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

ORIENTATION TO THE PROFESSION

Maintaining HONOR
&
Avoiding THIN ICE

Matter of Cooperman
83 NY2d 465 (1994)

THE OATH OF OFFICE

I do solemnly **swear** *(affirm)*

that I will support the constitution of the United States, and the constitution of the State of New York,

and that I will **faithfully discharge** *the duties of the office of attorney and counselor-at-law,*

according to the **best of my ability**

$\frac{1}{1,000}$

$\frac{1}{7}$

$\frac{1}{10}$

TWO-TIERED SYSTEM

Upper Tier

Court Sanctions (Public)

Lower Tier

Committee Sanctions (Private)

- **Screening & Registration**
- **Disposition - on papers**
- **The "Three C's"**

AVOIDING THE "CREDIBILITY CONTEST":

PRACTICE DEFENSIVELY

MEMORIALIZE

MAINTAIN RECORDS

90%

FEES & AGREEMENTS

FEES - Rule 1.5

MANDATORY WRITINGS

1. Domestic Relations
2. Contingent Fees
3. Any fee expected to be $3,000 or greater

MANDATORY FEE DISPUTE RESOLUTION PROGRAM PART 137

- Fee dispute is between $1,000 and $50,000 Not applicable to criminal matters.
- Must comply with rules in order to sue.

NON-REFUNDABLE CLAUSE PROHIBITED

Rule 1.5(d)(4)

A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

[Rule 1.16(e)]

FEE SHARING Rule 1.5(g)

"Referral" fee is unethical

Referring lawyer must either:

1. Perform services
   or
2. Retain responsibility

COMMUNICATION

AFFIRMATIVE DUTY

- Communicate with clients/ other lawyers
- Communicate settlement offers
- Reveal malpractice

EX PARTE COMMUNICATIONS

Rule 3.5(a)(2)

When in doubt, give appropriate notice to opposing counsel

Use "equivalent service"

THREATENING CRIMINAL PROSECUTION

Rule 3.4(e)

BEWARE OF DEMAND LETTERS

CONFIDENTIALITY

DISCLOSURE TO DEFEND AGAINST ACCUSATION OF WRONGFUL CONDUCT

Rule 1.6(b)(5)(i)

NECESSARY = MATERIAL & RELEVANT

CONFLICTS OF INTEREST

CONFLICT OF INTEREST

REAL ESTATE - Seller/Purchaser

Broker/Attorney

MATRIMONIAL - Husband/Wife

Divorce Mediation

NOTARY POWERS

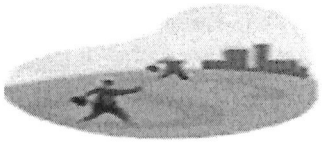
- **Know the rules**
- **If document says "Before me personally came...", the person must personally appear before the notary**
- **Proceeding by telephone is illegal**

CIVILITY AND PROFESSIONALISM

CIVILITY AND PROFESSIONALISM

- Special Rules of Court Decorum Appellate Division, Second Department 22 NYCRR Part 700
- Rules of Professional Conduct (Part 1200)
- Standards of Civility: 22 NYCRR Part 1200, Appendix A

Rule 1.15



- ♦Real estate
- ♦Workers comp
- ♦Personal injury
- ♦Business Sales
- ♦Estates
- ♦Matrimonial
- ♦Bankruptcy
- ♦Landlord/Tenant

Attorney Registration Certification

Each time a lawyer re-registers biennially with the Office of Court Administration they affirm that they:

⇨ **Have read** Rule 1.15

AND

⇨ **Are in compliance** therewith

The Client or 3rd Party Complaint

"Failure to Release Escrow Funds"

"Neglect of a Legal Matter"

"Won't Return My Inquiries"

