SUMMARY OF KEY CONCEPTS

Section 1. The Successful Law Office

A successful law office:

• serves its clients effectively and efficiently;
• upholds ethical standards and brings credit to the legal profession; and,
• provides professional satisfaction and a reasonable economic reward for its owners, managers, and employees.

Most attorneys and paralegals work in law firms that represent a variety of outside clients. In addition to meeting the three criteria above, a law firm usually seeks professional prestige in the legal community. A stellar “av” rating by professional peers in the Martindale-Hubbell Law Directory is a prized achievement. A socially responsible firm will divert some portion of its profits into pro bono legal services for the community and the less fortunate.

In a corporate law office, there is only one client—the corporation. Corporate legal departments must justify their existence, so the quality of their services is equally important in that environment. Often, the in-house counsel is able to minimize outside legal costs by providing legal advice at less cost, but also by managing the use of outside firms and carefully reviewing their bills.

Similar to a corporation, the law office in most public agencies has a single client. It, too, will concentrate upon the three essential traits of a successful practice. However, because it is supported by tax dollars and is established to serve the public well-being, it should not confine its efforts to the narrow parochial interests of the agency. Some public agencies are, in effect, public law firms: offices of the attorney general, county counsel, city attorney, district attorney, public defender, etc. A unique office is that of the public defender. Unlike other government attorneys, they have a single client and duty—to vigorously represent the defendant in a criminal case.

Regardless of the setting, a successful law practice almost always rests upon the following key factors:

• dedicated and qualified professionals;
• effective law office organization;
• sound attorney-client relationships; and,
• efficient law office procedures.

Qualified, hard-working individuals who perform their tasks in a professional manner are the most important single factor in the successful law practice. For that reason, it is vital that they be treated with respect and that they have the support they need to perform well. A reputation for high professional standards and enlightened management will, by
word-of-mouth, draw outstanding candidates for law firm positions.

Generally speaking, paralegals are at-will employees of the firm or corporation. That means that they may be dismissed at any time without cause or explanation. Also, they are free to leave at any time. Unless state law requires otherwise, an at-will employment relationship may be terminated by either party without any advance notice. There are four circumstances when employment will not be at-will:

- when a statute prohibits some form of discriminatory dismissal;
- when public policy does not permit arbitrary dismissal;
- when the employee and the employer have agreed upon an indefinite period of employment, with termination to be “for cause” only; or,
- when the employee and the employer have agreed upon a fixed period of employment, with termination to be “for cause” only.

Both state and federal statutes forbid employers from discharging employees for discriminatory reasons (e.g., race, gender, disability, etc.). These statutes modify the at-will employment. Even without a statutory protection, the state’s common law public policy might not permit an employer to discharge an employee for some reasons (e.g., a whistleblower who reports his employer’s illegal conduct).

The employer might establish an implied contract that modifies the at-will relationship. This can happen when the employer establishes a fixed period of “probationary” employment, during which the employee may be let go without explanation. By implication, satisfactory completion of the probation period means that the employee is no longer a probationary employee. The same effect can result if the employer publishes a personnel policy which provides that employees will be dismissed for specified causes (e.g., dishonesty, unsatisfactory performance, excessive absenteeism, etc.).

Many employers are advised by their attorneys to publish a comprehensive personnel manual, which governs the working conditions, benefits, and employment relationship. This is advised so that their personnel actions cannot be challenged as arbitrary. A consequential effect, however, is to create an implied employment contract that can limit their personnel actions.

Every law firm should carry professional liability insurance, also known as an “errors and omissions” policy. These policies usually cover all employees of the firm, including paralegals. The basic purpose of such policies is to protect the attorney from claims of legal malpractice, but they might cover other claims that arise in the course of practicing law.

The ability of a law office to provide the highest quality of professional services, and its ability to function within a budget, are both impacted by the way that the office is organized and managed. Even corporate and government law offices must operate within a budget. In the past, small law firms tended to be legal “general stores” for individuals and small businesses. In recent years, however, they have tended to specialize in one or two areas of practice.

Sole practitioners are thought of as individual attorneys who practice alone in a small office, supported perhaps by two or three employees. Many sole practitioners, however, share a suite of offices with other attorneys, so that a single receptionist, law library, and word processor can serve them all. They share these overhead costs, but not their practices or profits. In this arrangement, a legal assistant might be employed by the attorney-landlord, but perform work on a contract basis for the other attorneys, as well.

An attorney can be a sole proprietor of his practice without being a sole practitioner. This is made possible by employing associate attorneys to work under his general supervision. The attorney/proprietor must pay all overhead costs, as well as the salaries of the associates, but he will keep all profits to himself.

A law partnership can exist with as few as two or three partners. In small partnerships, the decision-making process tends to be collegial. Partners receive a share of the firm profits, but employed associate attorneys do not. Partnership interests need not be equal. Any combination of equity interests which adds up to 100% is possible.

In partnerships of a dozen or so, one partner is usually designated as the managing partner. Most often, this is one of the senior partners who has “paid his dues” in building the partnership’s practice. The managing partner is responsible for the day-to-day operations of the office and might also supervise the associate attorneys.

As the size of the firm grows, the role of the managing partner may become more important. She may have some responsibility for managing the law practice of the firm by assigning junior partners and associates to handle various client matters. An alternative arrangement is the executive committee composed of a small number of
senior partners. In very large firms, there might be a variety of committees handling specific aspects of the business and law practice.

