Garden State CLE
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Video Course Evaluation Form

Attorney Name_____

Atty ID number for Pennsylvania:_____

Name of Course You Just Watched_____

Please Circle the Appropriate Answer

Instructors:	Poor	Satisfactory	Good	Excellent
Materials:	Poor	Satisfactory	Good	Excellent
CLE Rating:	Poor	Satisfactory	Good	Excellent

Required: When you hear the bell sound, write down the secret word that appears on your screen on this form.

Word #1 was: _____ Word #2 was: _____

Word #3 was: _____ Word #4 was: _____

What did you like most about the seminar?

_____

_____

_____

What criticisms, if any, do you have?

_____

_____

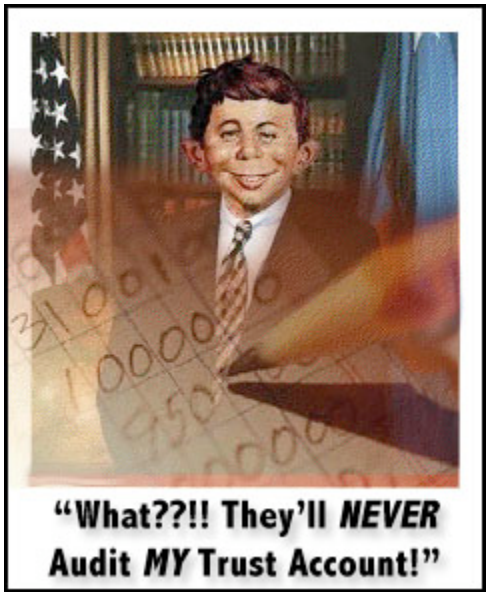
I Certify that I watched, in its entirety, the above-listed CLE Course

Signature _____ Date _____

Garden State CLE

Presents:

They'll Never Audit MY Trust Account!



Lesson Plan

They'll Never Audit MY Trust Account

Table of Contents

Part I - Introduction

New Jersey Constitution of 1947

ARTICLE VI

SECTION I

The judicial power shall be vested in a Supreme Court, a Superior Court, and other courts of limited jurisdiction. The other courts and their jurisdiction may from time to time be established, altered or abolished by law.

SECTION II

The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

Sources of Law are:

Rules of Court (Rule 1:21-6)

Rules of Professional Conduct (RPC 1.15)

Published Decisions of N.J. Supreme Court

Characteristics of the New Jersey Bar (December 2008)

1. Total Attorneys Admitted to Practice = 85,089 (8th in USA)

Engaged in Private Practice = 34,381 (40%) (90% Practice in N.J.)

Full Time – 21,348

Part-time – 7,308

Occasionally – 4,570

Undefined – 1,155

2. Law Firm Structures (Based upon Survey Response)

Sole Proprietor – 11,068

Two-Person Firm – 3,439 (1720 firms)

Three to Five Attorneys – 5,245 (1,311 firms)

Six to 49 Attorneys – 9,363 (698 firms)

50 or More Attorneys – 5.039 (101 firms)

Grounds for Imposition of Final Discipline – 2008

The Vast Majority of Accounting Issues Arise in the Context of Sole practitioners or small firms

Gross Neglect/Pattern of Neglect – 28.1%

Negligent/Reckless Misappropriation of Entrusted Funds – 20.6%

Knowing Misappropriation of Entrusted Funds – 16.5%

Total Held in N.J. Attorney Trust Accounts = $3 Billion

Additional Sums Held for Estates, Guardianships, etc.

Random Audit Compliance Program

Intended to Halt "Ponzi Schemes" and Reluctant Clients

98.7% of audits are unremarkable

Notice provided 10-days to two-weeks ahead of time

Review of both Business & Trust Account Records for:

*** Maintenance & Location of Records**

***Designation and Signatories on Checks**

*** No ATM or Overdraft Protection**

*** Seven-Year Retention Period**

*** Monthly Trust Account Reconciliation**

*** Separate Trust Ledger for Every Client Matter**

*** Running Balance for Each Trust Ledger**

*** Trial Balance of Trust Ledgers to Bank Balance**

*** All transactions recorded within 24 Hours**

*** No commingling of Personal funds with Trust Money**

*** No commingling Payroll Trustee taxes**

*** Separate Client Ledger for bank Charges**

*** Follow bank's Funds Availability Schedule**

Trust Overdraft Notification

New Jersey Banking Institution Holding Trust Monies Must Agree to Notification Procedures

