Handling Clients’ Funds

In a recent Alabama decision an attorney was employed by a woman and her husband in two cases arising out of an automobile accident. The lawyer negotiated a reduction in a chiropractor’s bill for the couple in the amount of two hundred dollars; however, he failed to inform the clients that he had done so, and also neglected to place the two hundred dollars in his trust account. The attorney was accused of acting fraudulently and in bad faith. He was charged with deceit and willful misconduct in failing to advise his clients that the bill had been reduced. Finally, he was accused of exhibiting conduct unbecoming to an attorney-at-law. The Board of Commissioners of the Alabama State Bar felt that the lawyer did not act fraudulently, but nevertheless suspended him from the practice of law for three months and publicly reprimanded him. In *Tarver v. Board of Commissioners of Alabama State Bar*, the Alabama Supreme Court upheld the Board of Bar Commissioners. The fact that the attorney later paid the clients, after the grievance proceeding was brought, did not prevent suspension.¹

Disciplinary Rule 9-102 of the American Bar Association *Code of Professional Responsibility* deals with, in essence, the handling of a client’s money. It establishes four closely related duties in this regard: a duty not to commingle, a duty to notify, a duty to account, and a duty to pay over promptly.² The Alabama *Code of Profes-

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¹ Tarver v. Board of Comm’rs of Ala. State Bar, 290 Ala. 87, 274 So. 2d 61 (1973).
² The *Code of Professional Responsibility* has its historical roots in the statute, the first of Westminster, Chapter 29, in 1275, which provided that “if any serjeant, pleader or other do any manner of Deceit or Collusion in any King’s Court or the Party and thereof be attained, he shall be imprisoned for a year and a day and from thenceforth shall not be heard to [plead] [conter] in [that] Court for any man.” This statute was the earliest provision regulating the professional conduct of attorneys-at-law. By the time of Edward I’s reign the legal profession in England was an organized body subject to fixed rules. In the United States’ early period there were high standards among the members of the bar; however, during the second third of the nineteenth century hostility grew against the bar because it was viewed as being undemocratic. Public opinion mandated statutes which lowered the qualifications of lawyers. During the period immediately after the War Between the States the bar reached its lowest point. In reaction to the deplorable state of the profession, there were movements to reestablish organizations of the bar and standards of education and character. The Alabama Bar Association adopted the first code of professional ethics in the United States in 1887. The American Bar Association followed suit and adopted the *Canons* in 1908. Over the
sional Responsibility, though not in effect at the time of this case, charges the attorney with a duty not to misappropriate, a requirement which varies from the ABA Code's duty to pay over promptly. The court in Tarver\(^3\) seems to have adopted the ABA approach, yet the operational rule at the time was limited to misappropriation, deceit, and willful misconduct.

In the area of attorney dealings with clients' money, misappropriation is by far the most common type of case.\(^4\) To warrant disbarment for this offense, some element of fraud or dishonesty must appear; in other words there must be evidence of the lawyer's bad faith.\(^5\) Mere retention is not enough to constitute misappropriation in the absence of an intent to defraud.\(^6\) Because bad faith is required in misappropriation cases, the defense of an agreement with the client to retain the money for fees is frequently raised to rebut bad faith. The cases seem to turn on whether the court believes the lawyer or the client, and on the strength of the evidence of an agreement.\(^7\) Misappropriation cases will probably become less numerous because the ABA Code's promptly pay and promptly notify requirements seem to point the way to a demise of the bad faith defense.\(^8\)

Hard times take their toll on the legal profession. There were more cases of misappropriation and other grievances relating to money matters in the 1930's than in any other period to date. The courts were sympathetic to pleas of necessitous circumstances but nevertheless suspended and disbarred lawyers because duty to the public must, of necessity, come first.\(^9\)

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\(^3\) years the Canons have been amended and revised into the Code of Professional Responsibility. See generally H.S. Drinker, Legal Ethics (1953).

3. 290 Ala. 87, 274 So. 2d 61 (1973).

