

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)*

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**THE OATH OF  
OFFICE**

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*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*

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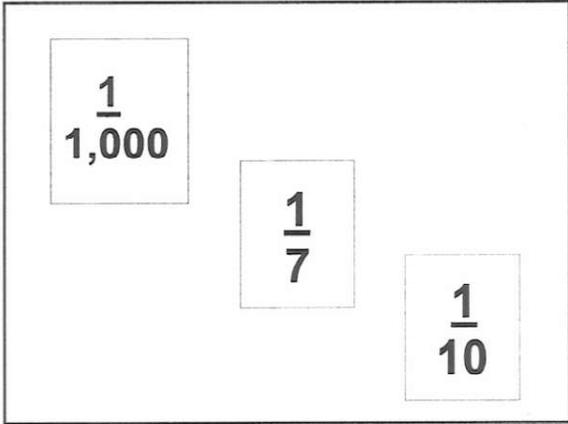
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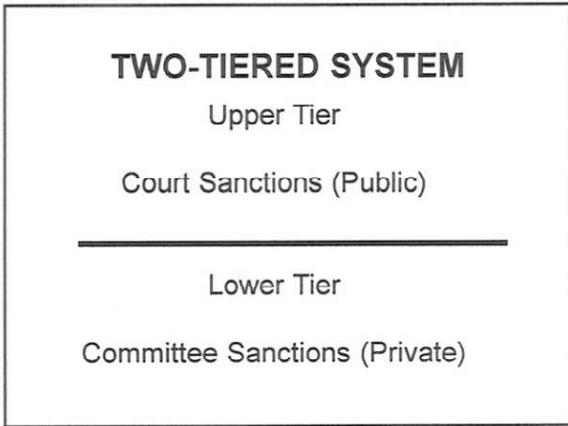
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- ▣ **Screening & Registration**
- ▣ **Disposition - on papers**
- ▣ **The "Three C's"**

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**AVOIDING THE  
"CREDIBILITY CONTEST":**

PRACTICE DEFENSIVELY

MEMORIALIZE

MAINTAIN RECORDS

**90%**

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**FEES &  
AGREEMENTS**

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**FEES - Rule 1.5**

**MANDATORY WRITINGS**

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

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**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.

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**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)]

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**FEE SHARING Rule 1.5(g)**

“Referral” fee is unethical

*Referring lawyer must either:*

- ① Perform services  
or
- ② Retain responsibility

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**COMMUNICATION**

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- AFFIRMATIVE DUTY**
- Communicate with clients/ other lawyers
  - Communicate settlement offers
  - Reveal malpractice

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**EX PARTE COMMUNICATIONS**

*Rule 3.5(a)(2)*

*When in doubt, give appropriate notice to opposing counsel*

*Use "equivalent service"*

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**THREATENING CRIMINAL  
PROSECUTION**

*Rule 3.4(e)*

**BEWARE OF DEMAND LETTERS**

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**CONFIDENTIALITY**

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***DISCLOSURE TO DEFEND  
AGAINST ACCUSATION OF  
WRONGFUL CONDUCT***

*Rule 1.6(b)(5)(i)*

**NECESSARY = MATERIAL  
&  
RELEVANT**

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**CONFLICTS  
OF  
INTEREST**

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***CONFLICT OF INTEREST***

REAL ESTATE - Seller/Purchaser  
Broker/Attorney

MATRIMONIAL - Husband/Wife  
Divorce Mediation

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**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

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***CIVILITY AND PROFESSIONALISM***

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***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

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**Rule 1.15**



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

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**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**

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**The Client or 3rd Party Complaint**

“Failure to Release Escrow Funds”

“Neglect of a Legal Matter”

“Won’t Return My Inquiries”

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**DISHONORED CHECK COMPLAINT**

NY BANK → Lawyers’ Fund → GC



**Failure to ensure funds  
were available at time of  
disbursement**

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**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**

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The Risk  **Audits can reveal:**

Improper bank & bookkeeping practices

Failure to safeguard = Misappropriation 1.15(a)



**UPPER TIER**

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**Four Key Principles:**

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

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**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**



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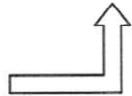
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Attorney Master/ Client Sub-Account(s)

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

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**PERILS IN OPENING ACCOUNT**



ATM

OVERDRAFT PRIVILEGES

LINKING BUSINESS/PERSONAL  
ACCOUNT TO IOLA ACCOUNT

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**SEGREGATION/COMMINGLING**

**Business**

**Client**

**Personal**

**Third party**

**Attorney fees**

**Bank charges**



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**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

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**What if the client refuses to pay your fee?**

If Escrow



**MUST RELEASE FUNDS**

If Non-Escrow



**CAN KEEP IN IOLA**

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REQUIRED BANK AND  
BOOKKEEPING RECORDS

