on December 19, 2003, acknowledging receipt and promising to submit a response “as soon as practicable” but within “no more than an additional twenty (20) days.” The respondent failed to submit a response either within 20 days from December 19, 2003, or January 7, 2004.

By letter dated January 21, 2004, sent regular mail, return receipt requested to the partnership’s offices, the respondent was again requested to submit a response within seven days. Postal records indicate that the letter was received by the partnership on January 22, 2004. The respondent failed to submit a response within seven days.

By letters dated January 30, 2004, sent via first class mail to the partnership offices, in three separate envelopes, addressed individually to each partner, each partner was directed to submit a written answer to the complaint not later than February 10, 2004. On or about February 1, 2004, the respondent took possession of all three envelopes. The respondent failed to submit a response by February 10, 2004. Not until March 8, 2004, did the respondent respond, over 90 days from the initial request.

Charge seven alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law by failing to respond to the legitimate demands of the Grievance Committee, as set forth in factual specifications contained in charge six, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge eight alleges that the respondent engaged in conduct prejudicial to the administration of justice by failing to advise his partner, Salvatore Paszynsky, about the sua sponte complaint and investigation, and failing to deliver the envelope addressed to him, in violation of Code of Professional Responsibility DR 1-102(a)(5) (22 NYCRR 1200.3[a][5]). On or about March 5, 2004, Paszynsky learned of the dishonored check and the complaint from Christopher Romano, Esq., and he requested and received copies from the Grievance Committee of the Committee’s letters. On or about March 5, 2004, the respondent falsely stated to Paszynsky that he had already submitted a response to the complaint and the required records, when, in fact, he had not.

Charge nine alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge eight, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge ten alleges that the respondent is guilty of failing to adhere to his bank and bookkeeping duties by failing to maintain the required records for the Quail Escrow Account and Quail Operating Account, in violation of Code of Professional Responsibility DR 9-102(d)(1), (2), (8), and (9) (22 NYCRR 1200.46[d][1], [2], [8], [9]). Between January 1, 2003, and March 2004, the respondent continued using the aforementioned accounts, but failed to maintain records of all deposits and withdrawals from these accounts, specifying the date, source, and purpose of each deposit, withdrawal, or disbursement. Further, during the same period, he failed to maintain copies of all bank statements, canceled checks, and duplicate deposit slips for these accounts. Nor did he maintain a ledger book or similar record for these accounts. Finally, he failed to make accurate entries of all financial transactions affecting these accounts.

Charge eleven alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge ten, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge twelve alleges that the respondent is guilty of failing to preserve client funds entrusted to him as a fiduciary, in violation of Code of Professional Responsibility DR 9-102(a) (22 NYCRR 1200.46[a]). On or about March 7, 2003, the respondent was entrusted with funds in the amount of \$68,750 in connection with a real estate transaction involving his client, Anthony Senft, and the Estate of Gallagher, which he deposited into the Quail Escrow Account. Between March 7, 2003, and May 23, 2003, when the respondent should have maintained at least \$68,750 in the Quail Escrow Account, the balance in the account fell, from time to time, below \$68,750.

Charge thirteen alleges that the respondent is guilty of conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge twelve, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

#### Charges Fourteen to Twenty-Six: Napoli Matters

Charges fourteen to twenty-six pertain the respondent's representation of Vincent Napoli and Michael Napoli, who retained the respondent in or about April 2003 to assist them in

securing the release of federal forfeiture liens encumbering their properties.

Charge fourteen alleges that the respondent engaged in conduct prejudicial to the administration of justice by failing to provide Michael Napoli with a written retainer agreement which complied with 22 NYCRR part 1215, in violation of Code of Professional Responsibility DR 1-102(a)(5) (22 NYCRR 1200.3[a][5]). On or about April 17, 2003, the respondent was retained by Michael Napoli to assist him in securing the release of a federal forfeiture lien encumbering his property located at 9 Ohio Avenue in Medford. The retainer agreement failed to: (1) adequately explain the scope of legal services to be provided, as required by 22 NYCRR 1215.1(b)(1); (2) adequately explain the respondent's fees to be charged, expenses, and billing practices, as required by 22 NYCRR 1215.1(b)(2); and (3) disclose, where applicable, that Michael Napoli may have the right to arbitrate any fee dispute, as required by 22 NYCRR 1215.1(b)(2).