Over 23 Years resulted in final discipline for 123 Attorneys (66 disbarred)

Part II - Misappropriation

1. Knowing Misappropriation - In re Wilson, 81 NJ 451 (1979)

What are the merits in these cases? The attorney has stolen his clients' money. No clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined. The public is entitled, not as a matter of satisfying unjustifiable expectations, but as a simple matter of maintaining confidence, to know that never again will that person be a lawyer. That the moral quality of other forms of misbehavior by lawyers may be no less reprehensible than misappropriation is beside the point. Those often occur in a complex factual setting where the applicability or meaning of ethical standards is uncertain to the bench and bar, and especially to the public, which may not even recognize the wrong. There is nothing clearer to the public, however, than stealing a client's money and nothing worse. Nor is there anything that affects public confidence more much more than the offense itself than this Court's treatment of such offenses. Arguments for lenient discipline overlook this effect as well as the overriding importance of maintaining that confidence.

In summary: maintenance of public confidence in this Court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will be crippled institutions. Functioning properly, however, in the best traditions of each and with full public confidence, they are the very institutions most likely to develop required reform in the public interest.

Elements of Misappropriation under *Wilson*

(In re Noonan, 102 NJ 157, 160-61, (1986)

[A] Misappropriation that will trigger automatic disbarment under *In re Wilson,* consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. To the extent that the language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality"-all are irrelevant.

2. Negligent Misappropriation

(In re Noonan, 102 NJ 157, 160-61, (1986)

Because of this ambiguity, we questioned counsel for the OAE who prosecuted the case before us closely on this issue, especially since the OAE took the position that respondent should be disbarred. That questioning revealed that the OAE's position was not that knowing misappropriation had been established, but rather that respondent's negligence in handling money was sufficiently gross to warrant disbarment even if he did not *know* it was client's money. That is *not* the rule of *Wilson.* Counsel for the OAE not only interpreted the findings of the District Ethics Committee and the DRB as the equivalent of a finding that there was *not* any knowing misappropriation, thereby reinforcing our similar understanding of the finding, but also conceded that the record could not support a finding of knowing misappropriation. It is our concurrence with that understanding that leads to our acceptance of the DRB's recommendation rather than the imposition of disbarment.

In re Gallo, 117 NJ 365 (1989) (Three-month suspension)

Although respondent did not knowingly misappropriate client funds, we cannot sanction his serious misconduct. Lawyers have a duty to assure that their accounting practices are sufficiently rigorous to prevent misappropriation of trust funds. Whether through ignorance or inattentiveness, the accounting procedures in respondent's office at the time of his audit were entirely inadequate. Respondent was unaware of the balance in the trust account on any given day and consequently could not determine whether the money belonged to a client or to himself. Respondent did not withdraw his fees when earned; rather, he commingled his earned income with client funds, making withdrawals when necessary to pay his operating expenses. We emphasize the seriousness of this inadequate accounting methodology and the resultant ethical violations.

See also - **In re Lehman, 182 NJ 589 (2005) (Reprimand)**

Other Examples:

In re Tompkins, 155 N.J. 542 (1998) (3 months); In re Ewing, 132 N.J. 206 (1993) (1 year);; In re Johnson, 105 N.J. 249 (1987) (indefinite suspension) and In re Perez, 104 N.J. 316 (1986) (2 year suspension).

In re Konopka, 126 N.J. 225, 238-39 (1991) (6 month suspension)

Respondent's conduct is more analogous to the conduct of the respondents in two recent cases, *In re Librizzi, supra,* 117 *N.J.* 481, 569 *A.*2d 257, and *In re Gallo, supra,* 117 *N.J.* 365, 568 *A.*2d 522. In those cases the attorneys were guilty of flagrant record-keeping violations but not of intentional misappropriation. Although we find that respondent did not knowingly misappropriate funds, his conduct was extremely careless. His record-keeping was totally inadequate. As the concurring opinion amply demonstrates, respondent has an appalling lack of knowledge of the maintenance of separate trust balances for each client. The record clearly and convincingly establishes a violation of *Rule of Professional Conduct* 1.15, requiring the safekeeping of clients' property and compliance with the record-keeping requirements of *Rule* 1:21-6.

