

LAW OFFICES

Jerome Karp, P.C.

JEROME KARP

*Suite 601
26 Court Street
Brooklyn, N.Y. 11242*

(718) 852-4454
FAX (718) 875-5075

Fax No.: (718) 875-5075

FACSIMILE TRANSMISSION

DATE: *3/4/09*

TO: *J. STELLA*

FAX NO. *212-822-1497*

FROM: *J. KARP*

RE: *KCCBA - CLE - 3/12/09*

NUMBER OF PAGES (including cover) *26*

COMMENTS: *Mr. John,*
enclosed are materials for a
portion of the program. I believe
Richard will find some needed at
criminal matters.

JK

NOTE: If you do not receive all of the indicated number of pages, please telephone the above number immediately.

KINGS COUNTY CRIMINAL BAR ASSOCIATION CLE 3/12/09

INTRODUCTION

This outline, and indeed the program, is not designed to cover all conceivable ethical problems. It is aimed at providing some practical guides for the practitioner. Thus, it is essential that the practitioner have an appreciation for the grievance process as well as the specific dos and don'ts.

At the outset, we should all appreciate the need for regulating the practice of law and that the Grievance Committee is not the lawyer's enemy nor is it created for the purpose of hurting lawyers except for just cause.

Recognizing that the lawyers attending are engaged in criminal practice, there will be some effort to touch upon the things which are important to that practice. This said, it is still paramount that every lawyer have a decent grounding in the basics of ethical practice attached to all segments of the law.

Thus, back to basics, so that we can all be better lawyers and be able to go home in the evening without worry of ethical considerations. In other words, let's just have to be concerned with doing our jobs better.

Jerome Karp

KINGS COUNTY CRIMINAL BAR ASSOCIATION CLE 3/12/09

- I. Disciplinary Process -
 - A. Second Department
 1. Sources of Complaints, including but not limited to:
 - a. letters from clients, other attorneys, judges, court personnel (DR1-103 requires reporting professional misconduct by an attorney);
 - b. judicial opinions;
 - c. sua sponte investigations based upon failure to timely re-register with OCA; failure to timely notify OCA of changes of address; failure to cooperate with the Grievance Committee; criminal convictions (attorneys are required to send a certified copy of the certificate of conviction to the Clerk of the Appellate Division within 30 days pursuant to Judiciary Law Section 90).
 2. Handling of the complaint:
 - a. upon initial screening if there is a failure to state a complaint in the legal sense, the matter is closed without further action;
 - b. fee disputes and minor complaints are sent to the local Bar Association, Free Dispute Committee or the Grievance Committee.
 3. Investigatory process:
 - a. inquiry is sent to the attorney for a response, to which the attorney must respond in writing;
 - b. copy of the attorney's response is sent to the complainant for any possible reply; the Grievance Committee does not necessarily send the complainant's reply to attorney, only if there is something raised which should have an answer.
 - c. request for production of documents;
 - d. deposition of the attorney when required.

4. Resolution of complaint:
 - a. counsel to the Grievance Committee makes a report and recommendation to committee;
 - b. Grievance Committee discusses the matter and votes on disposition at its regular meeting (there are ten annual meetings from September through June).
5. Disposition:
 - a. dismissal;
 - b. dismissal with advisement;
 - c. letter of caution;
 - d. letter of admonition;
 - e. disciplinary proceeding.
6. Disciplinary Proceeding:
 - a. Chairman of GC petitions court (Appellate Division) for permission to institute a Disciplinary Proceeding;
 - b. Court issues an order granting permission, assigning chief counsel to prosecute, appoints a Special Referee to hear and report;
 - c. Petition is served on Respondent;
 - d. Respondent answers;
 - e. Pre-hearing conference;
 - f. Hearing;
 - g. Referee reports after giving parties an opportunity to file memoranda - Report finds charges either sustained in whole or in part or not sustained. Referee cannot make any recommendation as to sanction. Standard of proof is preponderance;
 - h. Motion made by either side to confirm or disaffirm in whole or in part - other side can cross-move - memoranda generally submitted.
 - i. Court in conference reviews the matter. Reporting judges (five) sign off - always unanimous.

j. Possible sanctions when charges are sustained:

- i) censure
- ii) suspension
- iii) disbarment
- iv) court can remit the case to the GC to impose an admonition
- v) court can issue a private admonishment

B. First Department

1. Complaint letter and sua sponte complaints are used as in 2nd Department.

Answers required - Q&A used

2. Counsel makes recommendation to two executive committee members for permission to prepare and serve a statement of charges. This institutes a Disciplinary Proceeding without the court's imprimatur as in the 2nd Dept. One member necessary to dismiss or issue letter of admonition.

3. Respondent serves an answer

4. Hearing before a referee who:

- a. makes finding as to whether charges are sustained in whole or in part;
- b. if sustained, the referee takes proof as to sanction. Both sides make recommendations and may submit memoranda. Standard of proof is preponderance. Referee must make recommended sanction which is reviewed by a panel of the Disciplinary Committee and then by the Court. Range of sanctions are the same except First Department does not issue letters of caution.

