

## **CHAPTER VII**

### **DOING IT AND DOING IT RIGHT: COMPETENCE, COMMUNICATION AND CLIENT FUNDS**

#### **I. INTRODUCTION**

It is clear that, as part of the agency relationship and the duty of loyalty to the client, an attorney has an obligation to perform the work required for the client and to do so competently while keeping the client informed. These obligations are found in the Model Rules in Rules 1.1-1.4.

Historically, competence was not viewed as an ethical or professional responsibility concern. It was not until the adoption of the Code of Professional Responsibility in 1969 that competence was "explicitly made a professional obligation." Comment to Model Rule 1.1, Proposed Final Draft, Model Rules of Professional Conduct (May 30, 1981). Even then, while the incidence of complaints against attorneys regarding incompetence and neglect was high, the incidence of discipline was not, and what discipline was imposed was generally not severe.

In recent years, however, the incidence and severity of discipline for incompetence and neglect has increased. The seriousness of the problem of attorney competence is reflected in the placement of the rule relating thereto as the first of the Model Rules, (see 1.1), a placement that Robert Kutak, chairman of the ABA Commission on the Evaluation of Professional Standards, characterized as "no accident." Remarks to the 10th Annual Conference of the National Association of Law Placement, June 15, 1981, at 13.

This chapter will explore what is meant by competence and neglect, what obligations a lawyer has in dealing with client property and funds, what sanctions can be imposed for violations of these obligations, and what can be done in law office practice to avoid exposure in these areas.

#### **II. WHAT IS COMPETENCE?**

Read Model Rule 1.1 and Commentary.

While lawyers may face sanctions for incompetence and neglect, there had been little written until the early 80's regarding what constitutes competence. One attempt at a comprehensive definition of competence appeared in the ALI-ABA Committee on Continuing Professional Responsibility Discussion Draft, "A Model Peer Review System." That Report defined legal competence as follows:

Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

What do you think of this definition? Does it capture all the elements of competent performance as an attorney? Is competence more a function of knowing what to do or actually getting the job done? The Report notes the importance of “knowledge, skill, care and performance.” How important is each of these? What about motivation, and where does it fit into the equation? What other factors are relevant, and how are they weighed?

The A.B.A. Section of Legal Education and Admission to the Bar, in its *Report and Recommendations of the Task Force on Lawyer Competency: the Role of the Law Schools* (1979) [often referred to as the Cramton Report in recognition of the Chairman, Roger Cramton], noted:

Too much of the discussion of the “problem of lawyer incompetence” has failed to distinguish between competence and performance. Inadequate lawyer performance --- the failure to meet a satisfactory standard in some task undertaken for a client --- is not synonymous with lawyer incompetence. Competency properly refers to an individual’s capacity to perform a particular task in an acceptable manner. A lawyer’s actual performance may fall short of the appropriate standard for any number of reasons unrelated to competence: inattention, laziness, the press of other work, economic factors, or mistake. Indeed, available evidence suggests that reasons such as these, not a lack of capacity to do a proper job (incompetence in the narrow sense), are the cause of most instances of lawyer failure.

The Task Force then went on to address the “components of lawyer competence.” It concluded:

The Task Force believes it useful to view lawyer competence as having three basic elements: (a) certain fundamental skills; (b) knowledge about law and legal institutions; and (c) ability and motivation to apply both knowledge and skills to the task undertaken with reasonable proficiency.

Is it helpful to identify the characteristics of competent performance and encourage that lawyers conduct their practices in conformance therewith? The ALI-ABA Report attempted to do so. It identified ten criteria which it felt “give more specific content to the concept of legal competence.” The first four were viewed as broad types of work performed by attorneys and were “most important in that they directly reflect the attorney’s ultimate performance --- his or her output as a professional.” The remaining six were viewed as “qualities or activities which tend to promote competent performance.” The Committee Report defined each one, then provided commentary and illustrative indicators. The ten criteria are as follows: information gathering, legal analysis, strategy formation, strategy execution, following through, practice management, professional responsibility, practice evaluation, training and supervising support personnel, and continuing attorney self-education.

Are the various standards discussed above helpful? For what purpose? Are the standards for “competence” the same when dealing with malpractice liability and discipline? Should they be? In thinking about competence, should we view it from the client’s perspective? What do clients think they are getting when they buy a lawyer’s services? What should they have a right to expect?

