

**In God We Trust:  
All Others Must Certify Compliance**  
*by Charles Slanina, Esquire*

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Breaking news! If you have read my previous *IN RE:* columns, I have chronicled a number of solo practitioners who have been sanctioned for their “false” Certification of Compliance as part of their Annual Registration statement after a random compliance audit showed that their books and records were not in compliance and/or not all taxes were timely filed and paid. In a case of first impression, the Court has examined the duty of a managing partner with regard to those records and the Certification. If you are a managing partner and you have not already read this opinion, you need to do so. It should raise your level of caution since it raises your level of duty.

In imposing a suspension of six months and one day (requiring a petition and hearing for reinstatement rather than automatic reinstatement) the Court ruled that “the managing partner of a law firm has enhanced duties, vis-a-vis other lawyers and employees of the firm, to ensure the law firm’s compliance with its record keeping and tax obligations under the Delaware Lawyers’ Rules of Professional Conduct. A managing partner must discharge those responsibilities faithfully and with the utmost diligence”. *Matter of Bailey*, Case No 334, 2002(5/2/03).

A compliance audit done by the Lawyers’ Fund for Client Protection (LFCP), determined that the escrow and operating accounts were not reconciled for a two year period, and various taxes were not timely filed and paid. In addition, an investigative audit determined that the bookkeeper had deposited checks from the escrow account into the operating account to fund operating account withdrawals. There was at best, equivocal evidence that this was done with the actual knowledge of the managing partner. In a conclusion that could have far-reaching implications, the Court ruled that the managing attorneys conduct was “knowing” because, as the managing partner, he “knew or should have known” of these issues. “We agree with the Lawyers’ Fund’s assertion that the ‘sustained and systematic failure’ of a managing partner to supervise a firm’s employees to ensure compliance with Rule 1.15 may not be characterized as simple negligence.” (P. 26-27)

Now that I have your attention, I thought this might be a good opportunity to let you hear from the representative of the LFCP, compliance auditor Martin Zukoff, to gain some insight into the process before it occurs, since sooner or later, it’s going to happen to you.

Marty Zukoff is a CPA and a QuickBooks Professional Advisor in Wilmington where he operates his own public accounting practice. He is a native of Massachusetts, coming to the area to serve as Controller for a regional retail chain. He was appointed Auditor for the LFCP in 1993 and since then, has performed compliance audits of over 400 firms for the Fund.

I had the opportunity to interview Mr. Zukoff recently about his work and specifically what he looks for during a compliance audit. He told me that he first looks to see what computer software is used and how the client accounts are set up. He checks and views how transactions are recorded and notes the efficiency or inefficiency of the recordkeeping. He frequently makes suggestions to firms to improve this process. He also looks at more intangible aspects such as whether the books and records are neat, readily available and whether the staff seems knowledgeable about the process.

He then applies the Audit Program (found on pg. 206 of Vol.2 of Del. Rules Annot.) which has been designed to verify that the recordkeeping requirements of Rules 1.15 and 1.5(f) are being followed. His specific audit objectives are to determine that the firm's responses on the Certificate of Compliance are correct; that client funds are safeguarded; that proper records are maintained; that the firm is maintaining financial control over the law practice; that there is no commingling of client and attorney funds; that monthly reconciliations are properly performed; and that all federal, state and city business, payroll and personal tax returns have been timely filed and paid.

I asked Mr. Zukoff what some of the common mistakes he finds doing his audits are. His most frequent finding is that firms are neglecting to oversee the financial recordkeeping based on the assumption that their staff or outside bookkeepers and accountants understand Rule 1.15 and are performing those tasks properly. He also finds that attorneys fail to understand Rule 1.15 themselves and are therefore unable to adequately supervise their subordinates. He further noted that attorneys can contact him at (478-4734) to ask questions about their recordkeeping or the Bar's Professional Guidance Committee for other assistance before they file their Certificate of Compliance.

Mr. Zukoff does approximately 60 random audits per year, in addition to a number of investigatory audits done by fellow Lawyers' Fund auditor, Joseph McCullough, at the request of the Office of Disciplinary Counsel. He asked me to point out that last year, approximately one third of the random audits noted non-compliance. Of the 21 non-complying firms, fifteen had reported that they were in compliance in one or more years on their Certificate of Compliance. ODC refers to this as dishonesty, fraud, deceit or misrepresentation [Rule 8.4 (c)] or conduct prejudicial to the administration of justice [Rule 8.4 (d)].

To avoid this situation, Mr. Zukoff recommended (as have I) that firms consider having an independent accountant with knowledge and experience in dealing with Rule 1.15, pre-certify their compliance before they complete their Annual Registration Statement. (See form on pg. 205, Vol. 2 of the Del. Rules Annot.)

In light of the Court's most recent decision, can you afford to assume that you understand Rule 1.15? Are you sure that your bookkeeper and accountant do? Do you file the firm's Certificate based solely on what your paralegal or bookkeeper tells you? If so, let me remind you that there are 627 firms in the State and 400 have been audited to date. Sooner, rather than later, you will receive a visit from Mr. Zukoff. Will you be ready?