I. What to do when a complaint is received:

A. Do not disregard or neglect it; do not panic; do not procrastinate;

B. Do not fail to get help (this means seek the advice of a lawyer in whose judgment you have confidence and who is detached from your problem). I speak to lawyers all the time, often without being retained. I believe it is something that lawyers owe to one another. I advise so that a violation can be avoided. Be mindful of the fact

that a failure to respond to inquiry from the Grievance Committee is a disciplinary offense and, moreover, can result in immediate suspension from practice;

- C. All lawyers have a duty of candor to the Court. If a lawyer, in an effort to avoid responsibility, lies and this can be established, there will be additional charges often more serious than the initial complaint.
- D. Demonstrate sincere contrition.
- E. Although there may not be a true defense which excuses the infraction, it is helpful to demonstrate a reason for how and why the infraction occurred and to produce evidence of mitigation and good character.

II. Specifics:

- A. The initial cause of most problems is the failure of the lawyer to respond to the client. More often than not, the particular case is a stinker that the lawyer should not have taken, therefore be as selective as possible; good cases are attended to, bad ones are not.
- B. A lawyer who undertakes representation of a client even without receiving his fee, can not abandon the client and must do what is required for adequate representation. Lawyers must be relieved by the Court unless the client retains other counsel who substitutes.
- C. All agreements between the attorney and the client should be reduced to writing. Remember that if there is a dispute, the writing or contemporaneous memorandum is always the best evidence;
- D. Particular infractions:

- I. Conflicts of interest -

- A lawyer should avoid representing a client in an action against a former client. A lawyer who falls into the situation where a party consults him and does not become a client and the lawyer is then retained by the other side, either directly or as of counsel, he is precluded from representing either side.

- A lawyer shall not enter into a business relationship with his client. This

includes going into business and lending money to or borrowing money from a client. This means you can not advance money to a client for his/her living expenses. Exceptions are set forth in Section 1200.23.

You can advance disbursements as long as you provide for reimbursement.

If lawyer determines that his continued representation may adversely affect client by lawyer's own interests (unless a disinterested lawyer believes that client's interests will not be affected), client must consent after full disclosure of the implications of the lawyer's interest.

A common area where conflict raises its ugly head is when lawyer's obtain referrals from real estate brokers. Invariably, the lawyer works for a ridiculously low fee and, frequently, the interest of the broker becomes paramount to the interest of the client.

Another area which has caused a great deal of concern (particularly in the First Department) is the immigration field where clients have been referred by travel agencies and translation services. Very often the referrer of the client arranges the fee, collects the fee and pays the attorney. This is certainly unprofessional, if not illegal.

2. Fee disputes are generally heard by the fee dispute committees of the Bar Association. Try to make peace with the client even if you feel that the client is not entitled to return of fees. The time and aggravation, otherwise, just isn't worth it.
3. Notaries:

If I could convince you to meet with me tomorrow and each of you throws your notary stamp on a pile and we have a bonfire, I would find it satisfactory.

An example from an actual case unreported was the situation where two individuals were in partnership in the ownership of real property. They had a falling out and one partner was acquiring the interest of the other. This partner got various documents signed by the other partner and they were notarized. There was a foreclosure already pending on one of the parcels and the closing had to be held on

a particular day or the foreclosure would go through. For whatever the reason, the deed of conveyance was not notarized. The lawyer representing the purchaser, or the partner remaining in ownership, was under extreme pressure and when they discovered the omission of the notary at the closing, the lawyer notarized the purported signature of the seller. Of course the signature was a forgery and there was a great deal of difficulty.

Another case, also unreported, came about when an attorney, who represented a local individual in the ownership of various parcels of real property, advised his client to change the ownership of a parcel that was having difficulty meeting its mortgage obligation to a corporation and to effect the transfer of the property to the corporation, at the same time refinancing the mortgage. At that time, the lawyer was told that there was another individual who was involved in the ownership of the property and it was the sister of the client. The client appeared at the attorney's office with his sister who executed the necessary documentation, which was notarized by the lawyer. Unfortunately, it turned out that the client had a drug problem and that the purported sister was really one of his friends and the transaction was spurious. The lawyer, accepting the word of his client, never even bothered to obtain photo I.D. from the purported sister. (These types of situations are what created the absolute requirement for photo I.D.s and, further, probably caused the exclusion of notary public problems in the lawyers' malpractice insurance).

4. Dividing Fees:

- a. Client must consent to employment of other lawyer and know of division of fees;
- b. Division in accordance with the work done by each lawyer unless joint responsibility letter.

5. Deception:

- a. Lying to client (VIVAS, PIEPES);

seven years. The escrow ledger is a book which has recorded on a separate page each separate escrow deposit, each item paid out of escrow and a running balance of the client's money.

11. Responsibility of Partner -[See 1200.5] Partner is responsible if in the exercise of reasonable management or supervisory authority, should have known of the conduct.
12. Lawyer as Witness - [See 1200.21] Don't do it - Can't as to issues of fact. Exceptions.

IV. Understanding the Process:

A. Differs from knowing the process.

Curing the underlying problem does not necessarily make it go away. Many lawyers believe that if they make a monetary settlement with a client and the client signs a letter or affidavit withdrawing the charge, that the case is over. Not so. The Grievance Committee does not have to drop a case simply because the client wants to. Further, it is an offense for a lawyer to condition settlement of the dispute upon withdrawal of the complaint. It is also improper for a lawyer to importune the client to withdraw.