4. See, e.g., Padgham v. State Bar, 6 Cal. 2d 504, 58 P.2d 633 (1936); In re Cherry, 166 Minn. 448, 208 N.W. 197 (1926), annotated in 45 A.L.R. 1108 (1926); In re Dahl, 159 Minn. 481, 199 N.W. 429 (1924), annotated in 43 A.L.R. 52 (1924).

5. Butts v. State Bar, 31 Cal. 2d 453, 189 P.2d 1 (1948); Duffin v. Commonwealth, 208 Ky. 452, 271 S.W. 555 (1925); In re McCue, 80 Mont. 537, 261 P. 341 (1927); In re Irwin, 162 Or. 221, 91 P.2d 518 (1939).

6. Ex parte Acton, 283 Ala. 121, 214 So. 2d 685 (1968).

7. In re Langworthy, 39 Ariz. 523, 8 P.2d 245 (1932); In re Brumund, 381 Ill. 139, 44 N.E.2d 833 (1942); In re Williams, 180 Md. 689, 23 A.2d 7 (1941); In re Wittstein, 5 N.J. Misc. 239, 136 A. 183 (1927); In re Fraser, 83 Wash. 2d 884, 523 P.2d 921 (1974).

8. See Tarver v. Board of Comm'rs of Ala. State Bar, 290 Ala. 87, 274 So. 2d 61 (1973); In re Rude, 221 N.W.2d 43 (S.D. 1974).

9. Price v. State Bar, 8 Cal. 2d 201, 64 P.2d 727 (1937); In re Borchardt, 357
Illness parades as an attempted defense in this area, but it has broader overtones in that the illness sometimes seems to have been the cause of the problem. Generally, illness is regarded as a mitigating circumstance, not a total defense. There are several opinions recognizing alcoholism as a defense. The courts disbarred the lawyers but gave them the right of reinstatement if they reformed. A California opinion, however, thought that an alcoholic had been treated too leniently in being suspended for only three years for misappropriation of funds.

Bad business practices, not bad faith, are more evident in the commingling and failure to account types of cases than in the misappropriation type. In the former, courts seem to be more sympathetic to the attorney because the client himself has chosen counsel whose business acumen is less than adequate. However, good faith is not a defense to a charge that an attorney has commingled money belonging to his client with his own personal funds. In the accounting and notification area, confused files and unorganized systems are the reasons for the problems. One encounters young and inexperienced attorneys claiming that they were not taught in law school how to keep business records and busy practitioners who left the matter to subordinates. A few courts have emphasized the heaviness of the penalty to a person of losing his or her livelihood and that it is a factor to be considered in determining whether suspension or disbarment is proper.

Ill. 458, 192 N.E. 383 (1934); In re Zahn, 356 Ill. 283, 190 N.E. 419 (1934); In re Kanter, 181 Minn. 65, 231 N.W. 396 (1930); In re Kraus, 322 Pa. 362, 185 A. 737 (1936).

10. Ring v. State Bar, 4 Cal. 2d 196, 47 P.2d 704 (1935) (misappropriating lawyer suspended, not disbarred); In re Ahern, 23 Ill. 2d 69, 177 N.E.2d 197 (1961) (lawyer censured after receiving money for services he did not perform—illness in family and death of wife mentioned).

11. In re Rice, 241 Minn. 386, 63 N.W.2d 41 (1954) (fund commingled, converted, and attorney refused to account); In re Boland, 239 Minn. 141, 57 N.W.2d 809 (1953) (funds commingled, converted).


