GRIEVANCE ADMINISTRATOR
Petitioner/Appellant,
v
BARRY R. GLASER
Respondent/Appellant.

File No. DP 106/84

Decided: September 30, 1985

BOARD OPINION

Respondent represented the plaintiff in a personal injury automobile action. He obtained a settlement for the client retaining one-third as a fee. lie also obtained first party Personal Injury Protection (PIP) funds from the insurer. These came in a series of checks totaling $37,874.65 made out jointly to Respondent and Client. With implied authorization, Respondent endorsed Client's name and deposited these funds into his general firm business account. Respondent states that he had never heard of a client trust account before this case.

Client eventually insisted on an accounting of funds retained by Respondent. Respondent then claimed 25% of the PIP funds as his fee ($9,455.00), even though he had only spent thirty or forty hours of work in obtaining them.

The PIP funds in the general account were commingled, and the account was often overdrawn by Respondent and his partner, in paying routine bills.

The hearing panel found bases for misconduct:

(1) Charging a clearly excessive fee for the PIP collection;

(2) Commingling Client's funds in the general account, instead of putting them in a client trust account; and,

(3) Expending the funds of Client from the law firm account in violation of DR 9-102.

The panel suspended Respondent for 120 days and required him to take a course in legal ethics. The Grievance Administrator urges a more severe suspension; and Respondent seeks probation. We suspend Respondent for one year, vacate the ethics course requirement.

Respondent makes three arguments:

(1) The disciplinary rule against "charging" an excessive fee is operational only if the fee is actually collected, not just claimed;

(2) Simply because the funds of the Client were commingled in the general account does not mean that they were expended, despite the frequent depletions of that account in paying bills and other personal and firm items; and,

(3) Admittedly, Respondent did not know that client trust accounts are mandated by the discipline rules. A suspension of any kind is too harsh and would only have a permitive effect in this case. In lieu of suspension, Respondent seeks general probation with a requirement to perform pro bono work.

DR 2-106(A) states:

> A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. [Emphasis added.]

Respondent claims that he could not have violated this rule unless he actually collected, and not just asked for, an excessive fee. After litigation, a lesser fee was finally accepted by Respondent for his services in obtaining PIP insurance payments, although he did ask for $9,455 originally. The panel found that figure an excessive "charging," for the reason that it would have resulted in a charge of about $236 to $315 per hour for uncomplicated collection of insurance benefits.

Disciplinary rule 2-106 plainly indicates that it is the charging or collection of such an excessive fee which constitutes misconduct. The rule is stated in the disjunctive, "or" rather than the conjunctive, "and", as would be required if Respondent's suggested construction were to be accepted by the Board. In any case, the excessive "fee" and other funds were actually in Respondent's possession and were used for personal and firm expenses. This is surely a constructive collection and receipt. Respondent clearly violated DR 2-106(A).

Respondent admits that the Client's fees were commingled in his general firm account, and that this account was often depleted. Respondent argues, however, that this does not amount to expenditure of Client's funds. Since Client had a "claim of title" to a certain amount in the account at all times, his argument progresses, the client's funds were not expended and the client's title was not impaired.

That a client has a chose-in-action for monies commingled by an attorney is not a defense to misconduct charges. Respondent actually possessed the client's funds, and did not segregate and preserve them in a trust account as required by DR 9.102; hence, the purpose of requiring separate client accounts. Paper title is of little worth or comfort to the client-public if the account containing a client's money is wrongfully dispersed or commingled.

The repeated depletions of the professional account which was used to hold client funds, constitutes, at the very least, prima facie misconduct. It is not wholly explained by Respondent's admitted ignorance regarding the need for a separate identifiable trust account. The client here was particularly vulnerable because she suffered from severe psychological problems of which Respondent admits he was aware. Similar misconduct could warrant a greater sanction. In re:

Geralds, 402 Mich 387, 263 NW2d 241 (1978) (three year suspension for failure to preserve identity of client funds, using same for own gain without client's permission, and converting client's money).

Respondent claims that a suspension of any length would be punishment. The Michigan Supreme Court has pointed out that while the objective of attorney discipline is not punishment, some degree of punishment may be inherent in the discipline imposed.

> "It would be a rare attorney, indeed, who would not feel 'punished' if precluded from practicing law Further, the purpose of discipline -- protection of the public, the courts and the legal profession -- may at times best be achieved through the deterrent effect of punishment. We do not accept the assertion that 'protection' and 'punishment' are irreconcilable concepts and that the line between them cannot be crossed * * *." In re: Grimes, 414 Mich 483, 326 NW2d 380, 382-83 (1982).

Respondent is suspended for one year. The requirement of attendance at a course in legal ethics is vacated. Because of our decision regarding the need for suspension, we need not consider Respondent's arguments regarding this Board's authority to impose general probation without a showing of physical or mental disability pursuant to MCR 9.121.