B. Neglecting the Grievance Committee or what is known as a failure to cooperate.

This can be a serious infraction. As lawyers we have a duty of candor with the Court. Make no mistake about it, the Grievance Committee is an arm of the Court. (TIGHE)

C. Failure to cooperate can lead to an interim suspension which means an immediate suspension which is not always a sanction. It means that the lawyer is suspended just as though he were tried in a Disciplinary Proceeding and a sanction of suspension was imposed. Interim suspension continues until the charges are heard and the Court ultimately rules. In the case of TIGHE, the respondent was engaged in family court practice and had complaints made relative to four different

family court matters. The attorney was suspended on an interim basis for failure to cooperate. When he finally obtained counsel and the matters were addressed, the four underlying complaints were dismissed, but the failure to cooperate resulted in a suspension for a period of two years. In the Second Department, credit is now given for interim suspension or the sanction of suspension. First Dept had frequently given credit.

Interim suspension can occur where a motion is made to the court in other instances, such as conviction of a serious crime which is not a felony; uncontroverted evidence of commission of a serious infraction such as conversion; failure to register with OCA.

- D. The word venality finds itself in more and more decisions. Venality has a simplistic definition in most dictionaries. In Black's Law Dictionary the word "venal" is defined "pertaining to something that is bought; capable of being bought; offered for sale; mercenary. Used usually in an evil sense, such purchase or sale being regarded as corrupt and illegal." None of these definitions seem to fit the circumstances that we are concerned with. The 1st Department has found that a lack of venality in a given sense can be a defense to the charge, whereas in the 2nd Department a lack of venality, at best, has been used for mitigation purposes.

It would seem, based upon examination of some of the cases, that venality, used in the sense that we are interested in, is one of self-dealing. Where, for example, a lawyer abuses his escrow account and takes money for his personal use rather than using it for other purposes. See Matter of Wowtschuk, 588 NYS 2d 605 (A.D. 2nd Dept. 1992). See Matter of Quesada, 613 NYS 2d 585 (A.D. 1st Dept. 1994). See Matter of Klugerman, 596 NYS 2d 397 (A.D. 1st Dept. 1993). See Matter of Kass, 655 NYS 2d 53 (A.D. 2nd Dept. 1997). See Matter of Goodman, 539 NYS 2d 461 (A.D. 2nd Dept. 1989).

V. Escrow ledgers -

1. Surprisingly, many lawyers are not aware that an escrow ledger is different from the

- escrow register in a checkbook. Most every checkbook has a place where the amount of the check and the number of the check may be recorded as well as the name of the payee. This is not an escrow ledger but a check register. If it happens to be in an escrow account, then it would be the register of an escrow checkbook.
2. The escrow ledger that is required under the rules is a different writing altogether. The rules require a separate page for each case where money is held in escrow. Thus, as an example, and a copy of a sample ledger is enclosed herewith, when a case is settled on behalf of John Doe v. Roe, the check is endorsed by both parties if it is made out to the lawyer and the client, which is the usual case. It is then deposited in the lawyer's escrow account and, after the check clears, the monies are disbursed. There should not be an inordinate length of time between the time the check is deposited in the escrow account and the time it is disbursed, and certainly it should not be more than 30 days at the outside. If there are some problems attendant on the escrow, such as the need to hold a portion of the money for a disputed lien, then, of course, that money should be retained.
 3. The first item that would be recorded in a ledger sheet for that case of Doe v. Roe would be the date and the nature of the deposit, such as settlement, and the amount. These would be in one column which would be called either debit or credit as the case might be, depending on how the lawyer wants to make the entry.
 4. After time has passed for the check to clear, the check should be drawn first to pay any liens which are against the case and reported as such, and subtracted from the deposit and showing what the balance would be. Then, continuing on through all the other disbursements such as disbursements advanced by the lawyer, the share to the client, and, finally, to the lawyer. The lawyer's fee should not be withdrawn before the client's share is drawn and remitted. Many lawyers obtain the consent of the client to endorse the check and deposit it in the escrow account to save time. This is permissible but the consent should be obtained in writing and it is better practice for the lawyer to make a photocopy of the check so that he can show it to

the client as having been deposited.

5. When all the funds are drawn, there should be a zero balance. This record should be retained for the same number of years as you should retain any other record.
Each check drawn on the escrow account must have written on it the name of the matter and the purpose.

VI. Sale of practice -

- a. notice to clients
- b. must be consent
- c. if client does not take action or object within 90 days, then consent is presumed.
- d. must let client know whether buyer of practice has been disciplined.

VII. 1. Confidence in Lawyers -

Lawyers are held to the highest ethical standards of any profession. There are 28 licensed professions in the State of New York and the only one which is not governed by the State Education Department and the Board of Regents is the legal profession. Lawyers are held to a higher standard and for good reason. Consider that a perfect stranger who enters the lawyer's office may, by virtue of the fact that the person he is talking to is a lawyer, deposit with him vast sums of money in escrow in connection with a matter, such as a real estate closing. This confidence that emanates from the fact that the lawyer is admitted to the Bar of this State, is certainly sufficient reason for a strict compliance with the rules on the part of lawyers. The public's confidence in the legal profession has never been wonderful, but the reliance, nevertheless, exists, and as lawyers we must attempt to practice in a way that does instill confidence in the public.

