

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
MICHAEL J. KAVANAUGH,
Respondent/Appellee.

File No. DP 71/84

Decided: September 30, 1985

BOARD OPINION

Respondent was charged in a four-count Complaint with the following:

- (1) misappropriating \$5,000 of his client's money, part of the proceeds of a real estate transaction handled by Respondent for client;
- (2) commingling \$22,402.26 paid to him on behalf of the real estate client, by depositing the money in his professional account;
- (3) delivering to the client a check for \$22,500 (after the client demanded an accounting of the funds from the real estate transaction), which was dishonored for insufficient funds; and
- (4) commingling his funds with those of the client by depositing in his client trust account money from his professional account.

The hearing panel dismissed Counts I, III, and IV, but found a "technical" violation of Count II, and reprimanded Respondent. The Grievance Administrator sought review, arguing that the dismissed counts had been proven. We affirm the panel finding of misconduct on Count II, reverse the dismissal of Count I, and suspend Respondent for sixty days.

I.

In early 1979, Respondent was contacted regarding the sale of real estate owned by a client. At the initial closing in March 1979, Respondent came into possession of a check payable to himself and the client in the amount of \$18,950.34.

On April 6, 1979, Respondent acknowledged that the check was to be deposited into a client trust account and that he would make a full accounting. The client had authorized him to endorse her name on checks coming into his possession and to deposit them.

On April 19, 1979, Respondent accounted for the funds on deposit in the client trust account. He retained \$1,200 for legal fees earned through April 11th, paid \$12,750 to his client by trust

account check, and withheld \$5,000. Respondent testified that the \$5,000 was withheld to be applied to legal fees for future services anticipated by Respondent.

A considerable amount of legal work was actually performed for the client by Respondent after the March 1979 closing. Although Respondent did not submit a full accounting, the client used his services in various legal matters subsequent to the real estate closing. No statement for these services was ever submitted to the client. Although she did demand an accounting, the panel found that she “acquiesced in Respondent’s application of the \$5,000 toward attorney fees for services rendered on her behalf.” The panel also found that Respondent performed at least \$5,000 worth of services for the client, and was convinced that the “subsequent continuing relationship between the attorney and his client” justified this method of fee collection.

On or about October 5, 1979, Respondent received a check payable to his client in the amount of \$22,500, representing a payment due client as a land contract seller. During Respondent’s absence from his office, the check was endorsed by a stamp and deposited by an office employee into Respondent’s general firm account.

When Respondent returned from his absence and became aware that client's money had been deposited into his business account, he issued a check to the client on November 6th for \$22,500. Prior to that date, however, the balance in Respondent’s account (where the funds had been deposited) fell below the amount of the check. Realizing that the funds should have been deposited into his client trust account, Respondent stopped payment on the check dated November 6th, and on November 29th transferred \$18,347.74 from his law firm account to the client trust account. This amount was insufficient to replace the November 6th check, and Respondent borrowed enough money to enable him to bring the balance in the trust account to more than \$22,500. He then issued a trust account check to the client in the amount to which the client was entitled.

II.

We disagree with the panel findings on Count I, and find inadequate support in the record for the conclusion that the client acquiesced in Respondent's retention of \$5,000 for future legal services. Respondent admitted that the client inquired about the money during the course of meetings with him.

It is an untenable conclusion that an attorney may commingle, convert or apply to his own use a client’s funds so long as he later performs sufficient legal work to earn the commingled or converted sum. Client funds cannot be arbitrarily or unilaterally withheld with, a view toward speculative future services in the absence of some retainer agreement and authorization to provide such future services.

The applicable disciplinary rule provides:

DR 9-102. Preserving Identity of Funds and Property of a client

- (A) All funds of clients paid to a lawyer or law firm, . . . shall be deposited in one or more identifiable bank accounts . . . and no funds belonging to the lawyer or law firm shall be deposited therein except as follows: [Emphasis added.]
- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
 - (2) Funds belonging in part to a client and in part present or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The erroneous deposit of client funds by Respondent's employee (Count II) does not constitute an aggravated or severe breach of trust. Respondent made timely efforts to rectify this error; if he had not done so, a greater sanction would be in order. Even though it was a mitigated and technical violation of DR 9-102(A) it cannot be excused simply because it was carried out by office personnel. Attorneys may be responsible, for discipline purposes, for the acts and omissions of their employees who must be properly trained and supervised, especially with regard to handling of client property. In re Hudnut, No. 34884 (Mich ADB 1979).

The more egregious violation was Respondent's unilateral application of client funds to future unspecified, unauthorized legal services. Fortunately, Respondent did in fact eventually perform adequate services at least equal to the funds retained. We cannot, however, condone an improper withholding, even where the attorney may, in good faith, contemplate providing valuable services; to do so would create a potential for widespread abuse. Funds received from or on behalf of a client may be considered a fee only if there is sufficient, objective evidence of request by the client for services or client authorization of retainer.

III.

We find violations as alleged in Counts I and II and suspend Respondent for sixty days. Respondent's Motion to Dismiss the Grievance Administrator's Petition for Review because the supporting brief was filed late is denied for the reason that no showing of prejudice to Respondent was made.