HANDLING CLIENT FUNDS, TRUST ACCOUNTS AND IOLTA

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PERSONAL – THE IMPORTANT STUFF FIRST

Married to Martha for 20+ wonderful years and full-time father of three great boys as homework helper, standardize test reviewer, driver to practices, bleacher warmer, and ready to provide rarely asked for dating and life lesson advice (which is rarely well received.)

AREAS OF PRACTICE

Complex property divorces and complicated child custody cases. Protection of separate property and pursuit of reimbursement claims through tracing. Grandparent and third-party conservatorship claims, as well as interstate jurisdiction and international compact child custody issues.

LECTURER & AUTHOR (selected)

Important Provisions to be Included in SAPCR - College of the State Bar, Summer School - 2014
Guardianship and the Divorce Client - SBOT Marriage Dissolution - 2014
Inventory & Appraisement - SBOT Marriage Dissolution 101 - 2013
Child Support: Contractual and Statutory - SBOT Marriage Dissolution - 2012
Parentage and Paternity Fraud - Smith County Bar Assoc., Family Law Section - 2012
Top Ten Things Every Lawyer Should Know: Family Law - Smith County Bar Association –2012
Post-Divorce Medial Benefits - Pro Bono Project, SBOT – Moderator and Speaker – 2012
Child Support –Statutory and Contractual - Marriage Dissolution - 2012
Domestic Violence Panel – Moderator – Marriage Dissolution –2009
Child Support and the Failing Economy - Parent-Child Relationships - Critical Thinking on Critical Issues – UT CLE – 2009
Getting It In & Keeping It Out – A Mini-Guide to Evidence in the Family Law (Speaker only) Pro Bono Project - SBOT – 2008
Economic & Physical Torts: Proving Waste and Fraud for a Disproportionate Division Marriage Dissolution – SBOT – 2008
Ethics: Paralegal & You Marriage Dissolution Boot Camp – State Bar of Texas – 2007
ECONOMIC Contribution and Valuation - Texas Center for the Judiciary — 2007

PROFESSIONAL ASSOCIATIONS AND POSITIONS

Family Law – Texas Board of Legal Specialization – 2001 to present
Family Law Council – SBOT Family Law Division – 2011 - present
State Bar of Texas Grievance Committee – Past Member and Prior Chairman of District 2A
Texas Pattern Jury Charge Committee – Family – 2001 to 2009
Texas Family Law Practice Manual Formbook Committee – 2006-2008
Texas Academy Family Law Specialist – Prior Board of Director; Member - 2001 to present
Texas Bar Foundation – Fellow
Texas Family Law Foundation – Lifetime Sustaining Member
Smith County Bar Association; Prior President and other offices
Smith County Bar Foundation; Prior President and prior Board of Director

There is other stuff; it is immaterial for now; enjoy the speech…

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HANDLING CLIENT FUNDS, TRUST ACCOUNTS AND IOLTA

I. INTRODUCTION

A new client hires you for representation, you agree on type of work and fee and she writes you a check. What do you do with the money? Well… that is the question, now isn't it? And the lawyer answer is, it depends.

The answer truly depends upon what type of representation, what amount, what term of employment, one time or ongoing items, individual client or multiple clients. Each of these to a varying decree determines where and how you deposit the funds and the accounting that will be needed – now and potentially continuing in the future. But don't worry. There are LOTS of resources about how to do it correctly and the options best for you and your client.

This article will address the procedures (and some policy) as to what is needed to protect client funds; what steps are necessary to create an accounting of the fund and which duties you have as a fiduciary of the client funds. And make no mistake, you are a fiduciary. Treat it as such and err on the side of caution.

As this article is written for a family law seminar, it will lean toward the day to day activities that come within that practice area. But regardless of the scope of representation, the rules covering IOLTA and for accounting for client funds are the same. And those rules are outlined in multiple locations. You need not be afraid to ask for guidance.

II. RESOURCES GALORE

Your wonderful State Bar, www.texasbar.com, has multiple published articles to help you properly handle client money, to understand the accounts, guidelines to help you decide which account is needed as well as instructions on the setup for your individual practice. A very recent resource (recent as in April, 2014) attached as Appendix 1 covers trust accounts and provides a thorough overview of trust accounts and IOLTA for Texas lawyers.

Additionally, the Texas Young Lawyer's Association, www.tyla.org, has significant resources online and in print to assist in creating and properly maintaining your practice's accounts. There is no need to be a "young lawyer" to utilize TYLA resources.

In a nutshell, The Texas Access to Justice Foundation (TAJF or Foundation) administers the interests generated from Interest on Lawyers' Trust Accounts (IOLTA) and the Texas Access to Justice Commission (TAJC, or Commission) attempts to increase contributions and funding for the equal access to the rule of law.

TAJF describes itself as follows:

> *The Texas Access to Justice Foundation is the leading funder of legal aid in Texas. The organization is committed to the vision that all Texans will have equal access to justice, regardless of their income.*
>
> *The Foundation, a 501(c)(3) nonprofit organization, was created by the Supreme Court of Texas in 1984 to administer the newly implemented Interest on Lawyers' Trust Accounts (IOLTA) Program. Since then, TAJF has diversified its funding sources to include public funding and private donations.*
>
> *The Foundation grants millions of dollars per year to approximately 40 organizations statewide that provide free civil legal assistance to low-income Texans. With TAJF grants, legal aid organizations provide free legal assistance in civil matters, such as protection from domestic violence and assistance with housing issues, to more than 100,000 low-income Texans each year.*

TAJC describes itself as follows:

> *In 2001, the Supreme Court of Texas, with the support of the State Bar of Texas and civil legal services providers, created the Texas Access to Justice Commission to address the wide disparity in opportunities for low-income individuals to gain access to justice.*
>
> *The Commission is comprised of members from the law, education, public service and non-profit sectors. The Commission organizes its initiatives and projects through committees and task forces, which explore ways to improve access to civil justice for low-income Texans.*
>
> *Our efforts are focused on the following goals:*
>
> - *Securing stable funding for legal service providers*
> - *Addressing policy issues affecting access to justice*
> - *Raising awareness and providing education on access to justice issues*
> - *Expanding pro bono efforts*
> - *Advancing technology initiatives to ensure delivery of legal services*
> - *Helping self-represented litigants who are unable to obtain a legal aid or pro bono lawyer*

Part of the oral presentation will briefly cover these entities' relationship with each other, but for purposes of the paper, the above suffices and **BOTH** TAJF and TAJC offer wonderful information on how the attorney may easily comply with the appropriate rules and procedures.