Both sole practitioners and partnerships can incorporate their practice as a professional law corporation (PC). As mentioned in Chapter 2, a professional corporation can have individual attorneys, attorney partnerships, and even smaller professional law corporations among its stockholders. The primary advantage of the professional corporation is to limit the personal liability of the stockholders for the debts of the corporation. A creditor can only claim assets of the corporation, not of its individual attorney-stockholders. In some states, alternatives to the professional corporation are the limited liability partnership (LLP) and the limited liability company (LLC). These two latter forms combine the tax advantages of a partnership with the liability limitations of a corporation.

A corporate legal department is completely different from the professional law corporation described previously. It is simply one of many departments in a non-legal corporation. Several types of enterprises are especially likely to maintain their own corporate legal departments—those frequently sued, and those which require a substantial amount of legal services in the ordinary course of business. Corporations involved in litigation generally retain outside legal counsel to represent them in court, but often use their corporate legal department for:

- responding to discovery requests;
- coordinating litigation matters with outside counsel;
- reviewing (and questioning) bills presented by the outside counsel; and,
- advising management on ways to avoid future lawsuits.

An attorney from the corporate legal department might also sit second chair during the trial.

Corporations generally designate one attorney to serve as general counsel. The general counsel can be the head of the corporate legal department, or can be an outside attorney retained for that purpose. An in-house general counsel often holds the rank of vice president. In addition to advising management and coordinating with outside counsel, legal departments often monitor developments in legislation and government rule-making, and may coordinate the corporation’s lobbying efforts. Legal assistants in corporate legal departments assume a wide variety of responsibilities. A key role is preparing and maintaining the official documents and records of the corporation, including:

- corporate by-laws;
- minutes of directors’ meetings;
- resolutions adopted by the board of directors;
- stock registration statements;
- shareholder records;
- notices of shareholder meetings;
- proxy statements; and,
- stock option plans.

Another legal assistant in the corporate legal department might have totally different responsibilities, such as coordinating with outside counsel and responding to discovery requests. Paralegals typically have the hands-on task of monitoring pending legislation and rule-making.

Public agency legal departments serve purposes for those agencies that are very similar to the purposes of a corporate legal department—litigation and routine legal services being the primary purposes. Public agencies, particularly small ones, sometimes retain outside law firms to serve as their primary legal counsel, the equivalent of a corporation’s general counsel. Larger agencies usually have an in-house chief counsel.

In most law offices, paralegals and legal secretaries are part of the legal team that provides services for clients. In larger offices, the legal team might include law clerks, legal librarians, and paralegal managers. The ultimate responsibility for coordinating the team effort rests with the attorney responsible for that client matter. In large-scale litigation, a senior firm partner may serve as the attorney of record and supervise partners and associates who work on the case.

In many large law firms, other non-attorney professionals play a major role. These include paralegal managers, law office managers, and legal administrators. Law office managers generally supervise the office support staff—receptionists, secretaries, word processors, file clerks, etc. Legal administrators assume even more responsibilities, such as taking on a role similar to a managing partner, other than managing the firm’s practice of law.

Earlier chapters discussed the attorney-client relationship as it relates to privileged communications, ethical obligations to the client, and the client’s right to legal counsel. Another important aspect is the professional and business relationship—how legal services are provided to the client and how the client pays for those services. Certainly, ethical obligations are part of the
professional relationship. Effective communication and mutual trust are at the heart of a sound attorney-client relationship. Mutual trust is essential so that the communication is open and forthright.

When a client retains an attorney, it is customary, and required in some jurisdictions, that the attorney and client sign a retainer agreement that identifies the legal matter for which the attorney is being retained and sets forth the fees the client agrees to pay. Some law firms work on a contingency fee basis, which means that the law firm receives nothing unless the client recovers money. If the client’s case is lost, the client owes nothing, and the law firm receives nothing. The contingency fee is usually a fixed percentage of any monetary award won in court or negotiated in a settlement. The most common fee arrangement is based on hourly rates for the attorneys and paralegals who work on the case. The client is then billed monthly for the time these professionals have spent on that client matter. Hourly rates for paralegals vary widely with their experience and qualifications, and also among different regions of the nation. Some law firms have annual quotas for the hours billed by each legal professional. These quotas are generally in the range of 1400 to 1800 hours per year for paralegals, but there appears to be an upward trend in those expectations. Unlike attorneys, paralegals cannot become “rainmakers,” bringing in new client business. Instead, they are dependent upon attorneys for their assignments.

Most law firms keep time records in increments of six minutes. That is considered a “unit” of time and is the minimum which will be billed for any task, such as a short phone call. Other firms use units of ten minutes, and a few very large firms bill in units of fifteen minutes. The larger the billing unit, the easier it is to meet a given quota of billable hours.

Whether kept the “old fashioned” way on paper time sheets, or entered in the computer as the legal assistant completes each discrete task on client matters, the units of time and the corresponding task descriptions are fed into the firm’s computerized billing system. After the close of the month, it usually takes a week or two to prepare a statement for mailing to the client. The preparation includes these stages:

- a billing clerk consolidates all billed time for each client matter;
- a tentative itemization of billed time is printed;
- the responsible attorney reviews and corrects the itemization; and,
- a final itemization is printed with a summary of all fees and costs.

A critical part of this process is the attorney’s review of the tentative itemization for billed time. The attorney might revise the description so that it is more understandable to the client, and to reflect the professional nature of the task. The attorney might also “write off” (i.e., delete) or write down (reduce) some of the time billed by attorneys or paralegals. Any time written off will either not appear on the client’s statement, or will appear with a “no charge” notation.