3. Escrow Funds

In re Hollendonner, 102 NJ 21, 28-29 (1985)

(One-year suspension)

As the DRB observed, absent some extraordinary provision in an escrow agreement, absent here, it is a matter of elementary law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both parties. The parallel between escrow funds and client trust funds is obvious. So akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of *29 *In re Wilson, supra,* 81 *N.J.* 451, 409 *A.*2d 1153. We do not apply that rule in these proceedings in view of the absence of clear and convincing evidence that Respondent invaded the escrow funds with knowledge that the use of those funds was improper. Moreover, this is the first occasion on which we have addressed the near identity of escrow funds and trust funds.

In re Siegel, 33 NJ 162, 170 (1993) (Disbarment)

These opinions make clear that knowingly misappropriating funds-whether from a client or from one's partners-will generally result in disbarment. Although the relationship between lawyers and clients differs from that between partners, misappropriation from the latter is as wrong as from the former. A plainly-wrong act is not immunized because the victims are one's partners. We are unpersuaded by respondent's argument that he lacked constructive notice that the misappropriation of partnership funds could result in disbarment.

In re Greenberg, 155 NJ 138 (1998)

(Disbarment)

Most important, the Court has recognized "no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners." *(See In re Siegel).* Our perception that such acts of theft are morally equivalent does not derive from the relationships between attorneys and their clients or attorneys and their partners but, rather, from our belief that "misappropriation from the latter is as wrong as from the former." . Moreover, it is not clear that a distinction between client funds and firm funds is readily made by the average person. The general public is unlikely to know that attorneys are required to maintain separate accounts for client and firm funds, *RPC* 1.15, and may fear that the misappropriation of firm funds is synonymous with the misappropriation of client funds. It is this threat to public confidence in the integrity and trustworthiness of the bar that motivated the Court in *Wilson.*

Part III

Applicable Rules of Court

1. RPC 1.15. Safekeeping Property

- (a) **A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.**
-
- (b) **Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.**

- (c) **When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.**
-
- (d) **A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.**

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

- (a) Required Trust and Business Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:
  - (1) a trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney's care shall be deposited; and
  - (2) a business account into which all funds received for professional services shall be deposited.

  One or more of the trust accounts shall be the IOLTA account or accounts required by Rule 1:28A.

  Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all attorney trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as an "Attorney Business Account," an "Attorney Professional

Account," or an "Attorney Office Account." The IOLTA account or accounts shall each be designated "IOLTA Attorney Trust Account."

The names of institutions in which such primary attorney trust and business accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to Rule 1:20-1(b) and Rule 1:28-2, to the Disciplinary Oversight Committee and the New Jersey Lawyers' Fund for Client Protection. Such information shall be available for use in accordance with paragraph (h) of this rule. For all IOLTA accounts, the account numbers, the name the account is under, and the depository institution shall be indicated on the registration statement. The signed annual registration statement required by Rule 1:20-1(c) shall constitute authorization to depository institutions to convert an existing non-interest bearing account to an IOLTA account.

- (b) Account Location; Financial Institution's Reporting Requirements. An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court, which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty days' notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored

instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

In addition, each financial institution approved by the Supreme Court must co-operate with the IOLTA Program, and must offer an IOLTA account to any attorney who wishes to open one, and must from its income on such IOLTA accounts remit to the Fund the amount remaining after providing such institution a just and reasonable return equivalent to its return on similar non-IOLTA interest-bearing deposits. These remittances shall be monthly unless otherwise authorized by the Fund.

Nothing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney.

In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any

attorney trust account or attorney business account records on receipt of a subpoena therefor.

Digital images of these records may be maintained by financial institutions provided that: (a) imaged copies of checks shall, when printed (including, but not limited to, when images are provided to the attorney with a monthly statement or otherwise or when subpoenaed by the Office of Attorney Ethics), be limited to no more than two checks per page (showing the front and back of each check) and (b) all digital records shall be maintained for a period of seven years. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

- (c) Required Bookkeeping Records.
  - (1) Attorneys, partnerships of attorneys and professional corporations who practice in this state shall maintain in a current status and retain for a period of seven years after the event that they record:
    - (A) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by

attorney authorized financial institution transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee, and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account, and only an attorney shall be permitted to authorize electronic transfers as above provided; and

- (B) an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and
- (C) copies of all retainer and compensation agreements with clients; and
- (D) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and
- (E) copies of all bills rendered to clients; and

- (F) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and
- (G) originals of all checkbooks with running balances and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawals and deposit slips, when related to a particular client, shall include, and attorneys shall complete, a distinct area identifying the client's last name or file number of the matter; and
- (H) copies of all records, showing that at least monthly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and
- (I) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

- (2) ATM or cash withdrawals from all attorney trust accounts are prohibited.
- (3) No attorney trust account shall have any agreement for overdraft protection.