2. Sanctions -

Having said this, it is also important to attempt to alter some of the sanctions that are imposed for failure to comply. Too much time and money has been spent on matters which, I believe, can be adjusted by a type of "plea bargaining". This is not to say that lawyers on both sides can agree and that would be the end of it. Any accord that is reached would have to be subject to the approval of the Court. In addition, where cases are sufficiently serious to warrant a Disciplinary Proceeding, it would seem that in many instances, combinations of sanctions could be fashioned so as to avoid a lawyer's suspension or, sometimes, even disbarment. It requires some innovation in thinking and a willingness to apply those sanctions which are really at hand. For example, it seems that costs could be levied to defray the expense of the process in a given situation. Not that the payment of money should excuse or alleviate an infraction, but merely in a combination with another sanction, such as probation, supervised practice, community service. In one case in the Third Department, Matter of Sullivan, decided on September 30, 1998, the Court suspended a lawyer for 2 years but essentially stayed the suspension pending his good behavior and faithful monitoring of his escrow account by an accountant on a periodic basis. This is one example of where the Court can fashion sanctions within the existing law to avoid the loss of livelihood by the lawyer.

Unfortunately, there are some infractions that are inexcusable and must be heavily sanctioned. These, of course, include conversion, compromising of the Courts and our system of justice and serious matters of deception.

JOHN DOE V. ROE

ACCT. NO.

SHEET NO.

NAME		ADDRESS		TERMS	CREDIT LIMIT	RATING	
DATE	ITEMS	FOL	✓	DEBITS	CREDITS	DR. OR CR.	BALANCE
1/17/09	Settlement check			10000.00			10000.00
1/20/09	Disbursements				4000.00		9600.00
1/20/09	new KCH (cl. bill)				4000.00		9200.00
1/20/09	JOHN DOE - share less new				6000.00		3200.00
1/20/09	Att'y - fee				3200.00		0.00

Westlaw

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 183 A.D.2d 122, 588 N.Y.S.2d 605
 (Cite as: 183 A.D.2d 122, 588 N.Y.S.2d 605)

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C Supreme Court, Appellate Division, Second Department, New York.
 In the Matter of Ihor WOWTSCHUK, an Attorney and Counselor-at-Law.
 Grievance Committee for the Ninth Judicial District, Petitioner;
 Ihor Wowtschuk, Respondent.
 Oct. 13, 1992.
 As Amended Oct. 20, 1992.

In attorney disciplinary proceeding, grievance committee moved to confirm report of the special referee and subject attorney submitted affirmation in reply in which attorney conceded that report was correct as to its findings. The Supreme Court, Appellate Division, held that conversion and mishandling of escrow funds, commingling of clients' and personal funds in escrow account, and neglect of entrusted legal matter relating to administration of trust and estate warrant two-year suspension from the practice of law in light of mitigating factors, including absence of any element of self-dealing or venal interest.

Committee's motion granted, matter remitted, and attorney suspended.

West Headnotes

Attorney and Client 45 ↪ 59.13(3)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k59.1 Punishment; Disposition
 45k59.13 Suspension
 45k59.13(2) Definite Suspension
 45k59.13(3) k. In General. Most

Cited Cases
 (Formerly 45k58)

Attorney and Client 45 ↪ 59.13(4)

45 Attorney and Client
 45I The Office of Attorney
 45I(C) Discipline
 45k59.1 Punishment; Disposition
 45k59.13 Suspension
 45k59.13(2) Definite Suspension
 45k59.13(4) k. Mishandling of Trust Account or Client Funds. Most Cited Cases (Formerly 45k58)
 Conversion and mishandling of escrow funds, commingling of clients' and personal funds in escrow account, and neglect of entrusted legal matter relating to administration of trust and estate warrants two-year suspension from practice of law, in light of mitigating factors including absence of any element of self-dealing or venal interest.
 *122 **605 Gary L. Casella, White Plains (Maryann Yanarella, of counsel), for petitioner.

Bolger, Hinz & Zutt, P.C., Putnam Valley (William J. Bolger, of counsel), for respondent.

Before MANGANO, P.J., and THOMPSON, SULLIVAN, HARWOOD and BALLETTA, JJ.

PER CURIAM.

In this proceeding, the respondent was charged with six *123 allegations of professional misconduct. The Special Referee sustained Charges One, Three, Four and Five. Charge Six was sustained to the extent of finding the respondent guilty of neglecting a legal matter entrusted to him. The petitioner concedes that the Special Referee was correct in not sustaining Charge Two. The petitioner moves to confirm the report of the Special Referee and the respondent has submitted an affirmation in reply, in which he concedes that the report of the Special Referee is correct as to its findings.

Charge One alleged that the respondent engaged in conduct which adversely reflects on his fitness to practice law by converting funds entrusted to him

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to be held in escrow. Between September 1978 and March 1982, the respondent issued four checks drawn on his escrow account, either on behalf of clients or as reimbursement for various fees, prior to the receipt and deposit of client funds to cover those disbursements.

Charge Three alleged that the respondent issued four checks payable to the estate of Guerin and drawn on his escrow account at a time when no estate funds were on deposit.

****606** Charge Four alleged that the respondent consistently advanced funds from his escrow account for disbursements on behalf of clients prior to receipt and deposit of the subject funds into his escrow account.