17. People ex rel. Chicago Bar Ass'n v. Hammond, 356 Ill. 581, 191 N.E. 215
Lack of judgment pervades all the cases dealing with an attorney improperly handling a client’s funds. One common situation is where the attorney collects money and then uses it for his own personal purposes, intending to repay it, but with no certain means of so doing and without notifying the client of its collection.\textsuperscript{18} A variation on this pattern is where the attorney actively misrepresents the progress of the collection.\textsuperscript{19}

There is a problem with imprecise and vague language in the whole area. Many cases simply find the attorney guilty of conduct unbecoming an attorney or professional misconduct.\textsuperscript{20} What this means is not always clear. In Tarver\textsuperscript{21} the concept “conduct unbecoming an attorney” was defined to mean being guilty of fraud or deceit. Since Tarver was found guilty of deceit, “conduct unbecoming an attorney” in this case means wilful misconduct in failing to tell his clients that the chiropractor’s bill was reduced. The court construed this charge to be a deceit charge, relying on Peters v. State,\textsuperscript{22} which involved an affirmative intentional misleading. It is questionable whether Tarver’s conduct falls within this category. In fact the court states “that Tarver never represented to his client that he had not collected any of the client’s funds.”\textsuperscript{23} Furthermore, since no bad faith was found to enable the court to find Tarver guilty of misappropriation, logically there should not have been a guilty finding under the deceit charge if the standard of wilful deceit is followed.\textsuperscript{24} A strict liability concept is better attuned to the situation. In fact, the court has covertly recognized strict liability by holding Tarver, in effect, guilty of unintentional false suggestion\textsuperscript{25} which, translated into DR 9-102’s terminology, means failure to give prompt notification. Since the same operative facts gave rise

\textsuperscript{18} In re Allen, 75 N.H. 301, 73 A. 804 (1909).
\textsuperscript{19} In re Stuart, 257 Ala. 184, 57 So. 2d 874 (1952).
\textsuperscript{20} In re Rogers, 99 Ariz. 343, 409 P.2d 45 (1965); People v. Humbert, 69 Colo. 188, 194 P. 612 (1920); In re Banner, 31 N.J. 24, 155 A.2d 81 (1959); State ex rel. Okla. Bar Ass’n v. Burger, 401 P.2d 524 (Okla. 1965).
\textsuperscript{21} 290 Ala. 87, 274 So. 2d 61 (1973).
\textsuperscript{22} 193 Ala. 598, 69 So. 576 (1915).
\textsuperscript{23} 290 Ala. 87, 274 So. 2d 61, 67 (1973).
\textsuperscript{24} Peters v. State, 193 Ala. 598, 69 So. 576 (1915) (established the wilful deceit standard which the court purported to follow).
\textsuperscript{25} 290 Ala. 87, 274 So. 2d 61 (1973).
to both charges (withholding the clients’ money), Tarver was also
guilty of failing to promptly pay which means he was guilty of
misappropriation minus its bad faith aspect. There is really no clear
division between failure to promptly notify and failure to promptly
pay in this situation. As a matter of fact, Tarver did not promptly
pay or promptly notify. Since the court did not articulate a strict
liability rationale for not promptly notifying, it did not see the possi-
bility of extending strict liability to the traditional misappropria-
tion charge and instead confused deceit with prompt notification.
The case was contradictory in the sense of not also finding Tarver
guilty of misappropriation. However, it would not be difficult for a
later court to extend Tarver’s result to the promptly pay area.

Canon 9’s28 admonition really creates a tendency to use a strict
liability standard as the basis of liability.27 It will be noted that none
of the subsections of DR 9-102 speak to a bad state of mind or mens
re a but simply point out duties. The tendency is a good one because
it places the client’s interests above that of the attorney. It is not
overly harsh to attorneys if the bar is properly educated and pro-
perly familiar with the Code of Professional Responsibility.

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27. See In re Cornelius, 520 P.2d 76 (Alas. 1974) (accounting); Tarver v.
Board of Comm’rs of Ala. State Bar, 290 Ala. 87, 274 So. 2d 61 (1973) (promptly
notify); Silver v. State Bar, 13 Cal. 3d 134, 528 P.2d 1157, 117 Cal. Rptr. 821 (1974)
(commingling); Toledo Bar Ass’n v. Illman, 18 Ohio St. 2d 122, 47 Ohio App. 2d
Rude, 221 N.W.2d 43 (S.D. 1974) (promptly pay).