

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

2015-OLR- 2

Dale Nikolay,
Attorney at Law

Attorney Dale R. Nikolay, 50, currently practices in **Milwaukee or Glendale**, Wisconsin.

This reprimand is based on the following conduct in three matters..

First Matter

At all times pertinent to this matter, Attorney Dale R. Nikolay (“Nikolay”) practiced law in Milwaukee under the firm name, Nikolay Law Offices, S.C. He was personally responsible for maintaining his firm’s trust account records.

On May 21, 2009, there was a \$355.46 overdraft on Nikolay’s client trust account stemming from Nikolay’s disbursement of a \$621.36 check to his firm for costs relating to a personal injury matter. Due to multiple record keeping errors, there were insufficient funds in trust to cover that disbursement.

Prior to the overdraft, Nikolay failed to maintain accurate records for his trust account. His transaction register and client ledgers were incomplete, and he did not reconcile the account on a monthly basis. Numerous checks were written and not recorded in those records. On a number of occasions, this led to checks being written more than once, including checks to his firm for legal fees. In the most egregious of those matters, Nikolay’s failure to record disbursements led to an overpayment of \$15,127.03 in legal fees. In another matter, it resulted in an overpayment of

\$1,241.80. Upon discovering those errors, Nikolay reimbursed the shortfalls by leaving earned fees relating to other client matters in the trust account.

In addition to those errors, Nikolay occasionally misidentified the client for whom disbursements were made. For example, in one of seven such cases, he attributed a \$2,500 disbursement to Cynthia A. when it related to Jeffrey A.

The record keeping errors were exacerbated by Nikolay's failure to withdraw his full contingent fees when they were earned. In connection with 11 separate settlements, he made between 3 and 19 partial fee payments per matter to his firm or a creditor of his firm. In three of those cases, Nikolay disbursed a total of \$33,700 in partial fees directly from the trust account to a building owner to pay his law firm's rent.

In addition, Nikolay failed to perform regular backups of his electronic records. Consequently, when a hard drive failed in 2008, all of his trust account data was lost. Following the overdraft, Nikolay re-created the transaction register and client ledgers by utilizing settlement breakdowns and other records.

During the investigation of the overdraft, Nikolay failed to respond to OLR's first class letter of June 25, 2009, its certified letter of July 23, 2009, and its letter of September 2, 2009, which was personally served on the assistant at his law office. Nikolay ultimately responded to OLR's requests and indicated that he had not been in his law office since May of 2009 due to various health issues.

Although he later restored funds used to make excess payments, by making disbursements from his trust account for legal fees that exceeded the amounts to which he was entitled, Nikolay failed to hold funds in trust and violated SCR 20:1.15(b)(1).

By failing to promptly disburse earned fees from his firm's trust account, including \$33,700 in fees that he used to pay his law firm's rent, Nikolay held funds belonging to the firm in trust, and violated SCR 20:1.15(b)(3).

By failing to maintain accurate and contemporaneous records of each transaction in his trust account transaction register and client ledgers and by failing to reconcile the account on a monthly basis, Nikolay violated SCR 20:1.15(f)(1)a., b. and g.

By maintaining his IOLTA trust account records on a computer and failing to back up those records electronically and with paper copies, Nikolay violated SCR 20:1.15(f)(4)a. and b.

By failing to respond to OLR's letters of June 25, 2009, July 23, 2009, and September 2, 2009, despite personal service on his assistant, Nikolay violated SCR 22.03(2) and (6), which are enforced under the Rules of Professional Conduct via SCR 20:8.4(f).

Second Matter

In December 2008, Attorney Nikolay assumed representation of a client's claim against an investment company for damages resulting from the failure of the company's agent to follow the client's instructions to sell securities. The client was previously represented by another attorney in the firm.

Attorney Nikolay's practice is primarily personal injury. He had not previously handled any type of financial investment fraud or negligence cases. During his representation of the client, he did not consult with other attorneys who specialize in these cases.

On December 17, 2008, Attorney Nikolay wrote the investment company to give notice of his representation. On March 16, 2009, he sent a demand letter. On March 31, 2009, the investment company denied the claim. Attorney Nikolay timely provided copies of these letters to his client.