The billing clerk also consolidates all of the firm expenses which are chargeable to the client. These typically include:

- long distance telephone charges;
- Westlaw or LEXIS online fees;
- postage and messenger fees;
- court filing fees and recording fees;
- photocopies; and,
- mileage and parking fees.

Some firms also charge a flat fee for facsimile transmissions.

From time to time, an attorney might receive funds on behalf of clients that are then held temporarily for the benefit of the client. These funds may be from litigation settlements, insurance settlements, escrow funds in real estate transactions, the corpus (i.e., principal amount) of a trust, etc. As a fiduciary, the attorney holds these client funds in trust. The bank account where they are held must be a client trust account, and the funds may never be commingled with the law firm’s funds, nor used by it for any purpose.

The client, the law firm, and the departing attorney are presented with a dilemma when an attorney decides to leave the firm to strike out on his own or to join a different firm. This circumstance is becoming more common as many firms, for economic reasons, restrict the opportunity for an associate to make partner status in that firm.

The answer to the dilemma boils down to three questions:

- Is it the firm’s client, or the attorney’s client?
- Does an attorney breach his fiduciary duty to his former firm if he takes clients with him?
- What are the rights of the client?

In ethical terms, the last question is the most important. The short answers to all three questions are:

- The client doesn’t “belong” to either the firm or the attorney.
- Although the departing attorney may have fiduciary duties to his former law firm, those
duties cannot override the client’s right to choose his own attorney.

- “The customer is king” (or queen, as the case might be).

The client may decide to stay with the firm, go with the departing attorney, or find other legal counsel. If he goes with the departing attorney, or chooses a new counsel, the law firm must forward all of his client files to that attorney.

Section 2. Effective Law Office Procedures

One indicator of good law office management is the use of sound office procedures. Effective law office procedures will serve these purposes:

- the efficient and economical delivery of client legal services;
- compliance with all statutes of limitations and court deadlines;
- the protection of client confidences;
- positive working relationships with persons outside of the office;
- an atmosphere of order and structure in the workplace; and,
- smooth working relationships within the office.

It is the use of sound procedures that makes these things possible. It does no good if procedures are proclaimed but not implemented. A well-managed office will have an office “policies and procedures” manual that governs the day-to-day practice of law and the related support operations.

Before accepting a new client, the firm must perform a thorough conflict check to ensure that there is no conflict of interest created by accepting the new client matter. If a conflict is discovered, the firm must either decline to accept the new client, or obtain the consent of the both the old and the new client to waive the conflict. Conflict checks are usually done with computers, so it is imperative that client names be entered accurately and in various formats so that no conflict is missed.

A law office docket is the firm’s calendar of deadlines and important events. Of greatest concern are the deadlines established by statute, court rules, and court orders. The most critical is the statute of limitations, since it can be exceedingly difficult to obtain court approval to file a belated lawsuit. The docket should also track deadlines for discovery, dates of depositions and court appearances, dates for closing escrow, etc. The docket also operates as a tickler system, to alert attorneys and paralegals of an approaching deadline.

Law offices typically maintain at least six types of files, including client files, billing records, personnel records, and correspondence unrelated to specific client matters. A file is opened for each new client matter. The same client may have multiple client matters, and a separate file is kept for each.

There are two basic systems for organizing client files: alphabetical and numerical. The alphabetical system is well-suited to a sole practitioner and other small law offices. However, many larger firms find it more useful to assign a unique number to each client matter and maintain the files in numerical order. The advantage of a numerical system is that it can be set up to reveal additional information about each client matter: the date the file was opened; the responsible attorney; the nature of the legal matter; etc.

It is very common for the client and other law offices to request copies of materials in a client’s file. Law offices should have a strict policy about the release of client materials—even to the client, herself. Most firms require that an attorney’s approval be obtained to release any client materials. This is intended to prevent the improper disclosure of documents or information to outside parties. For example, a client may unintentionally, and unwittingly, waive the attorney-client privilege by showing a document to someone else. Some firms give legal secretaries or paralegals standing authority to release certain categories of non-sensitive documents (e.g., pleadings which have been filed with a court).

Eventually, most client files become inactive. It makes no sense to consume large amounts of office space with file cabinets or boxes of inactive files. The solution is to close any file that has been inactive for a defined period of time and is not expected to become active again within the coming year. Closed files are usually stored in a different location where they are secure and protected by automatic sprinklers. Eventually, the firm may offer to deliver the file to the client’s possession, with notice that the file will be destroyed if the client declines to accept it. Files are destroyed by shredding. Companies which specialize in the storage and destruction of confidential files will provide written certification of their destruction.

When legal assistants use any mode of external communications (e.g., telephone, e-mail, facsimile, U.S. Mail, or commercial delivery services) three considerations must be kept in mind:
• confidentiality and security;
• clarity of the communication; and,
• professional tone of the communication.

The most important of these is confidentiality and security. Clarity is essential so that the message will be understood. A professional tone causes the recipient to give the message his serious attention.

**REVIEW QUESTIONS**

1. New employees are generally considered to be _________ employees, which means that the employment relationship can be terminated at any time by either the employee or the employer.

2. There are four circumstances under which an employer may not terminate an employee without good cause:
   • when a statute prohibits some form of _________ dismissal;
   • when _________ does not permit an arbitrary dismissal;
   • when the employee and the employer have agreed upon an _________ period of employment, with termination to be “for cause” only; or,
   • when the employer and employee have agreed upon a _________ period of employment, with termination to be “for cause” only.