See Section VII below for FAQs from both entities websites.

III. THE DIFFERENCE BETWEEN TRUST AND IOLTA ACCOUNTS

Many times lawyers use the term trust account and/or IOLTA account interchangeably with the wholesome intent to be accurate. They are different accounts with different requirements and different uses. Both accounts operate basically the same – being substantially a bank account you control that contains other people's monies (and both carry fiduciary responsibilities.) The interest within the typical trust account stays with the deposits. But an IOLTA account varies in that the interest from the IOLTA account is utilized by a nonprofit organization (TAJF) for funding legal services to the poor. You don't see the interest and you don't have access to it.

A. Trust Accounts

Attorneys routinely receive client funds, such as unearned fees or settlements, which they place in financial institutions. Since the funds are being held for the benefit of the client, attorneys must place these funds in an account separate from their general operating account or any personal account – the trust account.

> A lawyer's trust account (and Black's Law Dictionary describes *trust*, and its variations, for five complete pages) is what we as well as the public thinks of as the generic lawyer's account – a bank account in the lawyer's name that holds clients' funds. Our clients provide us, their lawyer, money (of which we may not have a claim to, yet…) and we place it into a trust account for their benefit. Once we know how to distribute it, we do so and provide an accounting of its use. This distribution is either to ourselves for fees or expenses, to a third party or even back to the client.

If the client funds will generate interest income sufficient to offset the expense of investing them in a separate account for the client (large sums of money or funds to be held for a long period of time), the attorney should invest the funds for the client. An example would be funds from sale of real estate of which the competing parties have not determined how to divide.

Taking the old trust account operations and trying to do well by the public, the Supreme Court of Texas set up the Interest on Lawyers' Trust Accounts (IOLTA) Program in 1984 to allow attorneys to pool short-term and nominal deposits into one account with the interest paid to the Texas Access to Justice Foundation. The IOLTA account overtook the 'old' typical trust account that lawyers maintained for many years.

B. IOLTA Accounts

In 1984, the Supreme Court of Texas established a mechanism for funding legal aid for low-income Texans by collecting interest on client trust accounts. (All fifty states and the District of Columbia have approved IOLTA programs. In Australia and Canada, where the IOLTA concept originated, the programs have been operating since the 1960s.) Through the Texas Interest on Lawyers' Trust Accounts Program, attorneys voluntarily pooled the interest earned on trust accounts to provide civil legal services to the poor. The same year, the Court created the Texas Access to Justice Foundation, a nonprofit corporation, to administer the program, including the collection and granting of IOLTA funds.

In 1989, participation in the IOLTA Program became mandatory for Texas attorneys. The program in Texas currently generates millions yearly without taxing the public and at no cost to lawyers or their clients. Only client funds that are nominal or held for a short period of time may be deposited into IOLTA accounts.

The interest on the IOLTA accounts is remitted to the Foundation, which grants the money to nonprofit organizations that provide free civil aid to low-income Texans.

The Rules Governing the Operation of the Texas Access to Justice Foundation, adopted by the Supreme Court of Texas in 1988, prohibit the use of IOLTA funds to directly fund class action suits, lawsuits against governmental entities, or lobbying for or against political candidates or issues.

An IOLTA account is an interest-bearing checking account that an attorney or law firm maintains for client funds nominal in amount or held for a short period of time. The account is a demand account established in the name of the attorney or law firm. The account is often referred to as a client trust account – ergo some confusion by lawyers and non-lawyers on terminology.

In the Rules Governing the Operation of the Texas Access to Justice Foundation, Rule 4 states: Deposit of Certain Client Funds.

> An attorney licensed by the Supreme Court of Texas, receiving in the course of the practice of law in this state, client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time, must establish and maintain a separate interest or dividend-bearing insured depository trust account at an eligible institution and deposit such funds in the account. "Interest or dividend-bearing insured depository trust account" means a federally insured checking account or investment product, including a daily

financial institution repurchase agreement or a money market fund at an eligible institution as defined in Rule (7). A daily financial institution repurchase agreement must be fully collateralized by, and an open-end money market fund must consist solely of United States Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and have total assets of at least $250,000,000.

The funds covered by this rule shall be subject to withdrawal upon request and without delay. All IOLTA-eligible client funds may be deposited in a single unsegregated account.

Attorneys who practice in a law firm or for a professional corporation may utilize the interest-bearing trust account of such firm or corporation to comply with Rule 4. No funds belonging to the attorney or law firm, except funds reasonably sufficient to pay for fees or obtain a waiver of fees or to keep the account open, may be deposited in such an account. The interest earned on the account shall be paid in accordance with and used for the purposes set forth in these Rules.

The Foundation will hold the entire beneficial interest in the interest earned. Funds to be deposited under these Rules shall not include those funds evidenced by a financial institution instrument, such as a draft, until the instrument is fully credited to the financial institution in which the account is maintained. The term "draft" as herein used is defined in Section 3.104 (b) (1) of the Texas Business and Commerce Code. A draft or similar instrument need not be treated as a collected item unless it is the type of instrument which the financial institution generally treats as a collected item. Nothing in this or any other of these Rules prohibits the deposit of client funds into a general account or changes the legal relationship between depositor and financial institution from that established by contract or by applicable state and federal law.

IV. CONTINUED COMPLIANCE FOR IOLTA ACCOUNTS

The State Bar of Texas membership dues statement is used to confirm your compliance with the IOLTA Rules. By paying your bar dues, you certify that you have verified and updated, if necessary, your IOLTA information and are in compliance with IOLTA.