The meaning of competence, and the related requirements of diligence and

communication, are important in the abstract, but are even more crucial when we are attempting to define and deal with incompetence and neglect, the subject of the following section.

### III. SANCTIONS FOR INCOMPETENCE AND NEGLECT

Failure to act properly on behalf of a client may subject an attorney to a private civil suit for malpractice as well as to discipline for violation of the Code or Rules. The actions are different both as to matters of proof and as to the ultimate sanctions imposed.

#### A. Discipline

Model Rule 1.1 requires that an attorney provide competent representation to a client, and indicates that such representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.1 is stated as more of an affirmative requirement than its predecessor in the Code, D.R. 6-101 (A). Like 6-101, however, Rule 1.1 is rarely used by itself to discipline an attorney. It is more frequently used in conjunction with Rule 1.3 (diligence) and 1.4 (communication), and generally where there has been a pattern of incompetence and neglect, see, e.g., *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994); or in conjunction with other violations, see, e.g., *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); *In re Stricker*, 808 S.W.2d 356 (Mo. banc 1991); *In re Barr*, 796 S.W.2d 617 (Mo. banc 1990). For a discussion of whether one incident is enough, and of the types of cases leading to sanction, see generally Annotated Rules, at 20-26, 49-51.

As indicated, neglect, or lack of diligence, is the more common basis for discipline and sanctions are usually imposed for a pattern of neglect. See, e.g., *In re Crews*, 159 S.W.3d 355, 361 (Mo. banc 2005); *Oklahoma Bar Ass’n. v. Benefield*, 125 P.3d 1191 (Ok. 2005); but see *In re Redden*, 153 P.3d 113 (Or. 2007) (60-day suspension for serious neglect of one matter). Despite possible indications to the contrary, there is no doubt that “neglect of duty to clients is sufficient for disciplinary action.” *In re Alpers*, 574 S.W.2d 427, 428 (Mo. banc 1978). According to most courts, it is not necessary that such neglect be accompanied by moral turpitude or dishonesty. *Alpers, supra*. The concurring opinion of Judge Holman in *In re Holm*, 285 Or. 189, 590 P.2d 233 (1979) is indicative of the thinking of many courts and judges in this area:

In the past this Court has made an understandable distinction in the way offending members of the bar have been treated between those guilty of dishonesty and those guilty of procrastination and inattention to their clients’ affairs. It has been reluctant to inflict severe sanctions for other than dishonesty. Because of the number of cases presently coming to this Court which concern legitimate complaints of procrastination and inattention, I have come to the conclusion that protection of the public requires that more severe sanctions be imposed for such offenses. Unfortunately, the effect on the client may be just as disastrous as if dishonesty were involved.

*Id.* at 235; see also *In re O’Brien*, 29 P.3d 1044, 1049 (NM 2001).

The concern of courts regarding neglect is well stated in *Office of Disciplinary Council v. Kagawa*, 622 P.2d 115, 118 (Hawaii 1981):

Procrastination and delay in handling of legal affairs not only induces a client to lose confidence in his attorney, but reflects badly on the profession and the courts, and may foster an impression in the public mind that the highly-vaunted standards of professional ethics are no more than a sham.

Quoting from *In re Trask*, 53 Hawaii 165, 172, 488 P.2d 1167, 1171 (1971). See also *In re Hardge*, 713 S.W.2d 503,506 (Mo. 1986) where, in imposing a public reprimand for violation of DR 6-101 (A)(1)(3) and 7-101 (A), the court stated:

Having considered the entire record as presented we conclude that reprimand is adequate and proper. The failure of respondent to timely pursue her client's legal interests represents conduct that is simply unacceptable. The consequences of such conduct harms both the public and the legal community. Our action here is meant to protect the public and the profession by making it clear to both that the Court expects lawyers to be diligent and competent in all aspects of handling their clients' business.

Neither the fact that there has been no actual monetary loss to the client, nor that the attorney has been ill or is youthful or inexperienced, nor the demands of other legal work, will excuse or act as a defense to a charge under M.R. 1.1 and 1.3, although such factors may be considered in mitigation of the severity of discipline. See Annotated Rules, at 47-48.

