

Workshops

UNLAWFUL DISCRIMINATION FEBRUARY 22

Albuquerque T-VI will offer a morning workshop on Unlawful Discrimination on Saturday, February 22. Conducted by Penn Strode of the Human Rights Commission, the workshop will focus on the scope and limitations of the state's Human Rights Act. Comparisons with Title VII of the Civil Rights Act of 1964 will be offered as well as guidelines for preventing unlawful discrimination under both state and federal law. This session is designed for attorneys, employers and supervisors.

The workshop will be held from 8:30 a.m. to 12:30 p.m. in the Business Occupations Building at 525 Buena Vista SE. There is a \$20 fee, and the deadline for registration is February 14.

For more information and registration, call 848-1666 and inquire about Workshop "O" on Unlawful Discrimination.

Disciplinary Notes

ATTORNEY TRUST ACCOUNT

Two former associates of an attorney complained that their former employer had committed numerous violations of various disciplinary rules, including an allegation that the attorney in question had utilized client trust funds to pay office overhead expenses.

The attorney was extremely cooperative during the investigation, painstakingly addressing and documenting the responses to each allegation. The vast majority of the allegations were found to be totally without merit and possibly brought by the former associates out of some motive of revenge.

The bank records concerning the trust account (and supplied willingly by the attorney) clearly showed, however, that two rent payments had been made out of the client trust account. The attorney's explanation for this was that the funds utilized to cover these checks were actually funds earned as fees but not yet transferred to the office account. Rather than taking the two steps necessary to transfer this money to the appropriate account and then writing the rent checks on that account, the attorney claimed to have taken a short cut and simply paid the rent from the trust account. The attorney's own trust account records and client ledgers were meticulously kept and corroborated the attorney's version of what had occurred.

Nevertheless, the actions of the attorney constituted a violation of Disciplinary Rule 9-102 (A). This rule sets a requirement that an attorney trust account is to be utilized solely to maintain funds being held for clients. While funds paid in advance by clients for services to be rendered or an attorney's share of any award in a case taken on a contingency basis can and should be deposited into the trust account pending payment to the

attorney, once this money is earned by and/or payable to the attorney and thus belongs to the attorney it must be transferred out of the account immediately. The payment of the attorney's own expenses directly from the trust account indicates that attorney funds have been comingled with client funds and/or give rise to a suspicion (as occurred in this case) that defalcation of client funds has taken place. Rule 9-102 (A) seeks to prevent any such appearances of impropriety.

In that there was no evidence that this attorney had embezzled any client fund or engaged in any dishonest conduct, a reviewing officer approved a dismissal of the case with an informal admonition pursuant to Rule 11(a) (6) of the Supreme Court Rules Governing Discipline. In accepting the offer of admonition, the attorney acknowledged that the conduct could and did give rise to suspicions that improprieties had been committed and agreed that in the future, earned fees would be transferred from the trust account to the office account before distribution to creditors.

SUBPOENAED DEPOSITION EXPENSES

A complainant alleged that he had been subpoenaed to attend an out-of-town deposition and had appeared to testify as requested. When he asked for a witness fee and mileage expenses, however, the attorney who called the deposition refused to pay him.

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Disciplinary Notes

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The attorney acknowledged that he had issued the subpoena and that the witness had indeed attended the deposition. His position, however, was that since the witness had not asked the process server for the fee at the time he was served, pursuant to the precise wording of Rule 45(c) of the Rules of Civil Procedure, he was not entitled to be paid. (Whether or not the man had requested a fee from the process server and whether or not the server had a check to give him were matters of some disagreement.) The attorney also maintained that his client, who was paying costs directly, did not choose to pay the witness' fee and, furthermore, that if the witness had felt strongly about this, it was his responsibility to file a motion to quash the subpoena.

Obviously, the attorney was technically correct in his position that the witness should have requested the

fee at the time of service and could have moved to have the subpoena quashed. Disciplinary counsel discussed this case hypothetically with a number of attorneys, however, and learned that most attorneys will simply attach an appropriate check to the subpoena, particularly when the person being served is an adverse witness, or arrange with the witness before service to pay the fee at the time of his appearance and thus avoid this type of controversy. Most felt that such a hyper-technical reading of Rule 45 (c) was a little ridiculous and, if widely followed, might tend to have a chilling effect on the discovery process. All agreed that if a witness makes it clear that he expects to be paid a reasonable fee, then the fee should be paid. To expect a lay witness to be versed in the procedural remedies he might have available to him was seen as somewhat unreasonable.

While it is the client who must bear the costs of litigation, the client who has agreed that a particular step should be taken to

advance the litigation should not later be allowed to decide that the costs associated with that step will not be paid. In order to avoid this problem, an attorney might wish to request that the client advance money for each cost he agrees may be incurred; the attorney could then pay these bills out of the client's trust funds.

In this case, the attorney ultimately prevailed upon the client to pay the witness fee and was issued a letter of caution suggesting that he temper his literal translations of procedural law with a dash of common sense. While it is not proposed that attorneys abandon procedural requirements or that they ignore the wishes and rights of their clients, the rigid position of this attorney did little to enhance the reputation of the profession in the eyes of at least one member of the public. If carried to the extreme, such uncompromising tactics could be prejudicial to the administration of justice and in violation of Disciplinary Rule 1-102 (A) (5).

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