Charge fifteen alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge fourteen, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge sixteen alleges that the respondent is guilty of breaching his fiduciary duty by failing to promptly pay or deliver funds received on behalf of a client or third person to a third person who was entitled to receive such funds, as requested, in violation of Code of Professional Responsibility DR 9-102(c)(4) (22 NYCRR 1200.46[c][4]). In or about September 2003, the respondent agreed to assist Josephine Napoli in collecting monthly rent checks of \$1,250 from one of her tenants, Vogue Cleaners, deposit same into his escrow account, and remit escrow checks for the same amount to Antoinette Rizzo on Josephine Napoli's behalf. Between September 10, 2003, and November 10, 2003, the respondent received checks from Vogue Cleaners, deposited the same into his escrow account, and remitted escrow checks to Antoinette Rizzo. On November 17, 2003, the respondent received and deposited into the Quail Escrow Account a final check of \$1,250 from Vogue Cleaners. Despite attempts by Josephine Napoli to communicate with the respondent regarding remittance of the final check, the respondent failed to remit the final check until on or about April 22, 2004, five months after he received the funds.

Charge seventeen alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge sixteen, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR

1200.3[a][7]).

Charge eighteen alleges that the respondent violated his duty as a fiduciary by withdrawing a disputed fee from escrow prior to the dispute being resolved, in violation of Code of Professional Responsibility DR 9-102(b)(4) (22 NYCRR 1200.46[b][4]).

On or about April 21, 2003, the respondent was retained by Vincent Napoli in various legal matters, including the sale of certain real property in Center Moriches. From on or about April 21, 2003, and throughout his representation of Vincent Napoli, the respondent communicated almost exclusively with Michael Napoli, who was authorized to act on Vincent Napoli's behalf. On or about August 6, 2003, the respondent received a down payment check for the sum of \$12,750 from the purchaser of the Center Moriches Property, payable to the respondent's law partnership, and deposited the same into the Partnership Escrow Account.

On or about October 14, 2003, the respondent advised Michael Napoli that his bill for various services rendered to Vincent Napoli, to date, exceeded \$20,000, and he intended to utilize the proceeds from the sale of the Center Moriches property to pay himself the outstanding bill. At the closing on October 22, 2003, the respondent received, on Vincent Napoli's behalf, a certified check in the sum of \$38,000, payable to "James J. Quail, as Attorney," representing the balance of the sale proceeds due Vincent Napoli. The respondent deposited the check into the Quail Escrow Account.

The respondent advised Michael Napoli that his outstanding bill for services had increased to more than \$25,000 because of alleged difficulties relating to the closing. Between October 14, 2003, and October 31, 2003, Michael Napoli apprised the respondent of his objection to the claimed fee of \$20,000, the claimed increased fee of \$25,000, and the respondent's intention to pay himself from the sale proceeds. On or about October 26, 2003, the respondent received a letter from Scott Leemon, Esq. on Vincent Napoli's behalf, revoking the power of attorney granted to the respondent by Vincent Napoli, and asking the respondent to contact Michael Napoli to discuss the escrow funds. On or about October 31, 2003, the respondent withdrew \$25,000 of the escrow funds and deposited the same into the Partnership Escrow Account for his fees, prior to resolution of the disputed fee.

Charge nineteen alleges that the respondent is guilty of misappropriating funds

entrusted to him as a fiduciary by withdrawing a disputed fee from escrow without permission, in violation of Code of Professional Responsibility DR 9-102(a) (22 NYCRR 1200.46[a]).

Charge twenty alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charges eighteen and nineteen, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge twenty-one alleges that the respondent is guilty of charging and collecting an excessive fee, in violation of Code of Professional Responsibility DR 2-106(a) and (b) (22 NYCRR 1200.11[a], [b]). The respondent charged Vincent Napoli a legal fee of more than \$25,000 based upon a rate of \$400 per hour for services rendered from April 21, 2003, to October 27, 2003. The respondent's rate of \$400 and the amount charged were unreasonably excessive given, among other things, the respondent's limited experience, the nature of the legal matter for which he was retained, the services he purportedly performed, and the amount customarily charged in the locality for similar legal services.

