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## Attorney and Client—Handling of Client's Money or Other Trust Property—Commingling or Use by Attorney Cause for Suspension

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## CASE COMMENTS

**ATTORNEY AND CLIENT—HANDLING OF CLIENT'S MONEY OR OTHER TRUST PROPERTY—COMMINGLING OR USE BY ATTORNEY CAUSE FOR SUSPENSION.**—Complainants were clients of respondent attorney who had failed to remit promptly to the clients the proceeds from the sale of their real estate, as required by the Canons of Professional Ethics. Upon complaint to the County Ethics and Grievance Committee, respondent was found guilty of unprofessional conduct by delaying disbursement of the clients' funds and by utilizing those funds for his personal purposes in the interim. *Held*, in suspending attorney from practice of law for one year and until further order of the court, that the full amount of all checks payable to an attorney in his fiduciary capacity, as well as all cash similarly paid him, should be deposited immediately in a separate trust account used for that purpose alone. The fact that complainants had ultimately received the money, almost one and one-half years after the complaint was filed against respondent, could not condone the attorney's personal use of their funds, or the unwarranted delay in payment thereof to the clients. *In re Banner*, 155 A.2d 81 (N.J. 1959).

It cannot be denied that few business relations involve a higher degree of trust and confidence than that of an attorney and client. Consequently, the attorney-client relationship must be closely guarded by the law and governed by the sternest principles of morality and justice. *Stockton v. Ford*, 52 U.S. 232 (1850). A layman is forced to rely heavily on his attorney's advice and conduct, for most laymen have a very limited conception of the law and its application. Because of the relationship created, the lawyer is held to a much higher degree of care and responsibility than any other fiduciary.

Since a lawyer often holds funds in trust for clients, it is important that such funds be treated strictly as trust funds. Canon 11 of the Canons of Professional Ethics of the American Bar Association contemplates this and provides this admonition:

"The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

"Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

This Canon sets forth a simple and precise standard for the protection of both the attorney and his client. The principal case demonstrates that failure to follow Canon 11 may result in either suspension, or annulment of the attorney's license.

Under the influence of competent jurists, the state of New Jersey has been one of the leaders in the field of legal ethics. In the words of Chief Justice Vanderbilt, "The funds in the hands of an attorney that belong to a client or others must be kept inviolate. For obvious reasons, the strictest rules of conduct apply here and every presumption works against the wrongful user." *In re Gavel*, 22 N.J. 248, 264, 125 A.2d 696, 704 (1956). The jurist went on to state that there is absolutely no excuse for an attorney's failure to account for funds held by him for his client on the latter's demand. In addition to these responsibilities to his client, he owes the courts, the legal profession and the public a more rigid standard of conduct than that required of the ordinary layman, even when he is not acting in a representative capacity.

While a lawyer who handles relatively little money for others may object to strict adherence to the provisions of Canon 11, yet the principles and objectives of that Canon reach all attorneys with equal force. Thus, although an attorney stated that she maintained no trust account because the bulk of her work did not so require, it was held that the attorney must observe Canon 11 even though such a trust account is used only six or eight times a year.

"It is designed to assure the client's funds and serves as well to protect the attorney from difficulties which may inadvertently beset him if funds are confused in a common account. . . . Hence, where a check includes the interests of both the client and attorney, it should be deposited in a special account for the funds of others, and not in an account which the attorney uses to meet his personal or professional expenses."

*In re White*, 24 N.J. 521, 524, 132 A.2d 777, 778 (1957).

Other states have followed the lead of New Jersey in this area. An intermingling of an attorney's funds with those of his client is not countenanced in the professional relationship. The mere fact that the client does not complain is not important in an evaluation of the policies and practices involved. *In re Heider*, 341 P.2d 1107 (Ore. 1959).

Consistent with these principles is the California court's holding that misappropriation of a client's funds by his attorney is a gross violation of general morality. The public trust of the legal

profession is essential for the well-being of the profession, and a single violation of this trust may seriously harm the confidence of the public in its relations with attorneys. *Sturr v. State Bar of California*, 338 P.2d 897 (Cal. 1959).