3. In employment law, _________ cause is a principle requiring an honest and reasonable basis for the discipline or dismissal of an employee. This principle does not apply, however, unless it is established by statute or an employment contract.

4. During a _________ period, one is a true at-will employee. After satisfactory completion of that period, however, the employer has by implication created a different status.

5. Every firm should carry _________ insurance, also known as an errors and omissions policy.

6. In recent decades, sole practitioners and small law partnerships have gravitated toward a “_______” style of law firm which specializes in one or two areas of practice.

7. Partners who receive a share of the profits are known as _________ partners because their ownership interest entitles them to that share.

8. Larger law firms often establish an _________ committee of partners to oversee the management of the firm.

9. A _________ law corporation can be a sole practitioner or a law partnership organized as a corporate entity. The primary advantage is to limit the _________ of its attorney stockholders.

10. Corporations that are frequently _________ are likely to maintain their own legal department.

11. Corporations generally designate a particular attorney to serve as the corporation’s _________ counsel.

12. Corporate law paralegals generally maintain:
   • corporate _________;
   • _________ of the board of directors;
   • resolutions adopted by the _________;
   • _________ records; and,
   • _________ statements.

13. The client for most public agency attorneys is the _________.

14. The client for a public defender is _________.

15. In the larger firms with a hundred or so attorneys, a non-attorney legal administrator may assume many of the responsibilities a _________ has in mid-sized firms.

16. When a client hires an attorney, it is customary for her to sign a _________ agreement, which identifies the legal matter for which the attorney will represent her and sets forth the fees she will pay for those services.

17. Under a _________ fee agreement, the law firm will be paid only if the client recovers money. If the client’s case is lost, the client owes nothing and the law firm receives nothing.


19. Before detailed bills are sent to the client, the responsible attorney reviews them, and often “________” (deletes) or “________” (reduces) some of the time billed by attorneys and paralegals.

20. Client funds must be kept in a _________ account, separate from the law firm’s monies.
21. When an attorney leaves the law firm, his clients have three choices:
   • __________;
   • __________; or,
   • __________.
22. A law firm docket is the firm’s calendar of __________.
23. There are two basic systems for organizing client files, __________ and __________.

**KEY TERMS**

**at-will employment**

Your “best effort” definition:

Your revised definition:

**chief counsel**

Your “best effort” definition:

Your revised definition:

**client trust account**

Your “best effort” definition:

Your revised definition:

**docket**

Your “best effort” definition:

Your revised definition:

**errors and omissions policy**

Your “best effort” definition:

Your revised definition:

**executive committee**

Your “best effort” definition:

Your revised definition:

**general counsel**

Your “best effort” definition:

Your revised definition:

**limited liability corporation**

Your “best effort” definition:

Your revised definition:

**limited liability partnership**

Your “best effort” definition:

Your revised definition:

**probationary employee**

Your “best effort” definition:

Your revised definition:

**retainer agreement**

Your “best effort” definition:

Your revised definition:

**WORKING ON-LINE**

Go to the Web site for the American Bar Association:
http://www.abanet.org

Follow the link for “Legal & Professional Resources” and find your way to the page for the ABA’s Center for Professional Responsibility. From there, select “Formal Ethics Opinions Headnotes,” and review the headnotes that relate to law firm management, the obligations of an attorney leaving a law firm, and client fees.

**ETHICAL CHALLENGE**

Eartha Jankowski recently left the law firm of Ardon & Fillips and moved to Marsh, Muntz & Cubana. Her new firm is defending a client, XBO Corporation, against a lawsuit brought by a share-
holder who is a client of Ardon & Fillips. Although Ardon does not represent that client in this particular matter, Eartha’s new firm has erected an “ethical wall” to isolate Eartha from any possible exposure to the lawsuit. The firm even notified the court of the situation and without objection from Ardon, the court approved the precautions taken at Marsh.

At a recent social gathering, Eartha ran into friends from Ardon & Fillips and had a great time catching up on the news. Later in the evening, Eartha entered the ladies’ room just in time to hear one Ardon secretary say to another, “I hear the client is hoping that XBO will just pay him to go away. Jim even thinks the guy perjured himself in his depo, but there’s no way to be absolutely sure.” In confusion, Eartha quickly backed out the door and mingled with the crowd.

What should Eartha do with this information?

ETHICAL ANALYSIS

Of course, this is a classic example of loose talk by someone who should know better, but that doesn’t solve Eartha’s issue. As troubling as it may be to let someone get away with perjury, Eartha has no choice but to keep the incident to herself. She has an ethical duty to Ardon, her former employer, to keep confidential anything she learned about their clients. Although this new knowledge has been acquired after leaving Ardon, Eartha would have to violate the court-approved ethical wall to communicate the information to anyone at Marsh. She might even jeopardize Marsh’s continued representation of its client if the court were somehow to learn of her disclosure.

READING CASE LAW

The full text of In re Michiel, 610 A.2d 231 (D.C. 1992) follows. A hearing committee of the District of Columbia Bar found that attorney Michiel had misappropriated client funds and recommended his suspension from the practice of law for two months. The Board on Professional Responsibility accepted the committee’s finding of misappropriation, but recommended disbarment. The U.S. Court of Appeals for the D.C. Circuit adopted the Board’s recommendation. The threshold issue before the court was whether the Board should have deferred to the hearing committee’s finding that the misappropriation was negligent, not dishonest conduct.