Charge twenty-two alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge twenty-one, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge twenty-three alleges that the respondent breached his fiduciary duty by failing to promptly deliver funds belonging to Vincent Napoli to Vincent Napoli's attorney, as requested by his attorney, Scott Leeman, in violation of Code of Professional Responsibility DR 9-102(c)(4) (22 NYCRR 1200.46[c][4]). Following the respondent's withdrawal of the sum of \$25,000 from the Quail Escrow Account, the respondent maintained the sum of \$19,691.65 in escrow attributable to the sale of the Center Moriches property. Vincent Napoli was entitled to the entire sum of \$19,691.65 (hereinafter the undisputed funds). By letter dated November 10, 2003 (redated November 14, 2003), Vincent Napoli directed the respondent to transfer all the undisputed funds to Robert S. Lusthaus, Vincent Napoli's accountant. By letter dated December 9, 2003, the respondent advised Vincent Napoli that he would not forward any funds to Lusthaus without a notarized letter authorizing a transfer, and that he would prefer sending the undisputed funds to Vincent Napoli's criminal attorney for safekeeping. By letter dated January 24, 2004, Scott Leeman, Esq., Vincent

Napoli's criminal attorney, requested that the respondent wire the undisputed funds to his operating account and included a notarized letter from Vincent Napoli authorizing the transfer. The respondent failed to forward the undisputed funds to Leemon until November 2004, eleven months later.

Charge twenty-four alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge twenty-three, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge twenty-five alleges that the respondent engaged in conduct prejudicial to the administration of justice by failing to maintain a copy of the retainer agreement with Vincent Napoli for seven years, in violation of Code of Professional Responsibility DR 9-102(d)(3) (22 NYCRR 1200.46[d][3]). The respondent claims to have entered into a retainer agreement with Vincent Napoli in 2003, but acknowledges that he failed to maintain a copy of such agreement.

Charge twenty-six alleges that the respondent engaged in conduct which adversely reflects on his fitness to practice law based on the factual specifications set forth above in charge twenty-five, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

At the hearing, the Grievance Committee called three witnesses: Salvatore Pazsynsky, the respondent's former law partner; Henry E. Rakowsky, chairperson of Nassau County Bar Association Conciliation Committee and an expert on fees; and Michael Napoli. The Grievance Committee submitted 120 exhibits. The respondent called four witnesses: himself; Miguel Delgado, the respondent's treating psychiatrist; Debra Peavey, the respondent's fiancée and Thomas Koch, an individual employed by the respondent to manage the transitional homes he owns. The respondent submitted 11 exhibits. Both parties submitted post-hearing memoranda. The respondent admitted for the most part the factual allegations in the petition, with some exceptions. His case was devoted largely to presenting evidence in mitigation.

The parties stipulated to several amendments to the pleadings at the start of the hearing. With respect to charge one, the parties stipulated that the respondent's failure to appear at the conference scheduled on November 9, 2004, resulted from opposing counsel's failure to notify him of the conference. The parties agreed to delete from charges four and five the November 9, 2004, conference date as one of two conference dates on which the respondent failed to appear.

Regarding charge twenty-three, the parties agreed to delete the Quail Escrow Account as the source from which the respondent withdrew the disputed sum of \$25,000. With respect to charge twelve, the respondent admitted the factual allegations, but stipulated that there was no evidence that the respondent's failure to preserve certain escrow funds was intentional.

Based on the respondent's admissions and the evidence adduced at the hearing, we find that all twenty-six charges were properly sustained. Accordingly, the petitioner's motion to confirm the report of the Special Referee is granted, and the respondent's cross motion to disaffirm is denied.

In mitigation, the respondent called several witnesses who testified with regard to his mental condition during the years 2003 and 2004. The respondent claimed that the neglect of his professional responsibilities resulted from the debilitating physical, mental, and emotional stress he was then feeling caused by an undiagnosed bipolar disorder. Yet, according to these same witnesses, the respondent's impairment was not severe, and he functioned perfectly well as a lawyer during that period. In any event, the respondent's decisions to charge an excessive fee and to withdraw legal fees in dispute were the product of deliberate action and cannot be excused by his claim of stress and anxiety.

Notwithstanding the respondent's remorse, the remedial actions taken with regard to his own mental health and bookkeeping practices, and his work with so-called "sober houses," the respondent's misconduct was serious and not isolated.

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

PRUDENTI, P.J., MASTRO, RIVERA, SPOLZINO and FISHER, JJ., concur.

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

ORDERED that pursuant to 22 NYCRR 691.3, the respondent, James Joseph Quail, is suspended from the practice of law for a period of five years, commencing October 29, 2009, and continuing until further order of this Court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of the said period of five years upon furnishing satisfactory proof that during that period he (1) refrained from practicing or attempting to practice law; (2) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); (3)

complied with the applicable continuing legal education requirements of 22 NYCRR 691.11(c); and (4) otherwise properly conducted himself; and it is further,

ORDERED that the respondent, James Joseph Quail, shall promptly comply with this Court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until such further order of this court, the respondent, James Joseph Quail, shall desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

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

ENTER:



James Edward Pelzer  
Clerk of the Court