In addition to imposing discipline, several courts have required that the attorney return his or her fee where there has been a finding of neglect. In *Matter of Jaynes*, 267 N.W.2d 782 (1978), the North Dakota court issued a public reprimand to an attorney who had neglected the probate of an estate, but also required the return of the entire fee. The court in *Florida Bar v. Fuller*, 389 So.2d 998 (Fla. 1980) suspended the attorney for one month for failing to effectively communicate with his client and for not proceeding with the action as agreed, and conditioned readmission on return of the fee to the client. In addition to suspending an attorney who exhibited "inexcusable delay and procrastination in pursuing matters entrusted to his care," the Washington Supreme Court required an attorney who failed to close out an estate to hire another attorney to do so at his own expense and to pay interest charges which accrued on taxes for the estate which he had failed to pay. *In re Loomos*, 90 Wash. 2d 98, 579 P.2d 350 (en banc 1978). Thus, in addition to jeopardizing one's license to practice, neglect can be costly as well.

Discipline is also possible for failure to adequately communicate even absent incompetence or neglect. See *In re Harris*, 890 S.W.2d 299 (Mo. banc 1994). The court there recognized that "it is irritating to clients and damaging to the public perception of the legal profession when clients are not given timely and adequate information regarding the status of their case. *In re Kopf*, 767 S.W.2d 20, 24 (Mo. banc 1989) (Blackmar, J., concurring)." 890 S.W.2d at 302.

## B. Malpractice

Malpractice includes a broad range of acts and omissions that can lead to liability of an attorney for non-fraudulent wrongs committed in a professional capacity, including breach of standard of care, fiduciary obligation, or implied contractual commitments.

Attorney malpractice claims have increased significantly in recent years. Until the 1970's, there was no systematic collection of data relating to malpractice. But since then, the incidence of malpractice has increased faster than the increase in the number of licensed attorneys. Mallen and Smith, *Legal Malpractice* §1.6 (2008). Although the incidence of malpractice is hard to track, since there is not complete reporting by insurance carriers (and fewer than two thirds of lawyers carry malpractice insurance in any event), it is estimated that 10-20% of lawyers will have claims made against them in any given year, and that a new lawyer entering practice will have three claims filed against him or her over the course of a lifetime of practice. See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 Vand. L. Rev. 1657, 1664-68 (1995). While these figures represent a less than scientific sample and for the most part reflect claims, not successful judgments, they are cause for concern.

Most malpractice actions are the result of attorney negligence, although there are other bases for such actions including conflict of interest and breach of fiduciary duty. See, e.g., *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997). Nationally, substantive errors account for the largest percentage of malpractice claims, while administrative errors and client relations account for another significant percentage of such claims. Contrary to popular belief, it is lawyers in practice over ten years, and not new admits, who account for the largest percentage of malpractice claims, and firms of two to five lawyers have the largest incidence of claims, with solo practitioners not far behind (although solos are actually underrepresented when the number of claims is considered in conjunction with the number of lawyers in that category). See Mallen and Smith, §1.7. The data in Missouri is similar, with over 95% of actual losses in 2005 occurring among lawyers in practice over ten years. See Missouri Department of Insurance Legal Malpractice Report, <http://www.insurance.mo.gov/reports/legmal/index.htm> (Executive Summary).

There are four central elements to a malpractice claim. "To prevail in a legal malpractice action, these elements must be pled and proven: (1) that an attorney/client relationship existed; (2) that the attorney acted negligently or in breach of contract; (3) that such acts were the proximate cause of plaintiff's damages; and (4) but for attorney's conduct, the plaintiff would have been successful in the prosecution of his underlying claim." *McDowell v. Waldron*, 920 S.W.2d 555 (Mo. App. 1996); *Boatright v. Shaw*, 804 S.W.2d 795, 796 (Mo.App.1990); *Thiel v. Miller*, 164 S.W.3d 76, 82 (Mo. App. 2005). See generally Restatement, § 48.

An attorney-client relationship arises where the parties have agreed to enter into it, or where the client reasonably assumes that the attorney has agreed to the representation and the attorney fails to effectively advise the "client" otherwise. See *Donohoe*, 900 S.W.2d at 626 (attorney-client relation where "clients" can prove they sought and received legal advice and assistance and the attorney intended to undertake to give such advice and assistance on their behalf). Once this relationship arises, the normal duty is to do all things reasonably necessary to fulfill the objective of the employment.