Charge Five alleged that the respondent commingled clients' and personal funds in his escrow account from approximately 1976 to 1989.

Charge Six alleged that the respondent neglected a legal matter entrusted to him. Less than one month after his admission to the Bar, the respondent agreed to draft a will for a long-time family friend, J. Richard Guerin. Mr. Guerin's two sons were the sole beneficiaries, and trusts were established until the sons reached the age of 21. The respondent was named both the executor of the will and the trustee of the trust. Mr. Guerin died on November 19, 1977, and Letters Testamentary were issued to the respondent as sole executor on April 6, 1978. Pursuant to the will, the trustee was to continue to make support payments to Mr. Guerin's former wife, under a separation agreement dated April 2, 1976, until the younger child turned 21 on April 13, 1986. The estate consisted primarily of bank accounts, an insurance business, and an undivided one-half interest in the former marital ***124** residence. The insurance business was sold on April 11, 1978, for \$214,000; \$5,000 was to be paid upon execution of the contract, \$45,000 was due at closing, and the balance was to be paid to the respondent in equal semi-annual installments. Adjustments were to be made to these installments if accounts were

not retained or for liabilities which occurred after closing. The respondent failed to keep proper records of the adjustments and was unable to account for same. The respondent maintained a checking account in the name of the estate at the Bank of New York. From March 31, 1980, to June 29, 1984, the balance in the account was \$6,061.32. The bank sent the respondent a notification on January 13, 1984, indicating that the account had been inactive for the past five years and would "be subject to remittance to the State under the Abandoned Property Law". The respondent failed to take any action, and the monies were "remitted to the State in or about 1985." The respondent failed to maintain records for the estate, failed to pay real estate taxes on the Guerin residence from 1985 to 1988, and failed to file any estate or fiduciary tax returns until November 1989. At that time, \$21,804 was due in federal taxes, in addition to \$52,570 in accrued interest, resulting from the respondent's failure to file returns.

Based upon the evidence adduced at the hearing, we find that the Special Referee properly sustained Charges One, Three, Four, Five and Six, to the extent indicated. The respondent is guilty of the misconduct alleged. Accordingly the petitioner's motion to confirm the report of the Special Referee is granted.

In determining an appropriate measure of discipline to impose, we have considered the mitigating factors advanced by the respondent, including the absence of any element of self-dealing or venal intent. The respondent indicates that he has applied for and obtained the funds escheated and deposited them in the Estate account. He indicates that he had made disbursements out of the Estate account with due diligence and that he exacted no compensation for his extended services. Under the circumstances, the respondent is suspended from the practice of law for a period of two years, commencing November 13, 1992, and until the further order of this court.

ORDERED that the petitioner's motion to confirm

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the report of the Special Referee is granted; and it is further,

125 ORDERED** that the respondent Ihor Wowtschuk is suspended from the practice of law for a period of two years, commencing November 13, 1992, and continuing until the 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 two years upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of *607** disbarred, suspended and resigned attorneys (22 NYCRR 691.10), and (c) that he has otherwise properly conducted himself; and it is further,

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

N.Y.A.D. 2 Dept., 1992.
Matter of Wowtschuk
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END OF DOCUMENT

Westlaw.

196 A.D.2d 324

196 A.D.2d 324, 613 N.Y.S.2d 585

(Cite as: 196 A.D.2d 324, 613 N.Y.S.2d 585)

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V

Supreme Court, Appellate Division, First Department, New York.

In the Matter of Jose A. QUESADA (Admitted as Jose Alberto Quesada), a Suspended Attorney, Respondent.

Departmental Disciplinary Committee for the First Judicial Department, Petitioner.

April 7, 1994.

Hearing panel of Departmental Disciplinary Committee recommended suspension of attorney. The Supreme Court, Appellate Division, held that failure to maintain client funds intact and preserve identity of client funds, without venal intent, warrants two-year suspension.

Suspension ordered.

West Headnotes

Attorney and Client 45 ⇨ 59.13(4)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k59.1 Punishment; Disposition

45k59.13 Suspension

45k59.13(2) Definite Suspension

45k59.13(4) k. Mishandling of

Trust Account or Client Funds. Most Cited Cases (Formerly 45k58)

Failure to maintain client funds intact and to preserve identity of client funds, without venal intent and without conversion of funds, warrants two-year suspension, nunc pro tunc, from date of interim suspension. Code of Prof.Resp., DR 9-102, subd. A, McKinney's Judiciary Law App.

**585*324 Richard M. Maltz, New York City, of counsel (Hal R. Lieberman, attorney), for petitioner.

S. Stanley Kreutzer, New York City, of counsel (The Jacob D. Fuchsberg Law Firm), for respondent.

ent.

Before SULLIVAN, J.P., and KUPFERMAN, ROSS, ASCH and NARDELLI, JJ.

*325 PER CURIAM.

Respondent, Jose A. Quesada, was admitted to the practice of law in New York by the First Judicial Department on June 19, 1978 under the name Jose Alberto Quesada. At all times relevant herein, respondent maintained an office for the practice of law within the First Judicial Department.

By order of this Court entered February 4, 1992, respondent was suspended from the practice of law pursuant to 22 NYCRR 603.4(e)(1)(i) and (iii) on the grounds of his failure to cooperate with the Departmental Disciplinary Committee in its investigation, and uncontroverted evidence of professional misconduct, pending the outcome of disciplinary proceedings against respondent. 182 A.D.2d 145, 587 N.Y.S.2d 333.