DISHONORED CHECK COMPLAINT

NY BANK ⟶ Lawyers' Fund → GC

⇩

Failure to ensure funds were available at time of disbursement

WHEN COMPLAINT IS OPENED

→ Provide an **explanation**

→ Provide supporting **bank records**

→ Explain **ALL** of the transactions in the account for the period under review

GC will conduct an **AUDIT**

The Risk ⇨ **Audits can reveal:**

Improper bank & bookkeeping practices

Failure to safeguard = Misappropriation 1.15(a)

⇩

UPPER TIER

Four Key Principles:

- Appropriate Bank Account
- Segregation of Funds
- Record Keeping Mandates
- Preservation of Client or 3rd party $

Checklist Items:

IOLA or Interest Bearing

New York Bank

Dishonored Check Rule

Account Title

Attorney or Firm's name

Attorney Trust, Special or Escrow Account

Signatory

ONLY **NY LAWYERS**

Attorney Master/ Client Sub-Account(s)

John Jones, Esq. IOLA Account

Special Master Account # 123-456-789

⇩ Deposit to Sub-account

⇧ Transfer to disburse

⇩

Smith, A
123-456-789-01
Alias, B
123-456-789-02

PERILS IN OPENING ACCOUNT

ATM

OVERDRAFT PRIVILEGES

LINKING BUSINESS/PERSONAL ACCOUNT TO IOLA ACCOUNT

SEGREGATION/COMMINGLING

Business		**Client**
Personal		**Third party**
Attorney fees		**Bank charges**

ATTORNEY FEES

Carrier Inc. CK# 10
Payable to: **ATTY & Client** $10,000 ⇨ IOLA

Fee checks should be made payable to attorney, not to attorney's debtors

Have fee **payment approved** on back of check by client

What if the client refuses to pay your fee?

If Escrow

MUST RELEASE FUNDS

If Non-Escrow

CAN KEEP IN IOLA

REQUIRED BANK AND BOOKKEEPING RECORDS

Rule 1.15(d)

ALL ACCOUNTS THAT CONCERN OR AFFECT THE PRACTICE OF LAW

Keep a **GENERAL LEDGER**

Preserve ORIGINAL Bank records

Maintain copies of DISBURSEMENT items

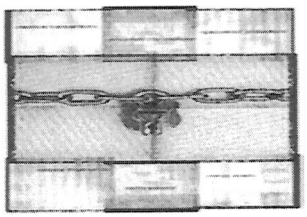
FOR SEVEN YEARS

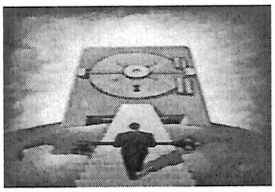
Reconciliation and Supervision

***Matter of Galasso*, 19 NY3d 688 [2012]**

- **Train and supervise all employees appropriately**
- **Regularly review and reconcile all bank accounts**

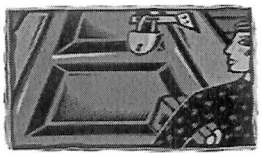
Preservation





Rule 1.15(a)

As a fiduciary, an attorney must not misappropriate funds or property being held for a client or another party.



Funds deposited = Funds disbursed

Preservation requires more:

The balance must be preserved each and every day the attorney is entrusted with the client or third-party funds.

Using one Client's $ for another Client's Matter

Date	Client	Transaction	Balance
12/1/13	Jones	Estate	$ 50,000
1/2/14	Smith	Sale deposit	$100,000
1/2/14	Smith	Purchase cks	$ 75,000 $ 20,000 $ 5,000

$100,000 in for Smith = $100,000 out for Smith

If $100,000 IS NOT Available

When the $75,000 check is presented

It will be dishonored

If either the $20,000 or the $5,000 check CLEAR the IOLA account, **before** the $100,000 sale deposit becomes **available**