A difficult question in malpractice litigation is whether an attorney can be held liable for malpractice not by the client, but by third parties to the transaction at issue. Should such liability be permitted? See Restatement, § 51. Although Missouri courts had refused to recognize third party liability, they finally did so in *Donohoe*. The court

concluded:

[T]he first element of a legal malpractice action may be satisfied by establishing as a matter of fact either that an attorney-client relationship exists between the plaintiff and defendant or an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit plaintiffs. As a separate matter, the question of legal duty of attorneys to non-clients will be determined by weighing the factors in the modified balancing test. The factors are:

- 1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs.
- (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence.
- (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct.
- (4) the closeness of the connection between the attorney's conduct and the injury.
- (5) the policy of preventing future harm.
- (6) the burden on the profession of recognizing liability under the circumstances.

900 S.W.2d at 628-29. Thus, intended beneficiaries of a failed testamentary transfer may well have the ability to sue the attorney who drafted the will for malpractice. *Id.* at 629.

The standard of care required is generally that degree of care, skill, professional knowledge and diligence which is commonly possessed by members of the legal profession. See Restatement, § 52. Mere loss of a case, and even bad judgment, are generally not held sufficient to give rise to malpractice liability. There is a split of authority on whether the rules of professional responsibility establish the duty of care, or are even relevant or admissible for this purpose. Most courts reject the view that the violation of an ethics rule creates a private cause of action for malpractice, see, e.g., Annotated Rules, at 5-6. More courts permit the rules to be used as evidence or to be part of an expert witness's conclusions, see *id.* at 6-9. In Missouri, an attorney cannot be held liable for a breach of an ethical rule, *Williams v. Preman*, 911 S.W.2d 288, 300 (Mo. App. 1995); *Greening v. Klamen*, 652 S.W.2d 730, 734 (Mo. App. 1984). Moreover, it is potentially reversible error to either admit the content of such rules into evidence or to allow an expert to refer to them. *Bross v. Denney*, 791 S.W.2d 416, 420 (Mo. App. 1990).

Generally, the most difficult hurdles for a malpractice plaintiff are causation and damages. In order to recover, a client must demonstrate that the wrongful conduct of the attorney was the proximate cause of the plaintiff's injury. In litigation situations, this often means the client must show that, but for the attorney's breach of duty, the client would have been entitled to money or property which he or she did not receive. In such cases, the client-plaintiff must show that the underlying claim was valid and would have produced recovery. This leads to the trial of the underlying case in the malpractice action. Comment, *supra* at 403-404; see also *Williams v. Preman*, *supra*. Complicated issues can arise where the underlying case has been settled. See, e.g., *Williams v. Preman*, *supra.*; *Bross*, 791 S.W.2d at 421.

Should malpractice insurance be required for all attorneys? Why or why not? Should lawyers be required to disclose to prospective clients whether they have malpractice coverage? This is currently a hot issue in the profession, with an increasing number of jurisdictions adopting such a requirement. See *generally* *Debate: Should Disclosure of Malpractice Insurance be Mandatory*, 20 GP Solo #3 (2003); [http://www.halt.org/reform\\_projects/lawyer\\_accountability/legal\\_malpractice/malpractice\\_article.pdf](http://www.halt.org/reform_projects/lawyer_accountability/legal_malpractice/malpractice_article.pdf); see also California Board of Governors Insurance Disclosure Task Force Final Report and Recommendations (2007), [http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis\\_BOG-Oct24.pdf](http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis_BOG-Oct24.pdf) (recommending adoption of a disclosure requirement).

While the hurdles to be faced by malpractice plaintiffs are not insignificant, as stated, the incidence of claims and recoveries has risen substantially in recent years. And while malpractice insurance is available and desirable, there is no substitute for conducting one's practice so as to avoid legal malpractice claims. See Stern, *Avoiding Legal Malpractice Claims* (5th edit. 1987); see *generally* Restatement § 48, Reporter's Notes, Comment 8 (collecting resources).