As a general rule, an appellate court considers questions of law and procedure, the facts having been determined, once and for all. In this case, however, the Court of Appeals distinguishes between “subsidiary findings of basic facts” and findings of “ultimate facts.” The court equates the latter to conclusions of law, which makes them reversible.

Read Michiel with special attention to the court’s reasoning regarding the nature of Michiel’s misconduct, which led it to order his disbarment.

ANSWERS TO REVIEW QUESTIONS

1. New employees are generally considered to be at-will employees, which means that the employment relationship can be terminated at any time by either the employee or the employer.
2. There are four circumstances under which an employer may not terminate an employee without good cause:
   • when a statute prohibits some form of discriminatory dismissal;
   • when public policy does not permit an arbitrary dismissal;
   • when the employee and the employer have agreed upon an indefinite period of employment, with termination to be “for cause” only; or,
   • when the employer and employee have agreed upon a definite period of employment, with termination to be “for cause” only.
3. In employment law, just cause is a principle requiring an honest and reasonable basis for the discipline or dismissal of an employee. This principle does not apply, however, unless it is established by statute or an employment contract.
4. During a probationary period, one is a true at-will employee. After satisfactory completion of that period, however, the employer has by implication created a different status.
5. Every firm should carry professional liability insurance, also known as an errors and omissions policy.
6. In recent decades, sole practitioners and small law partnerships have gravitated toward a “boutique” style of law firm which specializes in one or two areas of practice.
7. Partners who receive a share of the profits are known as equity partners, because their ownership interest entitles them to that share.
8. Larger law firms often establish an executive committee of partners to oversee the management of the firm.

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21. When an attorney leaves the law firm, his clients have three choices:
   - Go with the departing attorney;
   - Stay with the law firm; or,
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23. There are two basic systems for organizing client files, alphabetical and numerical.
610 A.2d 231
(Cite as: 610 A.2d 231)

District of Columbia Court of Appeals.

In re Richard A. MICHEEL, Respondent.
A Member of the Bar of the District of Columbia
Court of Appeals.

No. 90-SP-1363.

Decided May 19, 1992.

Disciplinary proceeding was brought. The Court of
Appeals, Terry, J., held that an attorney's reckless
misappropriation of client funds warrants disbarment.

Disbarment ordered.

Schweb, J., concurred and filed opinion.

West Headnotes

[1] Attorney and Client ☞ 44(2)
45k44(2)

Depositing client funds into attorney's operating
account constitutes commingling; misappropriation
occurs when balance in that account falls below
amount due to client. Code of Prof.Resp., DR

[2] Attorney and Client ☞ 44(2)
45k44(2)

Misappropriation which occurs when balance in
attorney's operating account into which client funds
have been deposited falls below amount due to client
is essentially per se offense: proof of improper intent
is not required. Code of Prof.Resp., DR 9-103(A)

45k53(1)

There is presumption of disbarment in all cases
involving misappropriation of client funds resulting
from more than simple negligence. Code of

45k57

Hearing committee conclusion that misappropriation
of client funds is result of simple negligence is
determination of "ultimate fact" which is conclusion
of law to which Board on Professional Responsibility
owes no deference. Code of Prof.Resp., DR

45k57

Board on Professional Responsibility is obliged to
accept hearing committee's factual findings if they are
supported by substantial evidence in record, viewed as
a whole.

[6] Negligence ☞ 1693
272k1693
(Formerly 272k136(14))

Whether there has been negligence is ordinarily
question for fact finder to resolve.

45k57

Board on Professional Responsibility must defer to
hearing committee's subsidiary findings of basic facts,
which include such things as credibility determinations; however, Board owes no deference to
hearing committee's determination of ultimate facts,
which are really conclusions of law.

[8] Attorney and Client ☞ 58
45k58

Misappropriation of client funds through indiscriminate writing of checks on commingled
account at time attorney knows or should know that
account was overdrawn and failure of attorney to
attempt to keep track of client's funds constitutes
misappropriation as a result of recklessness and
warrants disbarment. Code of Prof.Resp., DR

15Ak797

Court of Appeals will sustain administrative agency's
conclusion of law if agency has made findings of
material "basic facts," conclusion of law rationally
flows from underlying "basic facts" and is legally
sufficient to support agency's decision, and substantial
evidence supports findings of "basic facts."

[10] Constitutional Law ☞ 230.3(9)
92k230.3(9)

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Sanction of disbarment for attorney misappropriation of client funds resulting from more than simple negligence does not violate equal protection, although disbarment in misappropriation case may seem to be harsh sanction when compared with sanctions for other violations involving arguably more egregious conduct. Code of Prof.Resp., DR 9-103(A) (1990); U.S.C.A. Const.Amend. 14.

[11] Attorney and Client \( \text{\textsuperscript{44}(2)} \) 45k44(2)


*232 Elizabeth A. Herman, Asst. Bar Counsel, Washington, D.C., for petitioner, the Office of Bar Counsel. Frederick B. Abramson, Bar Counsel at the time the brief was filed, and Samuel McClendon, Asst. Bar Counsel, Washington, D.C., at the time the brief was filed, were on the brief, for petitioner.

R. Kenneth Mundy, Washington, D.C., for respondent.

Before FERREN, TERRY and SCHWELB, Associate Judges.