You must annually verify the information and identify any of the below changes:

- Closing your IOLTA account (a closure form is required)
- Opening a new IOLTA account (a notice form is required when opening a new account)
- Indicate that an attorney is no longer with the firm listed
- Indicate that the attorney is with a different firm listed than the one listed

All attorneys must verify that their IOLTA information is correct and up-to-date before certifying their compliance – this may be done online.

To verify or update your IOLTA account status, log-in to either:

Attorneys needing to verify or change their IOLTA account information should go to http://compliance.teajf.org/attorney/login.aspx

Firms (with 7 or more attorneys) needing to manage its IOLTA account information (add or delete attorneys) should go to: http://compliance.teajf.org/firm/login.aspx

V. OTHER ACCOUNTS FOR OPERATING A LAW PRACTICE

In addition to the trust account or IOLTA account necessary for an ongoing practice, many lawyers carry at least one additional account. An operating account or general account is the most common wherein day to day expenses are paid. The expenses from utilities, to rent, to postage meter, to copier rentals, and computer purchases come from this account. And it should be funded by the occasionally, and best regularly scheduled, transfer from the IOLTA account for your attorney fess earned.

Separately a payroll account may be maintained to keep track of the unique tax requirements for payroll taxes and withholdings. Many accounting programs have dedicated add-ons for payroll purposes. This is important in that tax laws change occasionally and error in the account is severely punished. The proper mechanism for payroll accounts is outside this paper – speak with a CPA. But generally, you will run a scheduled payroll, determine what is needed for that period, transfer funds from the operating account into the payroll account and write payroll checks. Then you will immediately write employer tax checks and withholding allowances to the dear Uncle Sam. Do not mess with the payroll account – use it solely for the designated purposes.

VI. CLIENT FUNDS DISTRIBUTION STATEMENTS

In addition to you keeping accurate records of what deposits are made and the withdrawals of the accounts, it is imperative that the client understand, via written reports or statements, of how her funds were utilized. This is done by your billing program, whichever you utilize, and should sync or easily transfer data to your tax preparer.

Client funds that are maintained and distributed need not follow any special format. The single item it must be is specific. If it is specific, it will be clear. If it is specific, it will be accurate. If it is specific, it will be harder to argue about.

This specificity will include the date of receipt, from whom and the amount. Then the date of distributions, the check number, the amount, the payee and the purpose. The who, what, why, where, when and how must be answered by every single transaction on the distribution sheet.

VII. FAQS – ATTORNEYS

The below are appropriate FAQs from the TAJF and TAJC websites that cover some common issues.

Q: What are attorneys' responsibilities under the IOLTA rules if they do not handle client trust funds?

A: Licensed attorneys in Texas who do NOT handle client trust funds are not required to establish an IOLTA account. However, such attorneys are required to advise the Texas Access to Justice Foundation during the annual IOLTA compliance process that they do not handle client trust funds.

Q: Where do attorneys deposit client trust funds that do not meet the short-term or nominal fund requirements of IOLTA?

A: Client trust funds that do not meet the nominal or short-term fund requirements of an IOLTA account should be deposited in a separate demand account to earn interest for the benefit of that client. The attorney must use that client's tax I.D. number instead of the Foundation's tax I.D.

Q: Do attorneys have to pay for service charges on IOLTA accounts?

A: Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest earned on an IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the attorney or law firm maintaining the IOLTA account.

Q: Does the IOLTA program pay for the checks, deposit slips and other related fees on the client trust accounts?

A: No. The Foundation will pay reasonable service charges on the IOLTA account. However, the Foundation does not pay for checks, wire transfers or other business expenses associated with the account.

Q: What do attorneys or law firms have to do to open an IOLTA account?

A: The attorney or law firm must take the IOLTA Notice to Financial Institution to the financial institution in which the IOLTA account will be opened. This form instructs the financial institution how to establish an IOLTA account. Once the account is opened, the financial institution must complete the form. The attorney, law firm or bank must then mail or fax a copy of the completed form to the Texas Access to Justice Foundation.

VIII. FAQS – BANKS

Since your IOLTA account is a regular bank account, with special handling and reporting provisions, the following FAQs for banks provide insight on what the lawyer needs to know.

Q: Do all attorneys need IOLTA accounts?

A: Only attorneys that handle client trust funds that are nominal in amount or held for a short time are required to establish IOLTA accounts. Licensed attorneys in Texas who do NOT handle client trust funds are not required to establish an IOLTA account.

Q: Where do attorneys deposit client trust funds that do not meet the short-term or nominal fund requirements of IOLTA?

A: Client trust funds that do not meet the nominal or short-term fund requirements of an IOLTA account should be deposited in a separate demand account to earn interest for the benefit of that client. The attorney must use that client's tax ID # instead of the Foundation's tax ID #.

Q: How do financial institutions assist attorneys or law firms in opening IOLTA accounts?

A: The financial institution must complete the IOLTA Notice to Financial Institution, which instructs the

financial institution how to establish an IOLTA account. The attorney, law firm or financial institution must then mail or fax a copy of the completed form to the Texas Access to Justice Foundation.

Q: Are IOLTA accounts subject to service charges? Who pays the services charges?

A: Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest earned on an IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the attorney or law firm maintaining the IOLTA account.

Q: Does the Foundation pay for the checks, deposit slips and other related fees on the client trust accounts?

A: No. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the attorney or law firm maintaining the IOLTA account.

IX. CONCLUSION

The long and short is after you set up accounts, it is a matter of doing paperwork. Paperwork that is not much fun and that doesn't add to the bottom line, but will absolutely destroy the bottom line if done improperly. Don't be afraid of asking for help and don't be afraid of asking how others do their accounting. Your bank will help and wants to help to keep your business.

Attached Appendix 1 is a complete and thorough explanation on what is needed for trust accounts and IOLTA complains. Read it and use it and you will be in compliance.

APPENDIX 1

A Lawyer's Guide to Client Trust Accounts

State Bar of Texas

This material is intended for educational and informational purposes only and intended only to address disciplinary issues under the authority of the State Bar of Texas. It does not constitute legal, accounting or professional advice, and no liability is assumed in connection with the information, suggestions, opinions, or links mentioned herein.

