

262 A.D.2d 862, 692 N.Y.S.2d 766, 1999 N.Y. Slip Op. 06302

(Cite as: 262 A.D.2d 862, 692 N.Y.S.2d 766)

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Supreme Court, Appellate Division, Third
Department, New York.
In the Matter of Donald I. ORSECK and Gerald
Orseck, Attorneys and Counselors-
at-Law.
Committee on Professional Standards, Petitioner.
Donald I. Orseck and Gerald Orseck, Respondents.

June 22, 1999.

In attorney disciplinary proceeding against two brothers who practiced law as partners, the Supreme Court, Appellate Division, held that: (1) 18-month suspension was appropriate for attorney who mishandled client funds, and (2) censure was appropriate for attorney who denied contemporaneous knowledge of, but was responsible for, the mishandling of client funds.

Suspension ordered for one attorney; other attorney censured.

West Headnotes

[1] Attorney and Client ↪44(1)

45k44(1) Most Cited Cases

Attorney who, under mistaken belief that personal injury client had authorized him to use settlement moneys for personal and office expenses so long as he remitted funds to client upon request, entered into the purported arrangement without any written agreement and without advising the client to consult independent counsel improperly engaged in a business transaction with a client without full disclosure. N.Y.Ct.Rules, §§ 1200.3(a)(5) [DR 1-102, subd. A, par. 5], 1200.23(a) [DR 5-104, subd. A].

[2] Attorney and Client ↪58

45k58 Most Cited Cases

Suspension for 18 months was appropriate for attorney whose escrow account fell below amount

maintained on behalf of clients, who commingled personal and non-client funds in the escrow account, who entered into purported business transaction with personal injury client regarding attorney's use of client's funds without providing full disclosure, and who converted client funds to pay personal income tax obligations. N.Y.Ct.Rules, §§ 1200.3(a)(4, 5, 8) [DR 1-102, subd. A, pars. 4, 5, 8], 1200.23(a) [5-104, subd. A], 1200.46(b)(2) [DR 9-102, subd. B, par. 2].

[3] Attorney and Client ↪58

45k58 Most Cited Cases

Censure was appropriate for attorney who denied contemporaneous knowledge of, but was responsible for, the misconduct of his law partner and brother whose escrow account fell below amount maintained on behalf of clients, who commingled personal and non-client funds in the escrow account, who entered into purported business transaction with personal injury client regarding brother's use of client's funds without providing full disclosure, and who converted client funds to pay personal income tax obligations. N.Y.Ct.Rules, §§ 1200.3(a)(4, 5, 8) [DR 1-102, subd. A, pars. 4, 5, 8], 1200.5(d)(2) [DR 1-104, subd. D, par. 2], 1200.23(a) [5-104, subd. A], 1200.46(b)(2) [DR 9-102, subd. B, par. 2].

**767 Mark S. Ochs, Committee on Professional Standards (Michael Philip Jr. of counsel), Albany, for petitioner.

Jonathan P. Harvey, Albany, for respondents.

Before: CREW III, J.P., SPAIN, CARPINELLO and GRAFFEO, JJ.

*862 PER CURIAM.

Respondents Donald I. Orseck and Gerald Orseck were admitted to practice by this court in 1969 and 1957, respectively. They are brothers and partners and maintain an office for the practice of law in

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Liberty, Sullivan County.

By report dated March 30, 1999, the Referee sustained five of six charges of professional misconduct filed by petitioner, the Committee on Professional Standards, against respondents. Petitioner moves to confirm the Referee's report with respect to the sustained charges and disaffirm the report with respect to the charge not sustained (charge V). Respondents seek to disaffirm the report with respect to specification 4 of charge II. We confirm the Referee's report, except insofar as it sustained the allegations of specifications 1, 2, and 4 of charge II that respondent [FN1] converted client funds in violation of the disciplinary rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation (Code of Professional Responsibility DR 1-102[A][4] [22 NYCRR 1200.3(a)(4)]).

FN1. Unless otherwise noted, "respondent" refers to Donald I. Orseck.

[1] Under the mistaken belief that a personal injury client had authorized him to use settlement moneys for personal and office expenses so long as he remitted funds to the client upon request, respondent so expended the funds. The client had only authorized respondent to invest his settlement moneys. By entering into the arrangement without any written agreement and without advising the client to consult independent counsel, respondent improperly engaged in a business transaction with a client without full disclosure (*see*, Code of Professional Responsibility DR 1-102[A][5]; DR 5-104[A] [22 NYCRR 1200.3(a)(5), 1200.23(a)]; *see, e.g., Matter of Chariff*, 221 A.D.2d 719, 633 N.Y.S.2d 618; *Matter of Coxeter*, 208 A.D.2d 1178, 620 N.Y.S.2d 501; *Matter of Hardy*, 172 A.D.2d 866, 568 N.Y.S.2d 463).