#### **IV. AVOIDING MALPRACTICE AND DISCIPLINE**

The largest causes of difficulty with malpractice claims and Code and Rule violations are failure to conduct one's office practice properly and failure to communicate with clients. It is imperative that good office procedures be established, including effective filing, calendaring and telephone message systems which these days are largely computer-based. There are many sources of information regarding such systems, and these should be consulted by any inexperienced attorney going into practice alone or with inexperienced partners. Some excellent resource books are available, including Foonberg, *How to Start and Build a Law Practice* (ABA 5<sup>th</sup> edit. 2004) and Bennett, *Flying Solo: A Survival Guide for the Solo Lawyer* (ABA 4<sup>th</sup> edit. 2005).

#### **V. LIMITING LIABILITY**

MR 1.8(h) prohibits an attorney from attempting to prospectively limit his or her liability for malpractice unless permitted by law and the client is independently represented in the agreement. It also prohibits an attorney from settling a claim for malpractice liability with a client unless the lawyer first advises the client in writing to seek independent representation. Violations of DR 6-102, the predecessor section to 1.8(h), have been found where an attorney attempted to secure a release as a condition of returning a client's papers (*In re Preston*, 111 Ariz. 102, 523 P.2d 1303 [1974]) and where an attorney placed a release as part of a client's endorsement of a check which was the return of the retainer in a case the lawyer had failed to pursue (*People v. Good*, 576 P.2d 1020 [Colo. 1978]). These rules apply even if there is no actual malpractice liability. *People v. Good, supra*. They do not apply to limitations on liability for actions by other lawyers within a professional corporation.

#### **VI. HANDLING CLIENTS' PROPERTY AND FUNDS**

One of the areas of office practice that causes most problems for attorneys, and particularly for inexperienced attorneys, is the handling of clients' funds. Read MR 1.15 and Comments.

The requirements of Rule 1.15 are fairly clear. Pursuant to subsections (a) and (d), an attorney must promptly notify his or her client or a third party when property or funds belonging to the client or third party are received, must identify and label such property and place it for safe-keeping as soon as possible, must maintain complete records of the clients' properties and funds and provide an accounting where requested, and must promptly pay or deliver such funds or property to the client or third party. In addition, the Rule requires that the attorney maintain a *separate* account for clients' funds. This account is not to be used by the attorney for office or other expenses. The account, termed a "client escrow account" or "client trust fund," should not contain any funds belonging solely to the lawyer, except those necessary to pay bank charges. M.R. 1.15(b). Failure to properly maintain a trust account and to keep client and lawyer funds separate is termed "commingling."

While these rules appear fairly simple, they have increasingly become a source of discipline for attorneys, and serious discipline at that. This has been true both under the Code and the Model Rules.

Consider the following:

**In re WILLIAMS**  
711 S.W.2d 518 (Mo. banc 1986)

RENDLEN, Judge.

. . . An Information was filed in this Court charging violation of Rule 4 DR 9-102(A) and (B) in that respondent failed to make timely, accurate and adequate accounting of funds to a client. Respondent answered admitting the violation but seeking dismissal of the Information because his conduct did not constitute a knowing and intentional violation. The Honorable L. Thomas Elliston . . . was appointed Master, and after plenary hearing the Master in his findings of fact and conclusions of law determined that respondent had violated Rule 4 DR 9-102(B) and (C), and the violation was willful, deliberate, and inexcusable. He recommended that respondent be disbarred. . . .

[T]he fact of violation of the Disciplinary Rules is not in dispute. Respondent undertook to represent a client, Marvin E. Miller, in a Workmen's Compensation claim. A settlement was reached in the amount of \$6,000 and on July 16, 1984, Maryland Casualty Company issued its \$6,000 draft payable to respondent and Miller. On or about July 17, 1984, respondent and Miller agreed that respondent would receive \$1,486.64 for his fee and expenses incurred and Miller would receive \$4,513.36, the balance of the \$6,000. Miller endorsed the check, leaving it in respondent's custody and was informed that "within a few days" respondent would deliver a check to Miller in the amount of \$4,513.36.