Thank you to the Washington State Bar Association for permission to use its illustrations from *Managing Client Trust Accounts – Rules, Regulations, and Common Sense.*

Updated April 15, 2014

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Introduction

Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct is titled, "Safekeeping of Property", and commonly referred to as the trust account rule. The purpose of this information is to discuss the proper handling of monetary funds, belonging entirely or partially to a client or third person, *and which are required by this rule* to be kept separate from the lawyer's own funds by depositing the funds into a trust account. A trust account may be one or more interest-bearing trust accounts or Interest on Lawyers' Trust Accounts (IOLTA),[1] the appropriate use of each are discussed later in this material.

Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct

1.14 Safekeeping Property[2]

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a trust or escrow account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

(See Appendix 1 for Rule 1.14 and comments.)

Policy Behind the Rule

The policy behind Rule 1.14 is to protect funds that *do not belong to the lawyer*. When a lawyer holds funds that belong to a client or third party, these funds must be protected from the lawyer's creditors or personal financial problems. Acting as a fiduciary,

lawyers are required to treat the property of others with the highest standards of accountability.[3] Accordingly, Rule 1.14 details a lawyer's duties to clients and third persons when acting in this fiduciary capacity.

Although Rule 1.14 also mentions the duty to safeguard "other property", the purpose here is to discuss safeguarding funds, and not personal property, such as jewelry or stock certificates.

The obligation to keep the property of others in a separate trust account in accordance with Rule 1.14 is absolute and not waivable.[4]

When to Use a Trust Account

In connection with a representation, if a lawyer holds any funds which do not belong to the lawyer, then the funds must be held in a separate account designated as "trust" or "escrow".[5]

This must be done whether the funds belong *in whole or in part* to *clients or third persons.*

Therefore, any lawyer who will handle funds that belong to a client or a third person will need a trust account.

Types of Funds

Funds that belong in a trust account:

1. All advances for fees and most retainers received from clients until they are actually earned by the lawyer
2. Funds which belong in part to the client and in part to the lawyer
3. Funds of the client that are being held for disbursement at a later time
4. Funds of third parties to be distributed at a later time

Examples of funds that **must** go into a trust account (*i.e.* funds that belong to a client or third party)

- Advance fee/expense deposits
- Settlement monies
- Overpayment of bills

Examples of funds that **must not** go into trust account (*i.e.* funds that belong wholly to the lawyer)

- Fully earned fees
- Reimbursements for cost advances
- Lawyer's personal or business transactions

In receiving monies, the lawyer may accept many methods of payment, including cash, check or credit card.[6]

Unearned Fees, True Retainers and Advanced Payments of Expenses

Any *unearned fee* or *advance payment of expenses* should be deposited into a trust account. Use of a trust account is appropriate whether it involves an hourly fee, flat fee, contingent fee or prepayment of an expense.

Examples of unearned fees include:

- Advance deposit or retainer for lawyer's fees which will be depleted as the lawyer bills the client on an hourly basis.[7] *(See Appendix 2 for Ethics Opinion 611.)*

- Flat fees that have not been earned, regardless of whether the fee is deemed "nonrefundable" in the fee agreement.[8] *(See Appendix 3 for Cluck v. Comm'n for Lawyer Discipline.)*

- Settlement funds which have not been distributed in accordance with the contingent fee requirements in Rule 1.04 (d).[9] (*See Appendix 4 for Rule 1.04 (d).)*

The types of fee arrangements between lawyers and their clients continue to change for a variety of reasons. For example, "value billing" is based on the results delivered to the client. *Regardless of the name tag placed on the billing arrangement, the rule is simple:* until the fee is earned, it must be segregated from the lawyer's own funds in a trust account. This rule applies to *any* practice area, whether it is criminal, family, or corporate law.

Unearned fees are always subject to refund until earned and cannot be deemed *nonrefundable* by agreement.[10] As such they belong in the lawyer's trust account. Distinguishable are fully earned fees. For example, when a client pays the exact amount on the lawyer's invoice for work already performed, that money is earned and should not be deposited into the trust account.

A common problem that arises in the context of flat fees is the question of when the fee is earned. Labeling a flat fee as nonrefundable or earned upon receipt does not make it so.[11] Therefore a flat fee should be deposited into the lawyer's trust account. Without contract terms that specifically define at what rate a flat fee is earned, lawyers should operate under the premise that none of the fee is earned until the end of the representation when all work has been completed to meet the client's objective. Since in many cases a lawyer cannot complete the representation, either due to termination by the client or from voluntary withdrawal, the lawyer will often face a situation where some work, but not all has been completed.[12] In these cases the lawyer faces the problem of determining what portion of the flat fee is earned. A lawyer can avoid this problem by stating in the fee agreement at what rate the fee is earned. This is often done at an hourly rate or by setting a schedule of work to be completed, prorating the fee and designating at each step what portion of the fee has been earned.

A *true nonrefundable retainer* is a fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment. If the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received. Thus, only a true retainer may be nonrefundable.[13] As an earned fee, a *true nonrefundable retainer* should not be placed in the lawyer's trust account.[14]

A true nonrefundable retainer, however, is not a payment for services. If a lawyer will perform services for the fee, then the fee is classified as a deposit or prepayment for services. A deposit/prepayment for services is always refundable until it has been actually earned through the performance of legal services.[15] A lawyer cannot make a deposit/prepayment for services nonrefundable simply by declaring that it is a nonrefundable retainer.[16] Since this deposit or prepayment of fees remains the client's property, it must be placed in the lawyer's trust account. Thus, an advanced deposit or prepayment retainer is wholly distinguishable from a *true nonrefundable retainer*.

It is much easier to identify what constitutes an advance payment of expenses as opposed to an unearned fee. For example, court costs

are often paid as part of an advance payment of fees. Until the court costs, such as filing fees, are paid to the courthouse clerk, these too, belong in a trust account. The same is true of anticipated travel expenses. Until the airplane ticket is purchased by the lawyer, or the lawyer reimburses himself, the money for this expense remains in the trust account.