- (d) Type and Availability of Bookkeeping Records. The financial books and other records required by paragraphs (a) and (c) of this rule shall be maintained in accordance with generally accepted accounting practice. Bookkeeping records may be maintained by computer provided they otherwise comply with this rule and provided further that printed copies and computer

files in industry-standard formats can be made on demand in accordance with this section or section (h). They shall be located at the principal New Jersey office of each attorney, partnership or professional corporation and shall be available for inspection, checks for compliance with this Rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics. When made available pursuant to this rule, all such books and records shall remain confidential except for the purposes thereof or by direction of the Supreme Court, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

- (e) Dissolutions. Upon the dissolution of any partnership of attorneys or of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (c) of this rule.
- (f) Attorneys Practicing With Foreign Attorneys or Firms. All of the requirements of this rule shall be applicable to every attorney rendering legal services in this state regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.
- (g) Attorneys Associated With Out of State Attorneys. An attorney who practices in this state shall maintain and preserve for seven years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.
- (h) Availability of Records. Any of the records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued in connection with an ethics investigation or hearing pursuant to R. 1:20-1 to 1:20-11, or shall be produced at the direction of the

Disciplinary Review Board or the Supreme Court. They shall be available upon request for review and audit by the Office of Attorney Ethics. Every attorney shall be required to cooperate and to respond completely to questions by the Office of Attorney Ethics regarding all transactions concerning records required to be kept under this rule. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege. When produced or examined during the course of a disciplinary or random audit, both the attorney or law firm and the producers and licensors of computerized software shall be conclusively deemed to have consented to the use of said software by disciplinary authorities as evidence during the course of the disciplinary proceeding.

- (i) Disciplinary Action. An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who fails to produce or to respond completely to questions regarding such records as required shall be deemed to be in violation of R.P.C. 1.15(d) and R.P.C. 8.1(b).
- (j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners. When, for a period in excess of two years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed,

and funds which are held for missing owners, after being designated as such, may, after the passage of one year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Part IV - The Six Trust Account Duties of New Jersey Attorneys

a. Duty to maintain required records as mandated by Rule 1:21-6

Attorneys must recognize that part of their responsibility to the legal system is the maintenance and supervision of accounting records. There can be no excuse for inadequate record keeping particularly in light of the technological and relatively inexpensive means available today. In re Orlando, 104 NJ 344, 350 (1986)

b. Duty to Account – (RPC 1:15(a))

An attorney has a duty to fully account to the client for funds or property coming into the attorney's hands. An attorney must also account to a client for the handling of funds. This may be done by reconstructing the events surrounding the receipt, maintenance and distribution of clients' funds. The duty to account runs, not only to clients, but to others to whom the attorney owes a duty, such as heirs of an estate. *In re Rea,* 143 N.J. 385, 386 (1996) (Three month suspension for violating RPC 1:15(a) by failing to notify relatives, who were the heirs of an estate for which he was executor and attorney, of his intention to claim certain funds as a fee and for taking the additional fee.)

c. Duty to notify clients promptly upon receipt of funds or property in which the client has an interest. (RPC 1:15(b)).

Since the funds belong to the client, necessary decisions about what to do with the funds require that the client be notified of their receipt. For this reason, client notification should be given just as soon as practical. For the lawyer's protection, the notice should be given in writing. *In re Stein, 97* N.J. 550, 564 (1984) (Six-month suspension).

d. Duty to promptly deliver to the client or a designated third person any funds of property that the client is entitled to receive. (RPC 1:15(b))

In addition to promptly notifying the client of receipt of funds and other property, an attorney has a correlative duty to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." RPC 1.15(b). Thus, if the client has authorized the attorney as part of a tort settlement to pay certain medical bills and they are not paid promptly, the attorney has violated the ethical duty to follow the directions of the client by making prompt disbursement of the client's funds. Naturally, no payments may be made until the funds are first deposited into the attorney's trust account and are collected by the attorney's financial institution. Collected funds should be disbursed as soon as it is practical to do so.

