

IN THE MATTER OF GARY A. ROTH,
A Member of the State Bar of Michigan,
Respondent,
File No. DP-20/81 & DP-9/82

Argued: March 30, 1983
Decided: July 18, 1983

OPINION OF THE BOARD

Respondent was suspended for one year for neglect and mishandling of client funds. He was also reprimanded for neglect of a second client matter. The Grievance Administrator challenges the sufficiency of the one year suspension. We affirm the reprimand and increase the suspension from one year to thirty months.

Respondent was retained in August 1972 to handle an accident claim. The hearing panel found that Respondent and the client attended a deposition in 1976, but thereafter communication between the Respondent and his client lapsed, due in part to the inaccessibility of the client. Respondent eventually settled the case without the complainant's knowledge or express consent. There is some indication, based in part on a prior continuing relationship between the Respondent and the complainant, that the complainant may have implied that Respondent was authorized to use his independent discretion to accept a settlement offer.

Respondent blatantly violated his position of trust by signing the complainant's name to the settlement release without authorization. Respondent also endorsed the settlement check without the complainant's permission and commingled the settlement funds with his own by depositing the settlement check into his own general account. The settlement check was endorsed by Respondent in September 1979, but the money was not released to the client until October 1982. In fact, the hearing panel found, and we agree, that a large portion of the funds were improperly converted by the Respondent, notwithstanding his reimbursement of the funds with interest to the client after service of the Grievance Commission's request for investigation. Given all the surrounding circumstances it is difficult to treat the late payment to the client as mitigation. Failure to give the client notice of the settlement and the payment, misappropriation of the funds and failure to pay until confronted by the Grievance Commission, together have a negative rather than a mitigating effect.

Furthermore, the misappropriation of funds is exacerbated by serious and prolonged neglect of a separate client matter. In that case, Respondent was retained in September 1972, to handle an accident claim. Respondent filed suit for the client, but the case was dismissed for lack of progress after Respondent failed to appear at a pretrial hearing on January 2, 1979. The complainant was not advised of the dismissal until 1981.

A greater sanction is required in this case given the record before us and Respondent's prior disciplinary suspension for 30 days for neglect and failure to communicate with a client, leading to the dismissal of the client's claim.

Misappropriation of client funds is among the most serious breaches of a lawyer's duty to a client. There is no professional or business relationship calling for a higher level of trust or confidence than that in which an attorney acts as a representative with apparent authority to negotiate reimbursement for damages and personal suffering and to receive the funds on behalf of the injured client.

The misappropriation and mishandling of client funds in this case violates Canon 1, DR 1-102(A) and Canon 9, DR 9-102(B)(1-4) which provides as follows:

“A lawyer shall:

- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
- (2) Identify and label securities and properties of the client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities and other properties of the client coming into the possession of a lawyer and render appropriate accounts to his client regarding them.
- (4) Promptly pay or deliver to the client as required by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive.”

The record clearly supports the finding that Respondent violated subsections (0) (1-3) above. While subsection (B)(4) requires payment of funds “as requested by the client,” and while such a request may not have been made by the client in this case, it would be absurd to construe that the rule allows lawyers to retain client funds until the client suspects that they might be entitled to delivery. Respondent's consent to the settlement and endorsement of the draft without the client's approval also constitutes dishonesty within the meaning of DR 1-102(A)(4).

We conclude:

- (1) That Respondent settled the client's accident claim without the proper authorization or consent of his client;
- (2) That Respondent violated his Canon 9 duties to segregate, label, account for and notify the client regarding receipt of settlement funds;
- (3) That acceptance, endorsement and the depositing of funds in his general account and the use of the client's share of said funds for purposes other than payment to the client was dishonest and fraudulent within the meaning of Canon 1, DR 1-102(A)(4);

(4) That Respondent neglected prosecution of the legal affairs of a separate client for several years; and,

(5) That Respondent neglected both clients by failing to communicate to them the status of their respective cases.

MITIGATION

Respondent had a duty to segregate and properly account for his client's funds. The record is devoid of evidence which might tend to mitigate Respondent's misappropriation of those funds. Regarding the settlement, however, there is some evidence tending to show an effort by Respondent to make contact with the client. Based on this evidence, we modify the hearing panel's rejection of Respondent's defense in this regard. The proof offered to show that Respondent attempted to contact the complainant mitigates the violations of DR 6-101(A)(3) prohibiting neglect and DR 9-102(B)(1) requiring prompt notification to the client upon receipt of client funds. However, Respondent's attempts to contact the complainant after the conversion would seem to have been of little avail since, because of the conversion, he could not have rendered an appropriate accounting of the settlement funds and, apparently, would have been unable to promptly pay or deliver the funds.

Respondent also asserts as mitigation that he possessed an implied authority to act independently in accepting the settlement offer. While the complainant's testimony is somewhat contradictory on this point, she never definitely acknowledged a waiver of her right to be consulted regarding the amount of the settlement; certainly, she did nothing that would suggest Respondent had authorization to endorse the settlement draft and deposit it into his own account. Respondent's urging that the complainant's inaccessibility contributed to the lack of communication is somewhat diluted by the complainant's testimony that she was advised by the Respondent after the deposition to concentrate on her rehabilitation and should not attempt to contact Respondent because he would contact her.

Therefore, the only mitigating factor of any significance is Respondent's limited effort to contact his client regarding the settlement. The suspension is increased from one year to a period of 30 months.

All concur except Board Secretary David Baker Lewis who did not participate in the hearing or decision in this matter.