Commingling and Funds for Account Maintenance

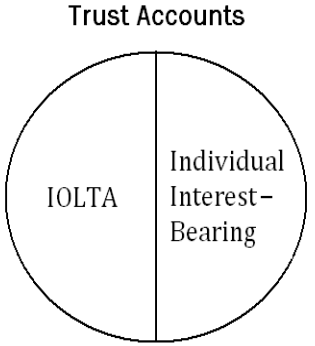
Rule 1.14 requires that funds of a client or third person be held separate from the lawyer's.[17] Therefore a lawyer should not commingle or mix his own or the law firm's funds with the client's. Funds that belong in whole to a lawyer should not be deposited into a trust account.

An exception exists to the general rule that funds belonging to the lawyer or law firm may not be deposited in a trust account. This exception permits the deposit of funds "reasonably sufficient to pay for fees or obtain a waiver of fees or to keep the account open."[18]

Individual Interest-Bearing Trust Accounts vs. Interest on Lawyers' Trust Accounts (IOLTA)

It is clear that a lawyer may not keep the interest earned from a trust account because the interest, just like the principal funds, belongs to the beneficiary of the trust account.[19] In setting up the trust account, the lawyer must first determine whether the trust account should be set up as an individual interest-bearing trust account or an IOLTA trust account.

There is often confusion about whether funds must be placed in an IOLTA (Interest on Lawyers' Trust Account) account. The terms *IOLTA account* and *trust account* are not synonymous. An IOLTA account is merely a certain kind of trust account. All IOLTA accounts are trust accounts, but not all trust accounts are IOLTA accounts.



A trust account may either be an individual interest-bearing account or an IOLTA account. The difference between the two types of trust accounts involves to whom the interest earned on the principal funds will be paid.

Individual Interest-Bearing Trust Accounts

This type of trust account is set up for the benefit of the person to whom the funds belong. In practice this is usually the client, such as when an advance payment of fees is paid to a lawyer. The general rule is <u>if the funds can reasonably earn interest for the beneficiary, then they should be placed in an individual interest-bearing trust account</u> where the interest will be paid to that beneficiary.[20] Alternatively, if the funds cannot reasonably earn interest for the beneficiary, the funds go into an IOLTA trust account.[21]

It is important that the lawyer use the beneficiary's social security number or EIN to open an individual interest-bearing trust account. For IRS reporting purposes, the lawyer should not use his own tax ID number on this type of account.

IOLTA Trust Accounts

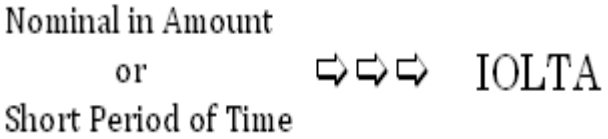
Rule 1.14 makes clear that funds belonging to others must be held in trust. In some situations, however, use of an individual interest-bearing trust account for each person for whom the lawyer holds funds would be very burdensome. A lawyer might try to solve this problem by placing multiple beneficiaries' funds in one trust account, but calculation of interest and account expenses for each would prove to be difficult and time-consuming, especially if funds were constantly being deposited and withdrawn for each beneficiary.[22] Use of an IOLTA-type trust account alleviates these problems.

When the monies of separate beneficiaries will be held for only a short period of time, or if the monies are nominal in amount, the lawyer should use an IOLTA-type trust account for these funds.[23] An IOLTA trust account operates to pool the separate beneficiaries' funds in one account and pays all accumulated interest to the Texas Access to Justice Foundation to benefit legal services for the indigent.

This practice has been upheld as permissible[24] and is required under the State Bar Rules.[25]

The IOLTA Rule

Article XI of the State Bar Rules requires that client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time must be held in an IOLTA trust account.[26] These types of funds cannot reasonably earn interest for the client.



Compliance with the IOLTA Rules

The IOLTA rules set forth additional requirements to which a lawyer using such an account is subject.[27]

Among those requirements are the following:

- Notice to financial institution from lawyer[28] (*See Appendix 5 for form.)*
- Annual compliance on State Bar of Texas dues statement[29] *(See Appendix 6 for form.)*
- Notice of IOLTA changes, such as closing an account or opening a new account at a different financial institution[30]

Finally, if a lawyer has made an error and placed funds into an IOLTA trust account when the funds should have been placed in an individual interest-bearing trust account, the lawyer should contact the Texas Access to Justice Foundation (TAJF). TAJF has procedures in effect to refund the interest received, so that the interest can be paid to an individual beneficiary.

The TAJF website has information, forms, and Frequently Asked Questions (FAQ) related to IOLTA accounts.[31]

Financial Institutions

Choosing a financial institution for your trust account is important. For example, how much federal deposit insurance does the financial institution offer? Is the financial institution eligible to participate in the IOLTA program administered by the Texas Access to Justice Foundation? Other factors to consider are fees, locations and convenience.

Federal Deposit Insurance

Rule 4 of the Rules Governing the Operation of the Texas Access to Justice Foundation requires lawyers to deposit trust funds into a federally-insured checking account or investment product, such as an interest-bearing account at an investment firm like Morgan Stanley Smith Barney.[32] Investment firms also insure the interest-bearing account, but through government securities, and not the Federal Deposit Insurance Corporation (FDIC). The federal government insures bank accounts through the FDIC.

All funds in IOLTA accounts at Insured Depository Institutions are insured in full under the Federal Deposit Insurance Corporation (FDIC). Starting January 1, 2013, the standard FDIC insurance amount will be $250,000 per depositor.[33] Because the FDIC considers IOLTA and other lawyer and law firm trust accounts as fiduciary accounts, the per depositor coverage means that funds of individual clients and third persons in a trust account will be fully insured up to the $250,000 maximum, including any funds a client or third person also has on deposit at the same insured depository institution.[34] The FDIC has more information online at: http:/www.fdic.gov/deposit/deposits/changes.html.