**Rule 1.15(d)**

ALL ACCOUNTS THAT CONCERN OR  
AFFECT THE PRACTICE OF LAW

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Keep a **GENERAL LEDGER**

Preserve **ORIGINAL** Bank records

Maintain copies of **DISBURSEMENT** items

**FOR SEVEN YEARS**

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**Reconciliation and Supervision**

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

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



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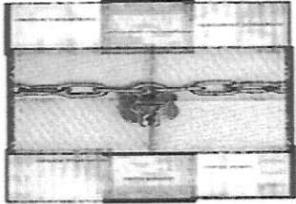
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# Preservation



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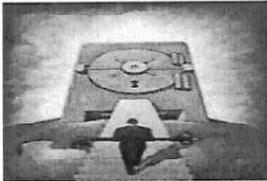
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## Rule 1.15(a)

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

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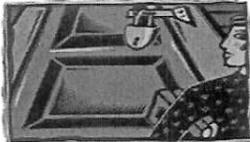
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Funds deposited = Funds disbursed

Preservation requires more:

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

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

<u>Date</u>	<u>Client</u>	<u>Transaction</u>	<u>Balance</u>
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

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If \$100,000 IS NOT Available

When the \$75,000 check is presented



**It will be dishonored**

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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

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<u>Date</u>	<u>Transaction</u>	<u>Client</u>	<u>Amount</u>	<u>Balance</u>
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	<b>Ret Dep</b>	Jones	5k	5k
1/20/14	Re-Dep	Jones	5k	10k
2/15/14	Closing	Smith	10k	0

◆ Rule of preservation has been violated ◆

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**No Speeding Zone**

KEY "FAC" BEFORE DISBURSING

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**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**

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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

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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

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**LAWYER  
ASSISTANCE  
PROGRAM**



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

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## 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

**Muriel L. Gennosa** is the Executive Director for Attorney Matters and Counsel to the Committees on Character & Fitness for the Appellate Division, Second Judicial Department. She previously served as an Assistant Counsel, and later Deputy Chief Counsel, for the Grievance Committee for the Tenth Judicial District (1986-2005). While at the Grievance Committee, Ms. Gennosa gained experience involving analysis of attorney's fiduciary accounts. She also served as a Deputy Chief Attorney in the Special Counsel's Office (2005-2014) and as the Supervisor of the Court's Attorney Disciplinary Department (commencing in 2015). Ms. Gennosa received her B.S. in Personnel Administration and Industrial Relations from Ithaca College and her J.D. from Hofstra University School of Law.

**Robert P. Guido** is "of counsel" to the firm of Russo Karl Widmaier & Cordano PLLC, where he concentrates primarily in matters involving attorney disciplinary defense, attorney reinstatements, and applicants for admission to practice. Mr. Guido retired from the Appellate Division, Second Judicial Department in December 2019, where he held the title of Executive Director for Attorney Matters and Counsel to the Committees on Character & Fitness. Previously, he served as a staff attorney with the Grievance Committee for the Tenth Judicial District, rising to the position of Chief Counsel from 2001-2005. He also formerly served as an Assistant District Attorney in Nassau County. Mr. Guido has served by appointment of the Chief Judge as a member of the New York State Commission on Statewide Attorney Discipline, the New York State Lawyer's Assistance Trust, and the Commission on Alcohol and Substance Abuse in the Legal Profession and served on the Administrative Board drafting committees for the Attorney Advertising Rules, the Rules of Professional Conduct, and the Rules for Attorney Disciplinary Matters. He is a Life Member of the New York Bar Foundation and has received awards for his service to the New York State, Nassau County, and Suffolk County Bar Associations, where he held leadership positions on various committees over the course of three decades. He is a frequent CLE presenter on lawyer regulatory matters. Admitted to practice in 1979, Mr. Guido holds his B.A. and J.D. from Hofstra University.

**Laura L. Smith** is Chief Counsel for the Advisory Committee on Judicial Ethics, which provides ethics advice to approximately 3,600 judges and justices at every level of the judiciary in New York State, as well as hundreds of quasi-judicial officials such as judicial hearing officers, support magistrates, and court attorney-referees. She previously served as one of the Advisory Committee's staff counsel, concurrently with her service as Executive Director of the Judicial Campaign Ethics Center (August 2006-May 2013), and then Statewide Special Counsel for Ethics for the New York State Unified Court System (May 2013-June 2015). Ms. Smith is a co-author of the "Civility" chapter in Volume 4A of Haig's *Commercial Litigation in New York State Courts*. She has also served as a speaker or panelist for Continuing Legal Education and other law-related programs at the New York City Bar Association, the Practising Law Institute, the Office of the Attorney General, the Association of Professional Responsibility Lawyers, and St. John's University School of Law. Before joining the Office of Court Administration, Ms. Smith was a senior litigation associate at Pillsbury Winthrop Shaw Pittman LLP. 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.