On or about January 15, 1993, respondent was served with a notice and statement of charges. The charges alleged that respondent failed to maintain escrow money intact for two separate clients, in violation of Code of Professional Responsibility DR 9-102(A) and engaged in conduct adversely reflecting on his fitness to practice law in violation of DR 1-102(A)(6).

Staff counsel advised the Hearing Panel that respondent had received two prior admonitions for neglect.

In its report, at the conclusion of the hearing, the Hearing Panel noted, *inter alia*:

"Staff counsel no longer alleges a failure to cooperate. Respondent has changed counsel and has cooperated fully since the time of his suspension.

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"At our hearing the Panel requested all evidence that might show improper diversion of funds, and staff counsel conceded that there was no such evidence. Quesada himself states that he never improperly diverted funds and that the errors, for which we find he is sincerely contrite, arose from the press of business in an overburdened single practitioner's office which handled a large volume of small cases, and a staff inadequate to certain of the functions of a well run office. He states without contradiction that he has hired more effective bookkeeping assistants and promises that such a mistake will never again be repeated."

The Hearing Panel announced it had sustained Charges One and Four reflecting that respondent failed to maintain client funds intact and preserve the identity of client funds, in *326 violation of DR 9-102(A) for both matters. The Hearing Panel did not sustain Charges Two and Three which alleged that **586 respondent engaged in conduct which adversely reflects on his fitness to practice law in violation of DR 1-102(A)(6).

The Hearing Panel recommended a sanction of suspension for a period of two years.

The Departmental Disciplinary Committee now seeks an order confirming the Hearing Panel's report and imposing the recommended sanction.

A review of the evidence presented to the Hearing Panel, particularly respondent's admissions, indicates that there is ample evidence to support the Hearing Panel's findings that respondent failed to maintain client funds intact and preserve the identity of client funds, in violation of DR 9-102(A). No evidence was presented, however, to indicate that respondent converted any of the clients' funds to his own use or acted with venal intent. It appears that the shortfalls in respondent's escrow account at various times were the result of his failure to attend to bookkeeping matters and his delegating the task of depositing clients' checks to secretaries and receptionists. No client suffered a loss as a result of respondent's actions and full, prompt and complete

payment of all disbursements and claims to all creditors and the balance due to the client in each of the matters charged was paid before charges were filed or even instituted by the Departmental Disciplinary Committee.

The lack of venal intent on the part of respondent distinguishes this case from the cases where attorneys have been disbarred for conversion. In cases where it has been found that the mishandling of client funds arose primarily out of an attorney's carelessness or the attorney was mistaken as to his entitlement to his client's funds and there was no motive to convert, the sanction imposed by this Court has been suspension from the practice of law for a period of two years. (See, *Matter of Klugerman*, 189 A.D.2d 284, 596 N.Y.S.2d 397 [1st Dept 1993]; *Matter of Altomerianos*, 160 A.D.2d 96, 559 N.Y.S.2d 712 [1st Dept 1990]; *Matter of Altschuler*, 139 A.D.2d 311, 531 N.Y.S.2d 91 [1st Dept 1988].)

In the case at bar, the Hearing Panel recommended that respondent, who has been temporarily suspended by this Court since February 4, 1992, should be "suspended until the completion of these proceedings, which should be approximately two years." Since the Hearing Panel's recommendation is in accord with recent precedent of this Court and respondent*327 did not present any compelling mitigation that would warrant less than a two-year suspension, we accept that recommendation.

Accordingly, the Disciplinary Committee's petition should be granted; the Hearing Panel's report should be confirmed and the recommended sanction imposed. Respondent is, therefore, suspended from the practice of law for a period of two years, nunc pro tunc, from February 4, 1992, the date of the Court-ordered interim suspension.

In view of the fact that no issue has been raised that respondent has failed to comply with the interim order of suspension, respondent is reinstated to the practice of law, effective immediately, without further proceedings. It does not appear that any pur-

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pose would be served to compel respondent to withstand a lengthy reinstatement proceeding at this point and such would unduly prolong the length of respondent's suspension.

Respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective April 7, 1994.

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Westlaw

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C Supreme Court, Appellate Division, Second Department, New York.
In the Matter of Arthur KASS, an attorney and counselor-at-law.
Grievance Committee for the Ninth Judicial District, Petitioner,
Arthur Kass, Respondent.
March 3, 1997.

In attorney discipline proceeding, the Supreme Court, Appellate Division, held that three-year suspension was warranted for attorney's conversion of funds entrusted to him and failure to account for those funds, improper withdrawal from his escrow account of funds payable to cash, and failure to maintain and/or produce ledger book or similar record and records for all deposits and withdrawals for his attorney escrow account.

Suspension ordered.

West Headnotes

Attorney and Client 45 ⇨ 59.13(4)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.13 Suspension
45k59.13(2) Definite Suspension
45k59.13(4) k. Mishandling of
Trust Account or Client Funds. Most Cited Cases
(Formerly 45k58)

Three-year suspension was warranted for attorney's conversion of funds entrusted to him and failure to account for those funds, improper withdrawal from his escrow account of funds payable to cash, and failure to maintain and/or produce ledger book or similar record and records for all deposits and withdrawals for his attorney escrow account, in case in which attorney did not benefit personally from errors. N.Y.Ct.Rules, 1200.3(a)(8) [DR 1-102, subd.