FDIC insurance coverage is important when dealing with large sums of money for particular clients. For example, a lawyer who is holding one client's $500,000 settlement in trust may want to consider placing those funds in two or more separate trust accounts at different banks in order for the entire $500,000 to be insured.[35] In addition, if the client has other funds on deposit at the same bank where the trust account is established, then each of the depositor's other accounts (e.g., personal and business accounts) and the trust account are cumulative for purposes of FDIC insurance.[36] Remember the $250,000 coverage is *per depositor,* and the client is treated as one depositor.[37]

Eligible Financial Institutions for Interest on Lawyers' Trust Accounts

The Texas Access to Justice Foundation determines which financial institutions are eligible to hold IOLTA accounts.[38] A lawyer may establish an IOLTA account at any eligible financial institution. Some eligible financial institutions, referred to as Prime Partners, have agreed to go above and beyond eligibility and pay the Foundation the higher of 1) 75.00% or more of the Fed Funds Target Rate; or 2) a minimum of 1.00% on IOLTA accounts and do not assess service fees. This results in increased interest for the delivery of legal services to low-income Texans. A list of all financial institutions approved by the Texas Access to Justice Foundation is available at: http://www.teajf.org/financial_institutions/docs/Eligible_Banks_List_Master.pdf.

Out-of-State Trust Accounts

A lawyer is required by Rule 1.14 (a) to maintain his trust accounts in the "state where the lawyer's office is situated, or elsewhere with the consent of the client or third person." This provision allows a lawyer to use a bank in another state if the client or third person consents. However, consent is limited to the geographical location of where the trust account is established. A lawyer cannot ask the client or third person to consent to commingling or keeping funds in a non-trust type account, such as a joint checking account.[39]

Opening, Maintaining and Closing Trust Accounts

Opening the Trust Account

Decide which financial institution (or in some cases, investment firm) to use based on the information in the previous section, titled "Financial Institutions". To open an IOLTA account, the lawyer needs to use the tax identification number of the Texas Access to Justice Foundation, which is **74-2354575**, because TAJF receives the interest. The lawyer also needs to complete the form, "IOLTA Notice to Financial Institution and Foundation", which is mandatory, and enables the account to be exempt from backup withholding and reporting interest income to the Internal Revenue Service.[40] The account should be titled in the lawyer's or law firm's name with the words, "Client Trust Account", "IOLTA Account", "Client Escrow Account", or "Lawyer's Name as Custodian for Client's Name".[41] The latter title is specific to an interest-bearing, individual client trust account. Lawyers who practice in a law firm or professional corporation may use the firm's or corporation's trust account without having to open a trust account specific to the individual lawyer.[42]

For interest-bearing accounts established on behalf of specific clients, the lawyer should use the client's tax identification number or social security number. This allows the financial institution to issue a 1099 tax form to the IRS in the client's name to report the interest income. If the bank sends the client's 1099 to the lawyer, he or she has a duty to forward it promptly to the client.[43] Although the account may have the client's name on it, the client cannot be a signer. Only the lawyer or persons under the lawyer's direct supervision may sign on the trust account.[44] It is advisable for the lawyer to require two signers on any type of trust account which holds a substantial amount of money. The lawyer may be liable, for example under disciplinary rule 5.01 or 5.03, when an employee converts trust account funds.[45]

A lawyer may also want to have another, optional signer on the trust account in case of the lawyer's death or disability. It can be important, too, if the lawyer goes on a trip and for whatever reason cannot make a time-sensitive disbursement or deposit due to a lack of Internet access or simply not being physically present to endorse a check. IOLTA accounts and interest-bearing trust accounts do not require the second signer to be a lawyer. However, a lawyer should be aware that under the disciplinary rules, he will be responsible for the conduct of other lawyers and staff regarding trust funds. Adequate supervision is essential in these circumstances.[46]

Upon purchasing trust account checks, the lawyer may want to consider ordering checks which are a different color or design from his or her operational account, so it is easy to tell the difference between the two accounts. It is the lawyer's responsibility to pay for the costs of check orders, bank fees, credit card fees, insufficient fund fees and other fees that may be deducted from the trust account. Consequently, the lawyer should anticipate these expenses

in advance in order to deposit a reasonable amount of money into the trust account to cover the expenses prior to their deduction.[47] However, this *exception* to the lawyer depositing his or her own money into the trust account *has limitations.* The lawyer cannot place additional funds into the trust account to provide a "cushion" against overdrafts or hot checks.[48]

In addition, a lawyer may have one or more trust accounts. There is no prohibition against using the same bank for all of the lawyer's trust accounts. However, consideration should be given to deposit insurance maximums for clients with large deposits at the same bank where the lawyer maintains his or her trust accounts.[49]

Maintaining the Trust Account

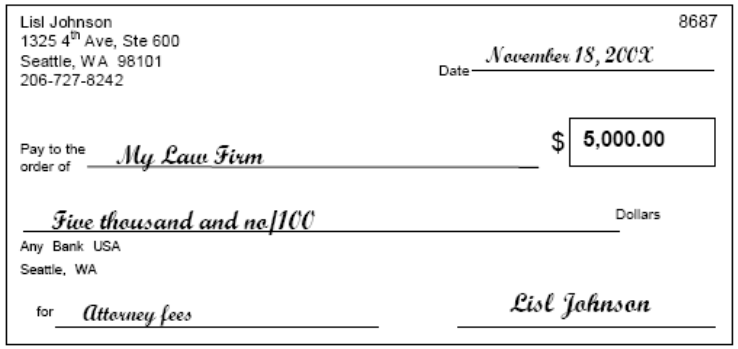
Remember these three simple rules:

- No commingling!
- Identify each clients' deposits and disbursements in order to create a record regardless of whether you make a wire or phone transfer, or bank online.
- Reconcile, reconcile, reconcile!

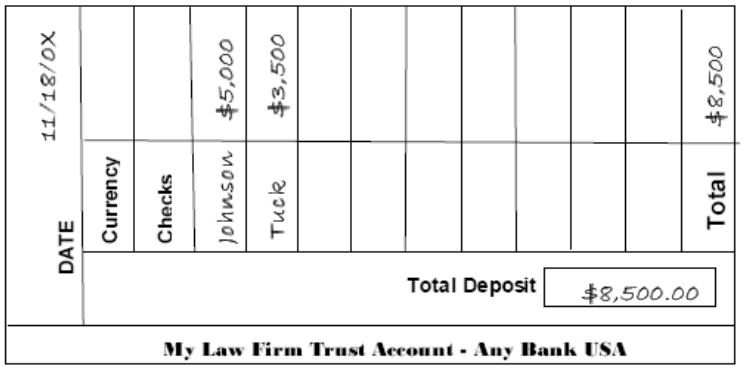
Deposits

A deposit slip should identify each client by name or file number. Here is an example:

Sample check from client



Sample deposit slip to trust account
You can see how the check from your client has been recorded.