E. Duty to keep client funds separate from the attorney's own property. (RPC 1:15(a) and (c)).

This duty is breached the moment the separate identity of the particular client's funds is lost. Classically, the only way to avoid commingling would be to establish a separate account for each client. Recognizing the practical difficulties of such a literal reading, our recordkeeping rule authorizes an exception, a controlled commingling of one client's trust funds with trust funds of other clients, provided strict, detailed recordkeeping practices are maintained. An attorney's own funds, however, are never permitted to be deposited into trust accounts holding clients' funds. This is called active commingling. An exception is made to permit a reasonable amount of attorney funds to be deposited in the trust account to pay bank charges. Commingling referred to as passive commingling, also occurs when an attorney fails to promptly withdraw from the trust account legal fees to which the attorney is entitled. In re Banner, 31 NJ 24 (1959) (One-year suspension).

f. Duty not to use those funds for any purpose whatsoever, other than as directed by the client (RPC 1.15(b) and (c)).

This is the essence of the *Wilson* violation. It can occur in a wide variety of ways, including taking unauthorized fees, disbursing money before it has been collected through the banking process.

Part V – Maintenance Issues

Basic Professional Responsibility

Who Must Maintain Attorney Trust Accounts

Where should the account be?

Title of Attorney trust Account

Proper signatories

Maintain Records for Seven Long Years

Who is ultimately responsible?

Basic Bookkeeping Goals

Separate Clients Need Separate Accounts

You Can't Spend What You Don't Have

Timing - Drawing against Uncollected Funds

No Commingling of Trust & other funds

What funds should be deposited?

Mandatory:

(1) All funds belonging to the client and "entrusted to (the lawyer's) care" by clients when the attorney is acting as a legal representative.

(2) All funds in which both the attorney and the client claim an interest arising out of the course of the legal representation.

(3) All funds in which both the client and a third person have an interest that come into the attorney's possession during representation of the client.

(4) General retainers for legal services, but only where there is an explicit understanding with the client that the retainer will be separately maintained.

What funds should be deposited?

Optional:

(1) General retainers for legal services, where no explicit understanding has been reached with clients that they will be separately maintained.

(2) Advances for costs.

(3) Funds of the lawyer that are reasonably sufficient to pay bank charges. [Impress Account – limit is $250]

What funds should NOT be deposited?

(1) Funds coming into the attorney's hands while acting as an executor, guardian, trustee or receiver, or in any other similar fiduciary capacity.

(2) An attorney's own personal funds [including earned fees].

(3) Business and investment monies of the attorney.

(4) Payroll taxes on employee wages [aka Trustee Taxes].

Extraction of Earned Legal fees

Before an earned legal fee may properly be withdrawn from a trust account, the client must be given notice of the nature of services rendered and the amount of the legal fee proposed to be paid to the lawyer. [Don't be a idiot…do it in writing!]

If no objection is received within a reasonable time, (something more than 11 nono-seconds) the attorney may withdraw the fee proposed.

Moreover, attorney fees which are justly due and owing may not remain in the trust account and must be promptly withdrawn. If not, the attorney is guilty of passive commingling.

All legal fees must be immediately deposited into the attorney's business account.

Legal fees may not be paid by drawing trust checks directly to the attorney or his/her creditors.

Monthly Reconciliation

Each attorney must perform written trust reconciliations monthly, showing reconciliation of the cash balance derived from the cash receipts and cash disbursements totals, the checkbook balance, the bank statement balance and the client trust ledger balances.

The FOUR-way balance check

Check book balance & Bank Statement Balance & Trust Journal & Trust Ledger trial balance all have the same total.]

When this does not occur…congratulations!!

You are officially:

Out of Trust

No such thing as a negative balance

Part VI – Nuts and Bolts Issues

Holding funds in a safe

Unidentified money – Extraction and Removal

Trust Overdraft Notification – Take immediate action

IOLTA Requirements – Exemptions Rule 1:28A

Attorney Original Signature

Checks to "Cash"

Distribution on uncollected funds (drafts)

Same day availability – EFT – CASH – Interbank transfers

Always Maintain an Audit Trail

Part VII – Random Audits - Q & A

WHAT IS THE RANDOM AUDIT PROGRAM?