TERRY, Associate Judge:

Bar Counsel charged respondent Richard A. Michelo with commingling and misappropriation of client funds. [FN1] misappropriating dishonesty. [FN3] A hearing committee found, after a hearing, that Michelo was guilty of commingling and misappropriation, but not dishonesty. Concluding that the misappropriation was the result of "simple negligence but no more," the hearing committee recommended that Michelo be suspended for two months.

FN1. At the time of respondent's conduct, attorney discipline in the District of Columbia was governed by our former Code of Professional Responsibility. Disciplinary Rule (DR) 9-103(A) of the Code provided in pertinent part:

All funds of clients paid to a lawyer or law firm ... shall be deposited in one or more identifiable bank accounts ... and no funds belonging to the lawyer or law firm shall be deposited therein... As of January 1, 1991, the Code was replaced by the new Rules of Professional Conduct. Current Rule 1.15(a) contains a provision similar to DR 9-103(a).

FN2. Former DR 9-103(A), which requires funds of lawyer and client to be separately maintained, has been read as prohibiting misappropriation, i.e., any unauthorized use of a client's funds by a lawyer to whom such funds have been entrusted. See, e.g., In re Buckley, 535 A.2d 863 (D.C.1987). We assume, without deciding, that the new Rule 1.15(a) may be similarly construed.

FN3. Former DR 1-102(A)(4) provided in pertinent part:

A lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Current Rule 8.4(c) contains substantially identical language.

The Board on Professional Responsibility accepted the hearing committee's conclusion that Michelo had commingled and misappropriated funds, [FN4] but did not engage in dishonest conduct. The Board concluded, however, that Michelo's misappropriation in this case was the result of recklessness rather than simple negligence. Relying on this court's holding that disbarment is the appropriate sanction in "virtually all" cases of misappropriation involving more than simple negligence, In re Addams, 579 A.2d 190, 191 (D.C.1990) (en banc), the Board recommended that Michelo be disbarred. We adopt the Board's recommendation.

FN4. In this court Michelo has conceded, both in his brief and at oral argument, that "commingling and misappropriation occurred."

I

The pertinent facts are undisputed. Mr. Michelo was retained by Roger Gregory, an acquaintance and fellow attorney, to represent him in connection with the purchase of a house in Silver Spring, Maryland. Michelo collected a total of $144,200.00 from various sources for disbursement at the settlement. These funds included checks for $127,700.00 from the mortgage lender, $9,000.00 from Mr. Gregory, and $7,500.00 from the seller as an adjustment in the price. Because he did not have a client trust account at that time, Michelo deposited all of these checks in his regular office checking account. [FN5]

FN5. Mr. Michelo explained to the hearing committee that he had previously maintained a separate bank account for client funds, but had closed it when he reorganized his practice.
dishonesty, in violation of DR 1-102(A)(4), was based on Bar Counsel's allegation that the misappropriation had been intentional, the hearing committee also found that Michael was not guilty of conduct involving dishonesty. [FN9]

FN9. The Board agreed with the hearing committee's conclusion that Michael did not engage in dishonest conduct. "Before this court, Bar Counsel no longer contends that a finding of dishonesty was required ... and we do not overturn the Board's determination on this issue." In re Cooper, 591 A.2d 1292, 1295 (D.C.1991).

II

[1][2] The hearing committee and the Board found that Michael had engaged in commingling and misappropriation, both violations of DR 9-103(A). Michael does not challenge these findings, nor could he, for it is clear that his conduct constituted both commingling and misappropriation. Depositing client funds into an attorney's operating account constitutes commingling; misappropriation occurs when the balance in that account falls below the amount due to the client. See, e.g., In re Hessler, 549 A.2d 700 (D.C.1988). Misappropriation in such situations is essentially a per se offense; proof of improper intent is not required. In re Harrison, 461 A.2d 1034, 1036 (D.C.1983).

[3] We held in In re Addams that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." 579 A.2d at 191; see also In re Hines, 482 A.2d 378, 386 (D.C.1984). In later decisions we have made quite clear that there is a presumption of disbarment in all cases involving misappropriation resulting from more than simple negligence. See, e.g., In re Cooper, supra note 9, 591 A.2d at 1297; In re Godfrey, 583 A.2d 692, 693 (D.C.1990); In re Robinson, 583 A.2d 691, 692 (D.C.1990); In re Thompson, 583 A.2d 1006, 1008 (D.C.1990). The principal *234 issue in this case is whether Michael's inadvertent misappropriation of his client's funds was the result of simple negligence or of reckless disregard of his duty to safeguard the funds.

The hearing committee specifically rejected Bar Counsel's contention that Michael "had a disregard for the security of the settlement funds giving rise to an inference that he intended to use the funds [for his own benefit]." The committee credited Michael's
testimony that any misappropriation was the result of "sloppy bookkeeping" and "bad accounting," rather than any intent to steal the client's funds. "This is not a case," the committee said, "where lassitude in record-keeping sank to the level of a reckless disregard for the state of the account." Rather, in the words of the hearing committee, Michel "negligently allowed [his office account] to become overdrawn on one or two occasions (within weeks of each other), and immediately made restitution as soon as it was called to his attention." The committee, citing In re Hessler, supra, 549 A.2d at 701, concluded that Michel's conduct involved "commingling and misappropriation through simple negligence, but no more...."