A, par. 8], 1200.46(d)(1, 2, 8), (e) [DR 9-102, subds. D, pars. 1, 2, 8, E].

****53*95** Gary L. Casella, White Plains, (Faith Lorenzo, of counsel), for petitioner.

Sarah Diane McShea, New York City, for respondent.

Before MANGANO, P.J., and BRACKEN, ROSENBLATT, MILLER and KRAUSMAN, JJ.

****54 PER CURIAM**

In this proceeding, the respondent is charged with four allegations of professional misconduct. The Special Referee sustained all four charges. The Grievance Committee now moves to confirm the Special Referee's report while the respondent cross-moves to confirm in part and disaffirm in part and to limit any sanction imposed to a public censure.

Charge One alleged that the respondent engaged in conduct adversely reflecting on his fitness to practice law by converting funds entrusted to him and failing to account for those funds in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]).

The respondent represented Marguerite Piasecki in a matrimonial matter and/or real estate closing in or about 1987. The closing of the Piasecki property occurred on June 24, 1987. By agreement of the parties, \$128,484.17 of the sale proceeds was given to the respondent for deposit in his escrow account at the Putnam County National Bank. The remaining \$98,612.83 paid by the purchasers at the closing was entrusted to Mr. Piasecki's attorney.

The records for the respondent's special account at the Putnam County National Bank reflect the following authorized disbursements by him from the proceeds of the sale of the Piasecki property:

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a. As agreed by the Piaseckis, on June 25, 1987, \$96,700 was paid by certified check no. 771, to Marguerite Piasecki, who was purchasing a condominium.

b. On or about September 23, 1987, the respondent issued check no. 821 in the amount of \$8,000 to Marguerite Piasecki.

c. On October 20, 1987, the respondent issued check no. 829 in the amount of \$217.56 to Marguerite Piasecki.

d. On October 20, 1987, with his client's approval, the respondent issued check no. 830 in the amount of \$900 payable to himself, in payment of his legal fees for handling the sale of Mrs. Piasecki's house and reviewing the contract for the purchase of her condominium (the respondent did not charge *96 Mrs. Piasecki any legal fees for handling her matrimonial matter).

e. On March 27, 1989, the Piaseckis having reached agreement on a property settlement, the respondent issued check no. 1014 in the amount of \$14,935.67 to Marguerite Piasecki.

f. On December 3, 1991, the respondent issued check no. 1112 in the amount of \$2,713.50, to Mrs. Piasecki. The respondent had opened a new IOLA account at the Putnam County Savings Bank in mid-1990 for client funds. The \$2,713.50 transferred to Mrs. Piasecki represented the balance remaining in the special account at the Putnam County National Bank. The respondent forwarded this amount to Mrs. Piasecki after he concluded that his prior calculations of the amounts due to her were in error and that the remaining balance in the now-dormant account must belong to her.

g. As of February 2, 1995, the total amount of funds disbursed to Mrs. Piasecki or on her behalf was \$123,466.73. In April 1995, having undertaken a thorough review of his bank records for all transactions, respondent paid an additional \$1,463 to Mrs. Piasecki. The sum of \$3,554.44 is still owed from

the sale proceeds, although the correct recipient has yet to be determined.

On April 7, 1994, the respondent appeared and testified at the petitioner's offices, as requested. He was not represented by counsel. In response to the petitioner's questions, the respondent testified that he had closed his special account at the Putnam County National Bank in December 1991 and, further, that he later learned that there was a shortfall in the account of "maybe \$6,000" which he was not able to account for or trace. The respondent explained that, without a full audit of the account and a thorough review of the files corresponding to the transactions he had handled, he could not determine why there was a shortfall in the account. In fact, the respondent had underestimated the Piasecki shortfall. A recent audit of the account concluded that there had been an underpayment from the Piasecki transaction of \$5,018. The auditor who was **55 retained by the respondent concluded on his May 1, 1995, report that there was no evidence that the respondent had received any portion of those funds or any other funds to which he was not entitled.

Charge Two alleged that the respondent engaged in conduct that adversely reflects on his fitness to practice law by converting funds entrusted to him and breached his fiduciary duty by failing to account for those funds, in violation of Code of Professional *97 Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]).

As of March 1, 1989, the balance in the respondent's special account should have included the approximately \$22,667 remaining from the sale of the Piasecki property.

The actual balance in that account on March 1, 1989, as shown on the monthly bank statement, was \$16,936.06. The deficiency in the account, approximately \$5,731, is not in dispute. There is no evidence that the respondent personally benefitted from that deficiency or that he received any portion of those funds.

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On March 27, 1989, the Piasceckis having agreed upon a property settlement in their pending matrimonial matter, the respondent disbursed \$14,935.67 to Marguerite Piasecki from the funds on deposit in his special account. Following that disbursement, the balance in his special account should have included approximately \$7,731 remaining from the proceeds of the sale of the Piasecki property. As reflected on the monthly bank statement for the account, the balance in the account on April 17, 1989, was \$6,169.17. The deficiency in the account on that date, approximately \$1,562, is not in dispute. There is no evidence that the respondent personally received any portion of those funds.