Since 1981, the New Jersey Supreme Court has operated a program for random audits of attorney trust and business account records to determine compliance with the Supreme Court of New Jersey's mandatory recordkeeping rule, R.1:21-6, and ethics rule RPC 1.15 ("Safekeeping Property"). The Random Audit Program is administered through the Supreme Court's Office of Attorney Ethics.

The central purpose of the New Jersey Random Audit Program is the education of New Jersey attorneys on the proper method of compliance with their recordkeeping and ethical responsibilities under R.1:21-6 and RPC 1.15.

A secondary purpose underlying random audits is deterrence. Just knowing that there is an active auditing program is an incentive, not only to keep good records, but also to avoid temptations to misuse trust funds.

Finally, there is the purpose of detection of misappropriation. Since the random selection process results, by definition, in selecting a representative cross-section of the Bar, a few audits inevitably uncover some lawyer theft.

HOW ARE ATTORNEYS SELECTED TO BE AUDITED?

An annual random selection of audit candidates is made from the statewide list of licensed attorneys using the law firm as the entity subject to audit, rather than individual attorneys. Every attorney in private practice is regarded as a member of a law firm. A law firm may consist of one or more attorneys, and the law firm identifier is the 10 digit "main" office telephone number. That number is captured for all private practice attorneys annually as part of the Attorney Registration Program.

IS THE SELECTION REALLY RANDOM?

The selection process is accomplished by a computer program that annually selects approximately 500 audit candidates using a tested random selection methods with is documented in its ability to produce truly random results. As a result, every law firm, regardless of size, has an equal chance of being selected for an audit.

How much notice of the audit is given?

Once an attorney or law firm is selected, the attorney or firm is provided with written notice 10 days to two weeks in advance of the scheduled date.

How many auditors are assigned to a matter?

Generally, only one auditor is assigned to a matter. Occasionally, two or more auditors are assigned if a large firm or other complicating feature is involved.

Does the attorney have to be present for the audit?

It is preferable for the attorney to be present at the audit. If the attorney cannot be present, a responsible person knowledgeable about the books and records must be available.

Exactly what does the auditor do at the audit?

On arriving at the law office, the auditor conducts an initial interview with the attorney or responsible person left in charge. Detailed information about the firm's recordkeeping procedures is secured and recorded on a Random Audit Questionnaire form. The auditor also conducts a review of the firm's trust and business account books and records in order to determine compliance with the rule requirements. The review culminates in a reconciliation of the attorney's trust account (or accounts) as of the date of the most recent bank statement.

What immediate feedback does the auditor provide?

Any recordkeeping deficiencies are noted by the auditor on a Recordkeeping Deficiencies Checklist which contains a brief description of the most commonly found recordkeeping deficiencies. The auditor provides a copy of the checklist to the attorney or person left in charge, and, in an exit conference, discusses with that individual the corrective actions that should be taken to remedy any deficiencies which have been found.

Are any informational handouts provided?

All law firms randomly audited are provided at the audit with a booklet, Outline of Record Keeping Requirements Under RPC 1.15 and R.1:21-6, developed by the Random Audit Staff. This outline includes a summary of the substantive requirements, and also contains samples of all required receipts and disbursement journals, client trust ledgers and reconciliation formats.

What happens after the audit?

Shortly after the audit, the attorney is formally advised by correspondence of the results. If the audit revealed no problems, a closing letter is forwarded that acts as the final disposition of the matter. If minor deficiencies were discovered, a deficiency letter is sent to the attorney describing the shortcomings that require corrective action. The source of information for the deficiencies is the aforementioned Recordkeeping Deficiencies Checklist.

What happens if there are minor deficiencies?

Within 45 days ater the date of the deficiency letter, the attorney is required to submit a response addressing the corrective action taken for the cited recordkeeping deficiencies. On receipt of an acceptable response from the attorney, the matter is closed. If the attorney does not respond, the matter may be referred to the Office of Attorney Ethics for disciplinary action.

What happens if there are major deficiencies?

If, at any point during the audit process, major deficiencies are discovered, such as misappropriation of client's trust funds, the matter is referred immediately to the Office of Attorney Ethics for disciplinary action. Historically, such referrals are made in less than 1% of the audits conducted.