Between April 3, 2009, and July 22, 2011, there was little communication between Attorney Nikolay and his client. Attorney Nikolay and the client provided no records of significant work done or of significant communications relating to the claim during this period of time.

On July 22, 2011, Attorney Nikolay sent the client a letter in response to her inquiry. In the letter, Attorney Nikolay stated that he found an expert for the case, that the case was ready to file, and the client needed to provide the filing fee. The client provided the filing fee by check dated July 25, 2011, along with a handwritten letter indicating her expectation that the case would be filed.

After July 25, 2011, there was some communication between Attorney Nikolay and the client. After September, 2011, however, there was no meaningful communication between them until April 18, 2013. Moreover, the lawsuit was not filed.

On April 18, 2013, the client hand delivered a letter to Attorney Nikolay's office asking for her files, which she would pick up on April 23rd. She returned on April 23rd, but Attorney Nikolay was not present and the file was unavailable. On May 23, 2013, Attorney Nikolay sent a letter to the client enclosing a refund of the filing fee and the client file. The letter also advised the client that her claim must be filed no later than July 7, 2014, or be barred.

By failing to file the client's lawsuit or take meaningful action after March 2009 to advance her interests, Attorney Nikolay violated Supreme Court Rule (SCR) 20:1.3, which states, "A lawyer shall act with reasonable diligence and promptness in representing a client."

By failing to communicate with the client between April 2009 and July 2011, and again between September 2011 and April 2013, Attorney Nikolay violated SCR 20:1.4(a)(3), which

states, “A lawyer shall . . . (3) keep the client reasonably informed about the status of the matter.”

By representing the client when he had no prior experience with financial investment fraud or negligence cases and when he did not consult other attorneys with expertise in these cases; and by failing to file the client’s claim or advance her interests for a period of over four years, Attorney Nikolay violated SCR 20:1.1, which states, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Third Matter

Evidence of misconduct on the part of Atty. Nikolay was brought to the attention of OLR by the Wisconsin Department of Workforce Development, Division of Unemployment Insurance (UI).

As of July 2013, Nikolay had failed to file UI unemployment insurance tax reports since the 1st Quarter 2010. As a result, UI assessed estimated taxes and penalties for each quarter in which taxes were not paid. Also as of July 2013, Nikolay had paid only a portion of the 2010 second quarter taxes and had not paid any of the estimated taxes, interest and penalties that were assessed quarterly since the second quarter of 2010. The amount owed by Nikolay at that time for estimated taxes, interest, penalties and collection costs, including special assessments for 2011 and 2012, was \$3,586.86, with interest then accruing at \$19.80 per month.

As of the summer of 2013, when Nikolay’s misconduct was reported to OLR, the Department of Workforce Development had filed a tax warrant against Nikolay Law Offices S.C. in the amount of \$2,342.64. *Department of Workforce Development vs. Nikolay Law Offices S.C.*, Milwaukee County case no. 2013 UC 87, filed January 14, 2013. UI scheduled an audit of

Nikolay's account to take place on May 22, 2013, and served a subpoena requiring Nikolay's appearance at the audit. The subpoena was served on a person whom Nikolay identifies as the landlord of the building where Nikolay then had his law office. The subpoena required Nikolay to appear with records from January 1, 2012 and forward, but Nikolay did not appear, meaning that UI was left without information necessary to calculate actual taxes due, as opposed to estimated taxes. Nikolay asserts that he did not knowingly fail to appear for the audit. He claims to have been out of the office at the time of the subpoena due to ill health, and that he did not have actual knowledge of the audit until after the date of the audit.

Nikolay had previously appeared at an audit by UI in 2010, after which he filed reports listing employees of Nikolay Law Offices S.C. for the 3rd and 4th Quarters of 2009. As of July 2013, Nikolay had not informed UI that his law firm had closed; that he no longer had employees; or that the service corporation had been closed and that compensation should no longer be reported. Nikolay also had not filed a Request for Officer Exclusion in order to exclude the owner's wages from taxes.