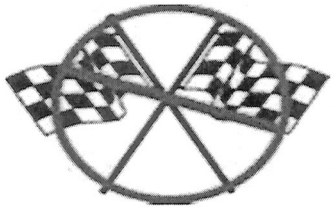
You risk a

PRESERVATION PROBLEM

Will clear against another client's funds

Date	Transaction	Client	Amount	Balance
1/2/13	Deposit	Smith	10k	10k
1/10/14	Deposit	Jones	5k	15k
1/15/14	Closing	Jones	ck:5k	10k
1/16/14	**Ret Dep**	Jones	5k	5k
1/20/14	Re-Dep	Jones	5k	10k
2/15/14	Closing	Smith	10k	0

♦ Rule of preservation has been violated ♦



No Speeding Zone

KEY "FAC" BEFORE DISBURSING

Confirmation of Availability of Funds

→ **Can I call my bank to confirm?**

See Greenberg, Trager & Herbst, LLP v HSBC Bank USA, 17 NY3d 565 (2011)

→ **Is online confirmation enough?**

See Fischer & Mandell LLP v Citibank, N.A. 632 F.3d 793 (2d Cir. NY 2011)

FINAL SETTLEMENT HAS OCCURRED

CLEARED-NOT SUBJECT TO COLLECTION

Disbursement Perils → GC Inquiry

AVOID DUPLICATE DISBURSEMENTS

- ♦ Fee checks w/o client reference
- ♦ No checks to cash

KEY: KEEP ACCURATE RECORDS

Make entries contemporaneously with transaction

Avoiding The Upper Tier
FOUR KEY PRINCIPLES

→ Maintain an IOLA account

→ Don't mix your funds with client or third party funds

→ Keep Accurate and Contemporaneous records, and Supervise record keeping

→ Satisfy Preservation by **FAC** checking before disbursement

LAWYER ASSISTANCE PROGRAM

Confidential Helpline
1-800-255-0569
Confidential e-mail
nysbalap@hushmail.com

A CALL FOR HELP

BY Patricia Spataro, *Director, New York State Bar Association Lawyer Assistance Program*

The following glimpse into a confidential conversation, though fictitious, is characteristic of exchanges between LAP staff and lawyers in crisis. By sharing this scenario I hope to demystify the process and let members of the legal community know what they will encounter when they call LAP.

I answer the phone and there is a long silence on the other end. After a long pause I hear a faint female voice say "things are out of control; I don't know what to do and I am embarrassed to have to call for help."

I do my best to normalize her feelings by telling her that most people who make the call feel that way. I also congratulate her for recognizing she has a problem and for having the courage to call. She relaxes a bit and asks if her conversation with me is confidential and I tell her it is -- and that the only exceptions to this confidentiality are when a person is at risk for harming themselves and/or others.

I invite her to share her concerns. I say a quick little prayer that I can help her and then I become intent on listening carefully. She begins to tell me about the problems and the crisis that prompted her call to LAP.

There are few jobs that cause you to drop everything and focus all your attention, at whatever cost to all else, on the person on the other end of the phone. The call may keep me from a scheduled meeting or conference call but there is nothing to be done, for the caller is the most important job for me. Gratefully, those with whom I would have the conference calls or meetings fully understand the nature of my work.

In the process of this critical conversation I establish rapport, most importantly, by not judging. Not passing judgment on a person creates a climate of trust and people tend to get more honest – sometimes sharing long-time burdens and secrets for the first time... I can hear their breathing loosen up. Sometimes I hear a sigh and the words "I've never shared that with anyone before."

I ask questions that probe more deeply into the severity and complexity of a problem. "Has anyone else in your family ever suffered from an addiction? At what age did you start drinking? How is your drinking affecting your ability to practice law or meet other responsibilities?" And the all important question ...do you have thoughts of suicide?" The questions are deliberate and round out the bigger picture of what's going on; the answers help me determine the best recommendations and referrals to make.

Since LAP is a voluntary program I do my best to engage the person so the individual will see the value of following through with the plan we develop together. If feasible, I will offer to meet with the person face-to-face, but I know that I might have one -- and perhaps only one -- chance to intervene so I see the phone not as my best option but as my only option.