The Supreme Court of Appeals of West Virginia has long recognized the necessity of a Code of Professional Ethics and in essence promulgated those adopted by the American Bar Association in 128 W. Va. xvii (1947). See also Rule VIII (b), Rules of Practice for Trial Courts, as promulgated by the Supreme Court of Appeals April 10, 1936. Canon 11, discussed in detail in the principal case, was adopted verbatim. 128 W. Va. xxiv (1947).

In addition, the West Virginia State Legislature thought Canon 11 to be of such importance that violation of it has been made a misdemeanor in this state, by W. VA. CODE ch. 30, art. 2, § 12 (Michie 1955).

"If any attorney at law or agent shall, by his negligence or improper conduct, lose any debt or other money of his client, he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had received such principal, and it may be recovered from him by suit or motion."

Further, § 13 provides:

"If any attorney receive money for his client as such attorney and fail to pay the same on demand, or within six months after receipt thereof, without good and sufficient reason for such failure, it may be recovered from him by suit or motion; and damages in lieu of interest, not exceeding fifteen per cent per annum until paid, may be awarded against him, and he shall be deemed guilty of a misdemeanor and be fined not less than twenty nor more than five hundred dollars."

Many applications of these statutes are found. One of the earliest decisions stated that the jurisdiction in such cases is legal rather than equitable. Also, it is essential that the attorney authorized to collect the fund had actually received it, and refused to pay it to his client on demand or within six months after receipt thereof, without good and sufficient reason. *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S.E. 609 (1904).

The cause for criminal prosecution under this section does not arise until six months after the receipt of the money by the lawyer, or until a demand is made by the client, whichever happens first. Since the offense is a misdemeanor, it falls under the one year

Statute of Limitations, and prosecution is barred after one year from the date when the cause arose. *State v. Locke*, 73 W. Va. 713, 81 S.E. 401 (1914). See also Constitution and By-Laws of The West Virginia State Bar, Art. VI, § 23.

Where an attorney has misused or refused payment of funds to his client, the West Virginia court has been quick to inform the attorney that he is entitled to no compensation for services rendered. Thus, where *D* refused without legal excuse to give to *P* money received by him for *P* in settlement of a judgment, it was held that by his conduct *D* disentitled himself to compensation; he could not deduct it from the damages owed to *P*. *Bailey Lumber Co. v. Dunn*, 109 W. Va. 725, 156 S.E. 79 (1930).

Manifestly, the importance of good faith and fairness cannot be too strongly stressed in the attorney-client relationship, especially where money and other property of the client are held by the attorney. To violate the principles controlling the relationship will result in attorney discipline, and possible criminal prosecution, disturbed feelings by and hardships on clients, bad public relations on the part of the Bar, and discredit to the Bar generally.

F. L. D., Jr.

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CONFLICT OF LAWS—INTERSTATE STATUS OF DIVORCE.—*H* instituted suit in West Virginia for an annulment of his marriage to *W*<sup>2</sup> on the grounds of a prior subsisting marriage. Prior to the institution of this suit *H* had obtained a divorce in Tennessee from *W*<sup>1</sup> on constructive service. The trial court entered judgment annulling the second marriage and *W*<sup>2</sup> appealed. *Held*, the courts of this state are not required to give full faith and credit to a judgment or decree of a sister state if that state was without jurisdiction to enter such judgment or decree. Nor, is the party who obtained such divorce precluded by estoppel or the "clean hands" doctrine from asserting the invalidity of such divorce in a suit in this state to annul a subsequent marriage. *Gardner v. Gardner*, 110 S.E.2d 495 (W. Va. 1959).

"... [A]ll marriages which are prohibited by law on account of either of the parties having a former wife or husband then living; . . . shall be void from the time they are so declared by a decree of nullity." W. VA. CODE ch. 48, art. 2 § 1 (Michie, 1955). Application of this provision to the instant case "necessarily implies an