Nikolay, who claimed to be in ill health for much of 2013, admitted to OLR in October 2013 that he had failed to file unemployment insurance tax reports. Nikolay said that all of his payroll filings were done electronically, but his law firm's software had not completed the returns for unemployment taxes. In October 2013, Nikolay told OLR that he had determined how to print the returns and would be filing the returns the following week with a check for the "nominal amounts" owed to UI.

According to Nikolay, he had no law partners and he has had no employees since December 2012. Nikolay said that his only employee since 2010, other than himself, was a former assistant. Nikolay said that the assistant had not worked for him since December 2012,

and prior to that, she had worked approximately twenty hours per week. Nikolay, however, had not informed UI that Nikolay Law Office, S.C. was closed, transferred or otherwise qualified for closure of the firm's unemployment insurance account, and the account had not been closed. Further, although he admitted having employees through the 4th Quarter 2012, Nikolay had not reported wages for any employee since wages were paid in 2009. As of mid-December 2013, Nikolay Law Office, S.C. owed over \$5,000 in estimated taxes, interest, special assessments, penalties and collections costs for quarters since the 2nd Quarter 2010.

Nikolay Law Office, S.C. had filed reports with UI as late as February 2010 for 4th Quarter 2009 but had failed to report compensation paid to Nikolay since that quarter. UI had not received an election for a Corporate Officer Exclusion from Nikolay Law Office, S.C. or any document that would entitle the firm to exclude the compensation paid to Nikolay. Under such circumstances, the compensation paid to Nikolay was required to be reported to UI and taxes were required to be paid on the nonexempt portion of that compensation.

Although Nikolay asserted to OLR in October 2013 that he would file the necessary returns and make payment to UI within a week, such prompt remedial measures were not taken. As of early 2014, Nikolay had not submitted any reports since he had filed late reports for the 1st Quarter 2007 through the 4th Quarter 2009 on February 22, 2010. Similarly, as of early 2014, UI had not received any payments from Nikolay for outstanding amounts due.

In March 2014, Nikolay provided OLR with copies of prepared Quarterly Contribution Reports for the four quarters of 2011 and the four quarters of 2012, all signed by Nikolay and dated October 20, 2013. Nikolay did not enclose a copy of a check to the Division of Unemployment Insurance evidencing payment of the amounts owed. Nikolay did not state whether or not he had filed the Quarterly Contribution Reports with UI.

OLR provided UI with copies of materials submitted to OLR by Nikolay, including the Quarterly Contribution Reports for the four quarters of 2011 and 2012 and other tax documents. UI had not received the quarterly reports until receiving them from OLR in May 2014, and after receipt the reports were processed by UI's wages unit.

As of September 2014, UI had not received any payments from Nikolay for amounts owed for 2011 or 2012. UI's position is that since the reports for 2011 and 2012 were filed under the name of the service corporation and Nikolay continued to use the service corporation letterhead, Nikolay needed to report any compensation he paid himself for UI's purposes for those tax periods.

The UI account for Nikolay Law Office, S.C. remained open as of September 2014, and Nikolay had failed to file reports or make payments for the 2013 tax year or for 1st or 2nd Quarters 2014. Nikolay had not filed an Account Change Information form informing UI of bases for closure of UI's employer account for Nikolay Law Office, S.C. As of September 2014, the UI account receivable totaled \$6,899.67, which includes estimated tax liabilities for 2013 and the first two quarters of 2014.

By failing to make timely and complete quarterly tax reports and payments to the Wisconsin Department of Unemployment Insurance, Atty. Nikolay violated SCR 20:8.4(f), which states, "It is professional misconduct for a lawyer to violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers," pursuant to standards of conduct established by Disciplinary Proceedings Against Owens, 172 Wis. 2nd 54, 492 N.W. 2nd 157 (1992), and other supreme court decisions finding that an intentional violation of tax laws, even without intent to defraud the government, constitutes professional misconduct.

Attorney Nikolay has no prior discipline.

In accordance with SCR 22.09(3), Attorney Nikolay is hereby publicly reprimanded.

Dated this 27 day of January, 2015.

SUPREME COURT OF WISCONSIN

 /s/ James G. Curtis Jr.
James G. Curtis, Jr., Referee