I have no leverage other than compassion and information. I take time to carefully assess the issues and make the best referrals. I do everything I can to help at that very moment because it might be the only moment I get.

I ask permission to get a phone number so I can stay in touch and provide whatever assistance the person might need in the process of getting help, whether that is to attend a Twelve Step meeting or contact a treatment provider. I then ask them if I can introduce them to a lawyer who volunteers to assist their colleagues and who has faced similar issues and difficulties. Most say yes to this, and I explain that their confidentiality will be preserved with the volunteer; I tell them this is guaranteed by Judiciary Law §499. LAP staff and volunteers ultimately provide comprehensive support, guidance, and referrals.

In-between the calls, LAP staff focus on educating lawyers, judges, and law students. We invest in our volunteers through committee work, retreats, recognition dinners, and training. We remain steadfast in recruiting volunteers and building connections among members of the legal community. There are many opportunities to experience job satisfaction but none as great as what we get when we say the words "I am here to help and I want you to know there is hope."

SPEAKER BIOGRAPHIES

Robert P. Guido was admitted to practice in 1979 and is currently Special Counsel for Grievance Matters to the Appellate Division, Second Department, serving as an advisor, instructor, and liaison for the Court in matters related to the lawyer regulatory process. He previously served for 23 years as a staff attorney with the New York State Grievance Committee for the Tenth Judicial District, rising to the position of Chief Counsel from 2001-2005. He has also served as an Assistant District Attorney in Nassau County, and has engaged in private practice. Mr. Guido is an elected Fellow of the New York Bar Foundation, and by appointment of the Chief Judge has served as a member of the New York State Lawyer's Assistance Trust (2006-2011) and the Commission on Alcohol and Substance Abuse in the Legal Profession (1999). He is a frequent CLE presenter on lawyer disciplinary matters, and has received awards for his service to both the Nassau and Suffolk County Bar Associations. Mr. Guido holds his B.A. and J.D. from Hofstra University.

Muriel L. Gennosa serves as an Assistant to the Special Counsel for Grievance matters, Appellate Division, Second Department. Mrs. Gennosa received her B.S. in Personnel Administration and Industrial Relations from Ithaca College and her J.D. from Hofstra University School of Law. Upon her admission to practice in December 1986, until to 2001, she served as an Assistant Counsel to the Grievance Committee for the Tenth Judicial District. While at the Grievance Committee, Mrs. Gennosa was primarily assigned investigations involving escrow analysis. In 2001, she was promoted to Deputy Chief Counsel and continued to serve in that position until May 2005 when she joined the Special Counsel's Office.

Laura Smith is the Statewide Special Counsel for Ethics for the New York State Unified Court System. She has primary responsibility for developing and facilitating ethics training, support and advice for the non-judicial employees of the Unified Court System, oversees all operations of the Judicial Campaign Ethics Center, and also serves as staff counsel to the Advisory Committee on Judicial Ethics. Ms. Smith is a co-author of Chapter 65, "Civility," in Haig's Commercial Litigation in New York State Courts (4A West's NY Prac Series 3d ed). Outside the court system, she has served as a speaker or panelist for Continuing Legal Education and other law-related programs at the New York City Bar Association, the Practicing Law Institute, the Office of the Attorney General, the Association of Professional Responsibility Lawyers, and St. John's University School of Law. Ms. Smith is a member of the New York City Bar Association and previously served as Secretary of the Committee on Professional Responsibility. Before joining the Office of Court Administration, Ms. Smith was a senior litigation associate at Pillsbury Winthrop Shaw Pittman LLP. In addition to her complex commercial caseload, she served as a non-voting associate representative on the firm's Professional Responsibility Committee, and researched ethics rules and issues for colleagues at the firm. Ms. Smith obtained her J.D. *magna cum laude* from the Boston University School of Law, where she was an Articles Editor for the Journal of Science and Technology Law.