The lawyer may want to make and keep a photocopy of the front and back of each deposit slip (prior to depositing the items at the bank) to resolve questions which may arise later, such as whether or not a deposit was recorded correctly. Deposits should be recorded in chronological order in the check register or similar electronic record.

Disbursements

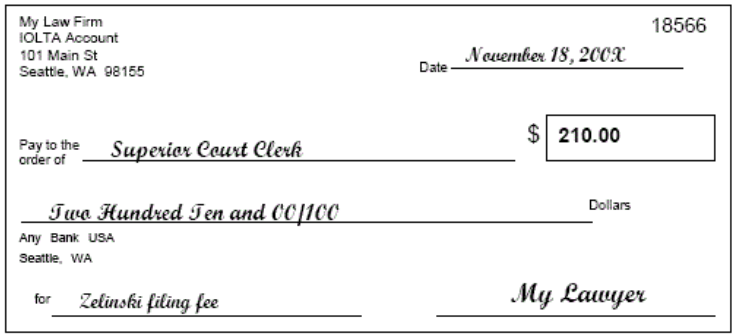
Disbursements should be made according to the fee agreement between the lawyer and client. Rule 1.04 (d) of the Texas Disciplinary Rules of Professional Conduct requires a contingent fee agreement to be in writing.[50] In addition, Rule 1.04 (f) requires a written fee agreement when two lawyers, who are not in the same firm, intend to share fees while performing legal services for the same client. In many cases, a fee agreement is not required to be in writing. However, it is *highly recommended* for the lawyer to have a written fee agreement with every client. Written fee agreements avoid disputes between the client and the lawyer as to the lawyer's fees, expenses, or payments to third parties on behalf of the client. Rule 1.14 (c) requires a lawyer to hold disputed funds in a trust account until the dispute over who is entitled to receive the money is resolved. Here again, a written fee agreement can provide a reasonable amount of time for the client to dispute the lawyer's fees before the fees are deemed earned.

Disbursements should be made promptly once funds have been received, deposited into the trust account, *and cleared the bank*. The latter is especially important since a failure to do so may cause the lawyer financial and disciplinary problems. In times of economic downturn, the lawyer faces a higher risk of accepting checks, money orders or other financial instruments that may be counterfeit, written on insufficient funds, or forged.[51] If the lawyer suspects a fraud, he or she should not hesitate to take the financial instrument to the bank from which it was allegedly issued and verify its authenticity.

It is also prudent for the lawyer to ask how much time the bank requires for local, in-state, and out-of-state checks, money orders, and cashier's checks **to clear the payor's bank.** The payor is the client or third person who wrote the check, or provided the cashier's check or other financial instrument. Once the funds have cleared the bank, they are called *collected funds*. It is important to distinguish collected funds from *available funds*, which have not cleared the bank and are still prone to chargebacks to the trust account. A chargeback is the amount of money disbursed from the trust account, but which is not available because the financial instrument never *cleared the payor's bank*. In other words, the lawyer did not wait until the funds were *collected funds* before making a disbursement. The bank may add its own fee to the amount which it charges back to the trust account. Wire transfers and cash are the only deposits which are recognized as *collected funds* upon deposit.

Disbursements, like deposits, need to be identified as to the client or third person to whom the payment is made on behalf of the client, and recorded chronologically. A file number may be used instead of the client's name. The purpose of the disbursement should also be noted. If the disbursement is made by some other means than a check, the check register (or the electronic equivalent) should indicate how the disbursement was made and include the above information. The purpose of these notations is to create a paper trail to facilitate an accounting of the trust account. The following example illustrates a disbursement with this information.

Sample check from trust account on behalf of client


My Law Firm
IOLTA Account
101 Main St
Seattle, WA 98155

18566

Date November 18, 20XX

Pay to the order of Superior Court Clerk

$ 210.00

Two Hundred Ten and CC/100 Dollars

Any Bank USA
Seattle, WA

for Zelinski filing fee

My Lawyer

Disbursements on behalf of a client should **never** exceed the amount of trust funds available to that particular client. It goes without saying that the client's trust account can never fall below zero! If it does, then the lawyer is converting one client's funds to make disbursements for another client or even for himself, which may lead to financial, disciplinary, and criminal liability.[52]

In addition, the lawyer should ***never*** *write a check for cash from the trust account.* Any transfers which do not create a paper trail for disbursements from a trust account should be avoided.

Reconcile, reconcile, reconcile!

Each month, the bank will provide the lawyer with a trust account statement. This bank statement needs to be balanced or reconciled with the check register first. The form to balance the bank statement is usually on the reverse side if the statement is received by mail. One way to accomplish reconciliation of a trust account is to use a general software program, such as Excel, to create ledgers and subledgers. There are also software programs specifically designed for law office billing and accounting. Examples of these include Tabs3 and PC Law, but many others are available, too.[53] A lawyer may also balance his trust account manually.