The Board adopted the hearing committee's conclusion that Michel had commingled and misappropriated funds. It deferred to the committee's finding that Michel did not intentionally misappropriate funds, noting that the committee had credited Michel's testimony to that effect and that it could not overturn the committee's credibility determinations. The Board nevertheless disagreed with the hearing committee's conclusion that Michel's conduct was the result of simple negligence. The Board held that on the undisputed facts, as found by the hearing committee, Michel's misappropriation "was the consequence at least of reckless handling of client funds, not mere negligence or inadvertence." Relying on In re Addams, the Board therefore recommended disbarment.

III

[4][5] We must first decide what deference the Board owed to the hearing committee's conclusion that Michel's conduct was the result of simple negligence. The Board is obliged to accept the hearing committee's factual findings if those findings are supported by substantial evidence in the record, viewed as a whole. In re Thompson, supra, 583 A.2d at 1008; Board on Professional Responsibility Rule 13.6. Michel argues that the Board erred in rejecting the hearing committee's conclusion that his conduct was the result of simple negligence.

[6][7] Whether there has been negligence is ordinarily a question of fact for the fact-finder to resolve. See, e.g., Montague v. Henderson, 409 A.2d 627, 628 (D.C.1979). Thus it would appear at first glance that the Board owed deference to the hearing committee's finding of simple negligence, since a determination of negligence is a finding of fact. This court, however, at least in the administrative arena, [FN10] has drawn a distinction between "substantive findings of basic facts" and findings of "ultimate facts," which we have equated with conclusions of law. Washington Chapter of the American Institute of Architects v. District of Columbia Department of Employment Services, 594 A.2d 83, 87 (D.C.1991) (hereafter "AILA "), citing Citizens Ass'n of Georgetown v. District of Columbia Zoning Commission, 402 A.2d 36, 42 (D.C.1979).

The administrative agency's reviewing body (in this case, the Board) must defer to the "substantive findings of basic facts," which include such things as credibility determinations, made by the agency's fact-finding body (the hearing committee). However, the Board owes no deference to the hearing committee's determination of "ultimate facts," which are really conclusions of law. AILA, supra, 594 A.2d at 87.

FN10. Under Rule XI, § 9(g) of this court's Rules Governing the Bar, we are required to "accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record"—the same standard governing our review of administrative agency findings. See D.C.Code § 1-1510(a)(O)(E) (1987).

*235 This court was called upon in AILA to decide whether an agency's determination that an employee's resignation from her job was "voluntary" involved a question of "ultimate fact." The employee had signed a letter of resignation but later claimed that she had done so under duress. She later sought unemployment benefits from the Department of Employment Services, which an appeals examiner denied on the ground that she had voluntarily resigned. The Office of Appeals and Review (OAR) reversed the appeals examiner's decision, ruling that the employee's resignation was "involuntary." The employer contended in this court that the OAR had erred in failing to defer to the appeals examiner's finding that the resignation was voluntary. We noted that although the applicable regulations described the question of whether a resignation was "voluntary" as one of fact, the answer to that question had a "legal consequence": it affected the employee's eligibility for benefits. Id. at 86-87. We therefore concluded that whether a resignation was "voluntary" was really a question of "ultimate fact," i.e., a question of law, on which the OAR owed no deference to the appeals examiner. Id. at 87.

In this case we hold, following AILA, supra, that the hearing committee's conclusion that Michel's
misappropriation was the result of simple negligence was a determination of "ultimate fact"—i.e., a conclusion of law. The "finding" of negligence had a clear "legal consequence": it directly affected the severity of the sanction to be imposed for concededly improper conduct. The Board therefore owed no deference to the hearing committee's conclusion that Michael was merely negligent. [FN11]

FN11. We note that whether someone has been negligent may also be a question of law in a tort case when the undisputed facts support but one conclusion. Montague v. Henderson, supra, 409 A.2d at 628.

IV

[8][9] We hold that the Board was correct in its legal conclusion that Mr. Michael was reckless. Because the Board focused only on Michael's conduct regarding the second dishonored check, we likewise direct our attention to the evidence relating to that check and conclude that it was sufficient to support the Board's conclusion. See D.C.Bar R. XI, § 9(g). [FN12]

FN12. This court will sustain an administrative agency's conclusion of law if (1) the agency has made findings of material "basic facts," (2) the conclusion of law ("ultimate fact") rationally flows from the underlying "basic facts" and is legally sufficient to support the agency's decision, and (3) substantial evidence supports the findings of "basic facts." AIA, supra, 594 A.2d at 87 n. 8 (citing authorities).

Mr. Michael knowingly and intentionally commingled his client's funds with his own, even though he knew that to do so was improper. When Michael wrote the second check on October 5, his account balance was insufficient to cover it. He testified that the funds were insufficient because of "bad accounting" on his part, and because "I don't reconcile [the account] the way I should, bad arithmetic on my part, I guess." Michael testified further about his accounting practices:

Q. [by Bar Counsel]: Do you keep records concerning the money in your office operating account, or did you keep the checkbook for that account current?
A. How do you mean that?
Q. In terms of reconciling it by the check stubs. The balance that would be left, and so forth?
A. Well, I do—1 truthfully did—do try to keep a running balance, but it has always been, unfortunately, that there may not be enough funds there to cover the checks.

In reaching its decision, the Board compared Michael's case with two misappropriation cases in which this court concluded that the misappropriation was the result of simple negligence. In In re Hessler, supra, the attorney received a settlement check, which he deposited in his office operating account. After deducting his fee, the attorney sent a check for the balance to the client, but the client never received it. The attorney, after being made aware of the missing check, issued the client a new one. Although the second check cleared, the balance *236 in the attorney's account had, between the time of the deposit of the settlement check and the issuance of the attorney's second check, fallen below the amount owed to the client. The attorney was therefore guilty of technical misappropriation, but the Board and this court concluded that the misappropriation was the result of "simple negligence, but no more." 549 A.2d at 701.