In July 1990, the respondent switched banks and opened a new account at the Putnam County Savings Bank, entitled "Arthur Kass, IOLA Account", account number 503370. From September 1990 until the account was formally closed in December 1991, there was no activity in the respondent's special account at the Putnam County National Bank, with one exception. On or about December 3, 1991, just prior to closing the account, the respondent disbursed \$2,713.50, the entire remaining balance in the account, to Mrs. Piasecki. The balance in the account, prior to this final distribution, should have included the \$7,731 remaining from the proceeds of the sale of the Piasecki property. The deficiency in the account, approximately \$5,018, is not in dispute. There is no evidence that the respondent personally received any portion of those funds. The deficiencies in the special account, which has now been audited, were attributed by the auditor in his May 1, 1995, report to several calculation errors in amounts due to clients and third parties. There is no evidence that the respondent benefitted personally from any of these errors or that he received funds from his special account to which he was not entitled.

*98 Charge Three alleged that the respondent engaged in conduct that adversely reflects on his fitness to practice law by improperly making withdrawals from his escrow account, in violation of

Code of Professional Responsibility DR 9-102(E) (22 NYCRR 1200.46[e]).

Code of Professional Responsibility DR 9-102(E) (22 NYCRR 1200.46[c]) requires that all special account withdrawals be made only to a named payee and not to cash. The respondent failed to comply with that section by withdrawing funds payable to cash.

Charge Four alleged that the respondent engaged in conduct that adversely reflects on his fitness to practice law by failing to maintain and/or produce a ledger book or similar record and records for all deposits and withdrawals for his attorney escrow account, in violation of Code of Professional Responsibility DR 9-102(D) (22 NYCRR 1200.46[d]).

At his appearance at the Grievance Committee's offices on March 24, 1994, the respondent was asked to provide copies of his check registers, bank statements, cancelled checks, deposit slips, and ledger for his escrow accounts. The respondent agreed to provide this material by April 7, 1994. During his testimony at the Grievance Committee's offices on April 7, 1994, the respondent stated that he did not maintain a ledger for his escrow account. The respondent failed to provide bank statements for his Putnam **56 County National Bank escrow account for October 1990 and December 1990 through November 1991.

On October 24, 1994, the Grievance Committee served the respondent with a court ordered judicial subpoena duces tecum, dated October 17, 1994. The subpoena directed the respondent to produce any and all deposit slips, deposit tickets, or deposit items, for both his Putnam County National Bank escrow account and his Putnam County Savings Bank escrow account. The respondent failed to produce deposit slips for his Putnam County National Bank escrow account for the period 1986-1991. Pursuant to Code of Professional Responsibility DR 9-102(H), (I) (22 NYCRR 1200.46[h], [i]) failure to maintain the aforementioned records subjects the

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respondent to disciplinary proceedings.

The respondent knew or should have known, in committing the aforementioned acts, that he was violating Code of Professional Responsibility DR 1-102(A)(8); 9-102(D)(1), (2), and (8); and 9-102(E) (22 NYCRR 1200.03[a] [8]; 1200.46[d][1], [2], and [8]; [e]).

*99 With respect to Charge Four, the parties stipulated that the respondent did not maintain a ledger book for his escrow account at the Putnam County National Bank. The respondent did, however, maintain bank statements, cancelled checks, and check stubs and made notations on these and on documents in his files reflecting the activity in the special and IOLA accounts.

The Putnam County National Bank supplied to the Grievance Committee the deposit slips for the respondent's escrow account which were the subject of a subpoena duces tecum dated March 3, 1995, issued by this court.

Based on the stipulations and the evidence adduced, we find that the Special Referee properly sustained all four charges. The Grievance Committee's motion to confirm is granted. The respondent's cross-motion is granted only to the extent that the Special Referee's report is confirmed and is otherwise denied.

In determining an appropriate measure of discipline to impose, the respondent asks the court to consider that he has been practicing law for more than 40 years with a previously unblemished record and is a contributing member of the community who often renders legal services to those who can least afford them. While he concedes that it does not excuse his actions, the respondent submits that his family tragedies during this period almost certainly affected his attentiveness to his practice and contributed to the problems at issue in this proceeding. The respondent emphasizes the lack of any evidence that he misappropriated funds or misused his escrow account. He has taken steps to prevent similar prob-

lems from occurring in the future, such as maintaining a ledger and arranging for the auditor to review his records regularly. The respondent submits that he poses no threat to the public and is unlikely to make similar mistakes again. In view of the absence of venality or personal gain and his undisputed reputation for honesty, integrity and trustworthiness, the respondent submits that a censure would constitute an appropriate sanction.

Under the totality of circumstances, the respondent is suspended from practice for three years.

ORDERED that the petitioner's motion to confirm the report of the Special Referee is granted and the respondent's cross-motion is granted only to the extent that the Special Referee's *100 report is confirmed, the cross-motion is otherwise denied in all respects; and it is further.

ORDERED that the respondent, Arthur Kass, is suspended from the practice of law for a period of three years, commencing April 3, 1997, and continuing until the 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 three years, upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10), and (c) that he has otherwise properly conducted himself; and it is further.

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

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(4) holding himself out in any way as an attorney
and counselor-at-law.

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