On July 18, 1984, respondent deposited the \$6,000 draft into an account titled "Law Clinic of David F. Williams Client Funds Account," an account which was overdrawn at that time. On July 20, 1984, a check in the amount of \$4,513.36 was drawn on that account and forwarded to Miller. However, that check was returned for insufficient funds on August 3, 1984, and again on August 14, 1984. Subsequently respondent's law office wire-transferred funds to Miller in the amounts of \$500 on August 17, 1984, and \$1,000 on August 21, 1984, leaving a balance due the client of \$3,013.36. On August 31, 1984, another check in the amount of \$3,013.36, drawn on the account of "Law Clinic of David F. Williams Client Funds Account," was forwarded to Miller, but on September 5, 1984 it too returned for insufficient funds. Throughout this period, Miller made



numerous requests to respondent's office for his money, but did not receive his funds from respondent or respondent's law office until September 10, 1984, five days after he filed a complaint with the Thirty- first Judicial Circuit Bar Committee.

Although as discussed below respondent offers the circumstances surrounding the above events, including his wife's role in the events and his ignorance of the problems encountered in paying Miller, in mitigation to harsh punishment, he does not offer such circumstances to deny his guilt. It is admitted and this Court finds that respondent failed to make timely, accurate and adequate accounting to a client in violation of DR 9-102 . . . .

The sole issue remaining is to determine appropriate punishment. In requesting sanctions less than disbarment, respondent submits his was not an intentional violation. Such claim is based upon the following circumstances surrounding the facts constituting the violation. Respondent and his wife each held signature authorization for the trust account and he had delegated to his wife (as secretary and bookkeeper) the tasks of making the daily bank deposits, writing checks and balancing the checking accounts. Respondent testified that he did not know at the time of the deposit of the \$6,000 check that the trust account was overdrawn, nor did he know of certain transactions which produced the insufficiency. Rather such problems were caused by his wife who did not inform him of the problems. Similarly, respondent and his wife testified that he was not made aware of the delays in paying Miller or the return of the checks for insufficient funds nor was he aware of Miller's attempts to contact him and thought Miller had been paid promptly.

Although respondent recognizes his ultimate responsibility for the acts of his employee-wife regarding the trust account and therefore does not offer them in defense to the charges, he does offer his ignorance in mitigation. We cannot rule out the possibility that such circumstances might work in mitigation in a different case, but in view of all the evidence here, respondent's assertion must fail. The record discloses that with respondent's knowledge the trust account long had been in serious disarray and he had taken little if any corrective action. Yet despite his knowledge of this disarray respondent knowingly exposed Miller's funds to the risks of this unstable account and must be held accountable to the same degree as if he had known of the specific problems encountered with the Miller payment. Having been aware of ongoing problems with the trust account, including return of checks for insufficient funds, credence cannot be afforded his plea of ignorance.

Respondent knew in December 1983 that problems were developing in the trust account. Checks drawn on the account and made payable to various courts were returned for insufficient funds. Respondent testified that he was not sure whether the account was ever "straight" after that time. Although he talked to his wife about these problems, respondent never attempted to review the account or obtain a proper accounting. Not once from January 1984 to July 1984 did respondent review the check stubs or the bank statements in an attempt to establish an understanding of the account. He testified that his only contact with the account "would be to see the envelopes unopened two and three months after they'd been received, the bank statements, and to holler about that. " When he saw such unopened envelopes, which he recognized as containing bank statements, he would merely talk to his wife about the fact that the account needed balancing and that they needed to know what was "going on" with the account. Although he threatened to take over supervision of the account from his wife, he failed so to do. Yet respondent testified he was so concerned that checks drawn on the account might be returned for insufficient funds he began

making payments, including court filing fees, by cash or money order rather than by check. Respondent testified that although he thought about straightening out the account, or that he should have opened a new trust account, he did neither. He also testified that after May 1983 he did not maintain a law office general checking account and if it became necessary to write a check for his firm he drew it on the trust account.

Additionally it is demonstrated by the evidence that subsequent to deposit of the \$6,000 draft but prior to return of the \$4,513.36 check for insufficient funds, a \$3,100 check was drawn on respondent's trust account by his wife, for payment on an amount due by respondent to the Internal Revenue Service. Respondent testified that check was written and cashed without his knowledge, and upon that check respondent places principal blame for his trust account's deficiencies regarding Miller's funds. However, the evidence also shows that before the check to Miller could clear the bank, \$1,400 was transferred from respondent's trust account to his landlord's bank account for payment of office rent, and respondent was paid his \$1,200 fee on Miller's case from the account. Respondent also on August 13, 1984, cashed a \$1,000 check from his trust account made payable to cash. This check had been signed by his wife in blank, and carried a brief time by respondent before cashing. Despite the fact that his \$1,200 fee already had been taken from the account, respondent testified that he thought this \$1,000 was fee from the Miller settlement though he made no attempt to verify that any funds in his trust account belonged to him.