[2][3] Respondent's handling of his firm's escrow account also violated various disciplinary rules (*see*, Code of Professional Responsibility DR 1-102 [A][5], [8]; DR 9-102 [22 NYCRR 1200.3(a)(5), (8); 1200.46]). *863 After making deposits on behalf of three clients, including the client **768 whose money he was supposed to invest, the

balance in the escrow account each time fell below the amount respondents were required to maintain on behalf of their clients (*see, e.g., Matter of Joseph*, 223 A.D.2d 999, 637 N.Y.S.2d 490; *Matter of Raphael*, 216 A.D.2d 788, 628 N.Y.S.2d 846; *Matter of Schreiber*, 211 A.D.2d 836, 621 N.Y.S.2d 153). Respondent violated the rule against commingling by making deposits of personal and non-client funds into the firm's escrow account and by not withdrawing legal fees deposited into the account within a reasonable period of time after they were earned (*see, e.g., Matter of Sullivan*, 253 A.D.2d 999, 678 N.Y.S.2d 169). Respondent issued a check from the escrow account against insufficient funds (*see, e.g., Matter of Chariff, supra; Matter of Bartholomew*, 195 A.D.2d 753, 600 N.Y.S.2d 336) and failed to properly title the account in accordance with Code of Professional Responsibility DR 9-102(B)(2) (22 NYCRR 1200.46 [b] [2]; *see, e.g., Matter of Van De Loo*, 240 A.D.2d 940, 659 N.Y.S.2d 899; *Matter of Holsberger*, 223 A.D.2d 920, 637 N.Y.S.2d 322).

Aware that the New York State Insurance Fund had asserted a lien against a client's funds on deposit in the escrow account, respondent nevertheless converted the moneys to pay respondent's personal income tax obligations (specification 3 of charge II) (*see*, Code of Professional Responsibility DR 1-102[A][4], [5], [8]; DR 9-102 [22 NYCRR 1200.3(a)(4), (5), (8); 1200.46]).

It does not appear that respondent intended to permanently convert client funds and he has made restitution where appropriate, albeit after petitioner's inquiry began. No client appears to have suffered any monetary loss.

Respondent is primarily responsible for the instant professional misconduct while respondent Gerald Orseck, who has denied contemporaneous knowledge of the misconduct, is responsible therefor by virtue of being his brother's law partner (*see, e.g., Code of Professional Responsibility DR 1-104[D][2] [22 NYCRR 1200.5(d)(2)]*).

Respondents enjoy a good reputation for

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competence and integrity in their legal community. Respondent has played an important role in an organization of national stature dedicated to helping children suffering from cancer and their families.

Both respondents have been the subject of cautions and admonitions by petitioner, and respondent Gerald Orseck was suspended from practice in 1981 for six months (*Matter of Orseck*, 81 A.D.2d 962, 438 N.Y.S.2d 887).

Under the circumstances presented, we conclude that respondent Donald I. Orseck should be suspended for a period of *864 eighteen months (*see, e.g., Matter of Raphael, supra*) and respondent Gerald Orseck should be censured.

ORDERED that respondents are found guilty of the professional misconduct set forth in charges I, III, IV, and VI of the petition and as set forth in charge II except insofar as it alleges violation of Code of Professional Responsibility DR 1-102(A)(4) (22 NYCRR 1200.3[a][4]) with respect to specifications 1, 2, and 4 thereof; respondents are found not guilty of charge V; the motions to confirm and disaffirm the Referee's report are granted and denied accordingly; and it is further

ORDERED that respondent Gerald Orseck is censured; and it is further

ORDERED that respondent Donald I. Orseck is suspended from practice for a period of eighteen months, effective twenty (20) days from the date of this order, and until further order of this court; and it is further

ORDERED that, for the period of his suspension, respondent Donald I. Orseck is commanded to desist and refrain from the practice of law in any form either as principal or as agent, clerk, or employee of another; and he is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority or to give to another any opinion as to the law or its application, or any advice in relation thereto; and it is further

**769 ORDERED that respondent Donald I.

Orseck shall comply with the provisions of this court's rules (22 NYCRR 806.9) regulating the conduct of suspended attorneys.

262 A.D.2d 862, 692 N.Y.S.2d 766, 1999 N.Y. Slip Op. 06302

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