In In re Harrison, supra, the attorney commingled funds and allowed the balance in the account to drop below the amount owed to the client. This court concluded that his misconduct was the result of his reliance on "his account balance rather than his running balance," and therefore justified a lesser sanction than disbarment. 461 A.2d at 1036.

We agree with the Board that Mr. Michael's conduct in the instant case was clearly worse than the attorneys' conduct in Hessler and Harrison. The attorneys in both of those cases at least tried to keep track of their clients' funds but were unable to do so accurately. The evidence in the instant case, however, shows that Mr. Michael made no attempt to keep track of his client's funds, but indiscriminately wrote checks on the account at a time when he knew or should have known that the account was overdrawn. The Board's conclusion that Michael misappropriated funds as a result of reckless disregard for the security of his client's funds rationally flows from the undisputed facts. We therefore uphold the Board's legal conclusion that the misappropriation in this case was the result of Michael's recklessness.

V

[10] In In re Addams, supra, we recognized a presumption "that in virtually all cases of misappropriation, disbarment will be the only
appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." 579 A.2d at 191. We realize that disbarment in a case such as this may seem to be a harsh sanction when compared with sanctions for other violations involving arguably more egregious conduct. See, e.g., In re Sandground, 542 A.2d 1242, 1243 (D.C.1988) (three-month suspension for helping client to conceal assets during divorce proceedings); In re Thompson, 538 A.2d 247, 248 (D.C.1987) (one-year suspension for lying to federal immigration authorities); In re Hutchinson, 534 A.2d 919, 920 (D.C.1987) (en banc) (one-year suspension for lying to federal authorities investigating securities law violations); In re Reback, 513 A.2d 226, 228 (D.C.1987) (en banc) (six-month suspension for filing falsified documents with the court). Overriding that seeming disparity, however, is "our concern ... that there not be an erosion of public confidence in the integrity of the bar. Simply put, where client funds are involved, a more stringent rule is appropriate." In re Addams, supra, 579 A.2d at 198. Michieh argues that our harsher treatment of attorneys in misappropriation cases violates the Equal Protection Clause of the Constitution. We recently rejected essentially the same argument in In re Dulaney, 606 A.2d 189 (D.C.1992), and we reject it again here.

Michieh does not and cannot contend that this court's disparate treatment of attorneys who misappropriate client funds impinges upon a fundamental right or involves a suspect class. That treatment is therefore presumptively constitutional and will withstand constitutional muster if it is "rationally related to a legitimate state interest." Backman v. United States, 516 A.2d 923, 926 (D.C.1986) (citations omitted); accord, In re Dulaney, supra, at 190. It cannot be seriously doubted that attorney discipline is a "legitimate state interest." See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2015-16, 44 L.Ed.2d 572 (1975) (states "have a compelling interest in the practice of professions within their boundaries").

[11] We made clear in Addams that the need to maintain "public confidence in the bar" justified our stricter treatment of misappropriation cases. Addams, supra, 579 A.2d at 197 (citation omitted). We cited with approval an opinion noting that "modest discipline [in cases of misappropriation] threatens public respect for the legal profession *237 and will impair public confidence in the court's regulation of the bar...." Id. at 198, citing In re Deragon, 398 Mass. 127, 133-134, 495 N.E.2d 831, 834 (1986) (dissenting opinion). We concluded that because the relationship between attorney and client is and must be founded on complete trust, [FN13] a breach of that trust by a lawyer who misappropriates client funds "is so reprehensible, striking at the core of the attorney-client relationship, that the respondent must carry a very heavy burden to rebut the presumption of disbarment]." In re Addams, supra, 579 A.2d at 198-199. Thus we hold that "[a] clear rational basis exists for [the] conclusion that attorneys who knowingly misappropriate client funds stand in a different position than attorneys who commit other acts involving dishonesty." In re Dulaney, supra, at 190. Accordingly, we reject Michieh's constitutional argument and adopt the Board's recommended sanction of disbarment. [FN14]

FN13. "[I]t is commonplace that the work of lawyers involves possession of clients' funds.... Whatever the need may be for the lawyer's handling of clients' money, the client permits it because he trusts the lawyer." In re Wilson, 81 N.J. 451, 455, 409 A.2d 1153, 1154 (1979), cited with approval in In re Addams, supra, 579 A.2d at 198.

FN14. There are no mitigating factors in this case sufficient to overcome the strong presumption of disbarment. See In re Robinson, supra, 583 A.2d at 692 (small amount of money involved, short period of time during which client was denied use of funds, lack of financial harm to client, and lack of prior disciplinary record held insufficient to overcome the presumption of disbarment recognized in Addams ).

It is therefore ORDERED that respondent, Richard A. Michieh, shall be disbarred from the practice of law in the District of Columbia, effective thirty days from the date of this opinion.

SCHWELB, Associate Judge, concurring:

I remain of the opinion that this court's relentlessly unforgiving approach to misappropriation cases like this one is difficult to reconcile with what I view as substantially greater and sometimes excessive leniency towards violations involving far more dishonorable conduct. See In re Addams, 579 A.2d 190, 209-10 & nn. 16-20 (D.C.1979) (en banc) (Schwelb, J., concurring). In light of the decision in Addams, however, I am constrained in this case to join the opinion of the court.

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