Though, as noted above, respondent attempts to avoid the harsh result of disbarment by characterizing his violation as unintentional, it is clear from the evidence that while he may not have known of the specific problems with the Miller payment, he was well aware of prior problems with the account, including return of checks for insufficient funds, and that he knowingly and intentionally failed to correct the ongoing problems or supervise the account. The evidence establishes that he should have known a problem such as Miller's would soon occur, and that he should have reviewed the account and taken corrective action to ensure that Miller would receive the funds belonging to him.

In deciding the appropriate sanction, we recognize that the primary purpose of this proceeding is not to punish respondent, but to inquire into his fitness to continue as an attorney. "Any discipline imposed has as its objective the protection of the courts and the public and maintenance of the integrity of the profession and the courts."

We further recognize that, as we held in *In re Mentrup*, 665 S.W.2d 324, 325 (Mo. banc 1984):

The misappropriation of a client's funds is a serious matter. It is always a ground for the disbarment of an attorney that he has misappropriated the funds of his client, either by failing to pay over money collected by him for his client or by appropriating to his own use funds entrusted to his care. That respondent has made restitution of the converted funds is no defense to these charges. Neglect of duty to one's client also justifies disciplinary action.

From our review of the entire record we are unimpressed with respondent's attempt to avoid disbarment by characterizing his misconduct as unintentional. While it is true that we recently stated "an appropriate remedy for willful conversion or misappropriation of client's funds is disbarment," disbarment is no less appropriate here. Respondent's offer of his ignorance as mitigation to harsh

punishment must fail where he had knowingly and intentionally failed to correct the ongoing problems with the trust account, given that he knew of the account problems. It is readily apparent from the evidence that respondent is not the innocent victim of an errant employee-spouse. We cannot allow an attorney to escape ultimate responsibility for mishandling of a client's funds where he knowingly and intentionally ignores trust account problems and demonstrates an almost total disregard for the protection of those funds. Certainly where an attorney misappropriates a client's funds, protection of the public is uppermost in our minds and disbarment is generally appropriate in such cases. Given the nature of the violation, and respondent's long disregard for the protection of his clients' funds, respondent's testimony regarding recent improvements upon his accounting system does not offer sufficient safeguard to the public interest and therefore cannot alter the result here.

Respondent is ordered disbarred.

The Missouri Supreme Court continues to consider disbarment the appropriate sanction for trust fund violations, although the Court has, on occasion, found extenuating circumstances that make suspension, rather than disbarment, the proper sanction in particular cases. *Compare In re Griffin*, 873 S.W.2d 600 (Mo. banc 1994) (disbarment for failure to properly handle estate funds and forging name on check); *In re Schaeffer*, 824 S.W.2d 1 (Mo. banc 1992) (disbarment for depositing settlement check in business account); *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990) (disbarment appropriate where lawyer failed to pay over funds received in settlement to reimburse Union that had paid medical costs for client); *In re Fenlon*, 775 S.W.2d 134 (Mo. banc 1989) (disbarment appropriate for failing to notify client of receipt of funds and delay in payment of bills from settlement despite restitution) *with In re Barr*, 796 S.W.2d 617 (Mo. banc 1990) (suspension for at least six months proper where lawyer deposited settlement check in non-trust account); *In re Charron*, 918 S.W.2d 257 (Mo. banc 1996) (minimum one year suspension proper where lawyer failed to turn over property and files to client and took unauthorized payment from estate [of funds the lawyer actually was owed]). The Missouri Supreme Court obviously takes commingling seriously, and so should all lawyers.

For further help in understanding your obligations with regard to trust funds, including the duty to use interest-bearing accounts pursuant to IOLTA, see Devine, *Trust Accounting, IOLTA and the New Missouri Ethics Rules*, 44 J. Mo. Bar 169 (1988). More specific information on handling trust funds can be found in *The Lawyer Trust Funds Handbook* (available from the Missouri Bar), *Money of Others: Accounting for Lawyer Trust Accounts* (available from the Kansas Bar Foundation IOLTA Program), as well as Foonberg, *The ABA Guide to Lawyer Trust Accounts* (1996).