GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
ROBERT R. CUMMINS, P-12392,
Respondent/Cross-Appellant.

Case No. ADB 159-88

Decided: December 5, 1988

BOARD OPINION

The respondent in this case has filed a Petition for Review seeking reduction of a thirty-day suspension imposed by a hearing panel. Respondent was found to have commingled client funds with his own by depositing a settlement check in his general business account and it was determined that the return of the disbursement check to the client for non-sufficient funds established a misappropriation. The findings and conclusions of the hearing panel are affirmed; however, discipline in this case is reduced to a reprimand in light of significant mitigating factors.

The facts in this case are not in dispute. The respondent, who normally represented defendants worker's compensation cases, in this instance represented a single plaintiff in a compensation claim against the City of Detroit. On December 16, 1985, he received a $3600 settlement check from the City and on December 16, 1985 he wrote a check to his client in the amount of $2152.50 for her share of the proceeds. The settlement check from the City of Detroit was deposited by the respondent in his general business account rather than in a separate trust account as required by the applicable provision of Canon 9 of the Code of Professional Responsibility, DR 9-102(A) [now MRPC, Rule 1.15(a)]. The respondent testified that his practice as defense counsel did not require the handling of client funds and he did not have a client trust account.

According to the bank records admitted into evidence, his business account had sufficient funds from which to satisfy his obligation to his client from the date he deposited the settlement check, December 19, 1995, until December 30th. On that date, he wrote a $100 check bringing the balance to $2135.10--$17.40 below the amount to which the client was entitled. When she presented her check to the bank the following day, it was dishonored for insufficient funds and was subsequently dishonored a second time. The client's Request for Investigation was filed in January 1986 and served on the respondent February 4, 1986. He rectified the overdraft situation by presenting his client with a cashier's check on February 14, 1986.

The respondent has never denied that he failed to segregate his client funds or that the check to his client was dishonored upon presentment. He explained that he had gone to Florida on vacation, that his return to Michigan was delayed when he

contracted pneumonia and that the entire situation was, in his words, the result of an "accounting error".

There should be no question as to the nature of the misconduct in this case. We can perceive of no excuse for an attorney's failure to be aware of the requirement under Rule 1.15 of the Michigan Rules of Professional Conduct [formerly DR 9-102(A)] that client funds be held separately from the lawyer's own money. There are no exceptions in either the former or present rule which would allow an attorney to commingle client funds in a business or personal account for reasons of convenience or expedience. We note in this case that the respondent received the settlement check from the City of Detroit on December 12, 1985 and deposited it in his bank account one week later on December 19, 1985. Whether or not he had ever needed a trust account before, there was certainly sufficient time to open such an account in this instance.

Nor should there be any question that the facts of this case establish that client funds were misappropriated. As this Board has ruled in a recent case, misappropriation is essentially a per se offense; once the running balance of the office account fell below the amount held in trust for the client, misappropriation had occurred. See Matter of Steven J. Lupiloff, DP 34/85, ADB Opn. March 24, 1988, citing, In Re: E. David Harrison, 461 A2d 1034 (1983).

The rule prohibiting the commingling of client funds with the funds of an attorney is not subject to a defense based upon accounting error nor is the amount of money involved significant in determining whether the rule has been violated. The rule is designed to insure against any invasion of client funds, whether careless or intentional.

As we also pointed out in Lupiloff, supra, however, the issue of intent may have some significance in determining the appropriate level of discipline. We find support in the record in this case for the respondent's argument that there was no willful intent to invade the client funds or to deprive his client of the use of her money. We note, for example, that had the client presented her check for $2152.50 at any time from December 19 to December 30, 1985, it would have been honored by Mr. Cummins' bank.

While we cannot over-emphasize the importance of the duty to refrain from commingling funds, we believe that the lack of harmful intent together with Mr. Cummins' prior unblemished record and the absence of evidence regarding similar incidents presents a situation in which the imposition of a reprimand will adequately discharge our obligation to protect the public and the legal profession.

Hanley M. Gurwin, Remona A. Green, Theodore P. Zegouras, Linda S. Hotchkiss, M.D., Robert S. Harrison and Patrick J. Keating.

Dissenting Opinion

Martin M. Doctoroff

I would affirm the thirty-day suspension imposed by the hearing panel. I believe that the Board should, whenever possible, affirm the decision of a hearing panel inasmuch as it is the panel, not the Board, which has the greater opportunity to observe the respondent and to weigh those factors such as credibility, sincerity and remorse which may be considered in assessing the appropriate discipline.

Furthermore, I am troubled by the message that we send to the public, the Bar in general and this respondent by imposing a reprimand for a violation of a duty which my colleagues on the majority have recognized as a fundamental obligation on the part of an attorney. Granted, the misappropriation in this case could be described as "technical" inadvertent misappropriation of a relatively small amount for a relatively short period of time. Nevertheless, we do the public and the legal profession a disservice if we focus primarily on the consequences of respondent's act rather that upon the act itself. This respondent had an absolute duty to deposit his client's settlement funds in a separate account and to refrain from commingling those monies with his own. He failed to do that.

While I believe that the discipline imposed by the hearing panel may have been lenient, I recognize the mitigating effect of respondent's unblemished record and his lack of fraudulent intent and I would defer to the judgment of the panel on the issue of discipline.