To balance a trust account, the IOLTA check register (or similar electronic record) should include the following information:

Sample IOLTA check register

My Law Firm Check Register

Date	Ref	Payor/Payee	Client	Memo	Deposit	Check	Balance
Balance forward							38,916.71
11/1/0X	18560	My Law Firm	Olson, M	attorney fees		866.66	38,050.05
11/5/0X	18561	My Law Firm	Felty	attorney fees		1,745.62	36,304.43
11/7/0X	18562	My Law Firm	Smith, D	attorney fees		8,450.50	27,853.93
11/8/0X	Deposit	Jones	Kane	award	15,000.00		42,853.93
11/10/0X	18563	Dr. Grey	Weatherholt	medical		238.00	42,615.93
11/11/0X	18564	Dr. Radtke	Tyner	medical		169.50	42,446.43
11/17/0X	18565	WSP	Zelinski	records		67.89	42,378.54
11/18/0X	Deposit	Johnson	Johnson	attorney fees	5,000.00		47,378.54
		Tuck	Tuck	attorney fees	3,500.00		50,878.54
11/18/0X	18566	Superior Ct Clerk	Zelinski	filing fee		210.00	50,668.54
11/24/0X	18567	No-Pain Chiro	Olson, E	medical		156.38	50,512.16
11/25/0X	18568	Pinkerton Inv.	Dexter	investigation		2,450.25	48,061.91
11/31/0X	18569	Karen Kane	Kane	settlement		15,000.00	33,061.91

If the account is an interest-bearing trust account for one particular client, then the client's name is not necessary on each deposit and disbursement. However, the check register itself should be identified *as to the specific client*. If the check register does not have room to include the above information, the lawyer should create a separate *trust account ledger* to include it.

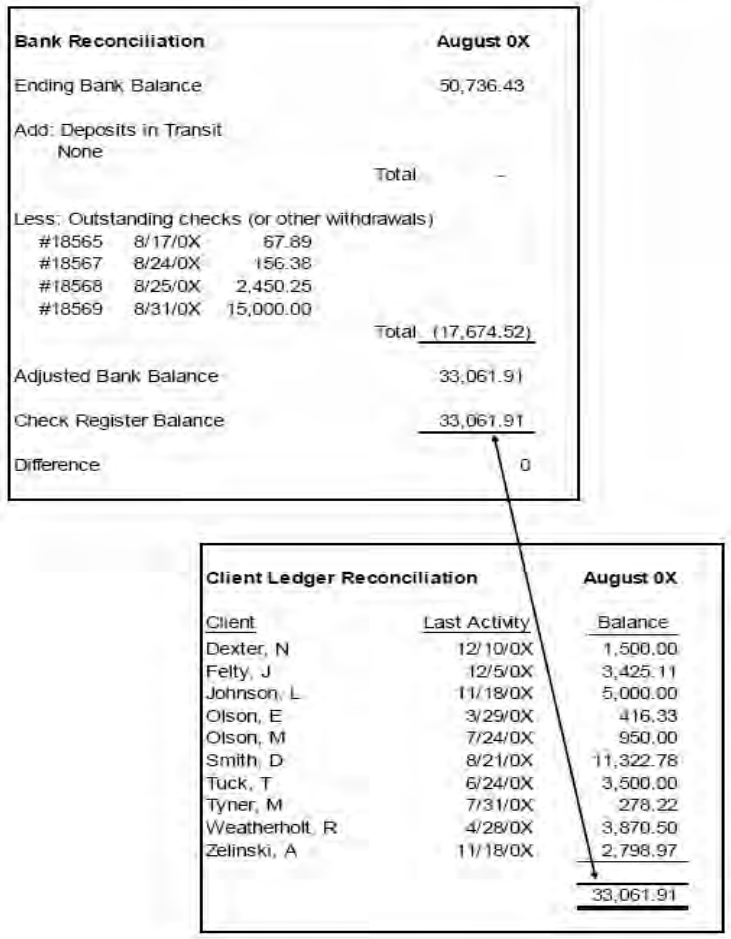
Each client should also have an individual ledger, showing the client's deposits and disbursements with a brief description. Recording deposits and disbursements on individual client ledgers should be done close to, or at the same time as the entry in the check register. If the lawyer has deposited his own nominal funds to cover check orders, bank fees, or credit card fees which will be deducted from the trust account, then the lawyer should keep an individual ledger for himself.

Client ledgers are a summary of that particular client's trust account balance. Below is an example of a *client ledger*.

Client Ledger						
Client:	A. Zelinski					
Date	Ref	Payor/Payee	Memo	Deposit	Check	Balance
10/15/0X	Deposit	A. Zelinski	Adv. Fee dep	3,500.00		3,500.00
10/23/0X	18545	My Law Firm	Attorney fees		423.14	3,076.86
11/17/0X	18565	WSP	records		67.89	3,008.97
11/18/0X	18566	Superior Ct Clerk	filing fee		210.00	2,798.97

Consequently, the lawyer should be able to add together *all* of the individual client ledgers (including the lawyer's own ledger for the trust account), and obtain the same total dollar amount as shown on the reconciled monthly bank statement. The following illustration demonstrates this principle.

Sample Bank Reconciliation and Client Ledger Reconciliation



Bank Reconciliation **August 0X**

Ending Bank Balance 50,736.43

Add: Deposits in Transit
None
Total –

Less: Outstanding checks (or other withdrawals)

#18565	8/17/0X	67.89
#18567	8/24/0X	156.38
#18568	8/25/0X	2,450.25
#18569	8/31/0X	15,000.00

Total (17,674.52)

Adjusted Bank Balance 33,061.91

Check Register Balance 33,061.91

Difference 0

Client Ledger Reconciliation **August 0X**

Client	Last Activity	Balance
Dexter, N	12/10/0X	1,500.00
Felty, J	12/5/0X	3,425.11
Johnson, L	11/18/0X	5,000.00
Olson, E	3/29/0X	416.33
Olson, M	7/24/0X	950.00
Smith, D	8/21/0X	11,322.78
Tuck, T	6/24/0X	3,500.00
Tyner, M	7/31/0X	278.22
Weatherholt, R	4/28/0X	3,870.50
Zelinski, A	11/18/0X	2,798.97
		33,061.91

If the sum of the client ledgers does not equal the reconciled monthly bank statement balance, the lawyer needs to review the check register (or trust account ledger(s)) for mistakes. If a mistake is found in the check register, it also needs to be corrected in the corresponding client ledger. Occasionally, the bank will make a

mistake. When the statement and the ledgers do not reflect the same balance, it means that:

- A client ledger may have been forgotten and not added;
- An activity was not posted in the check register or to the individual client's ledger; or
- A mistake was made in adding or subtracting the running balance in the check register, reconciliation of the bank statement, or a client ledger.

Reconciling the ledgers and bank statement *every month* is practical, wise, and a necessity for efficient law office management. Not only does it prevent hours of aggravating reconciliation over longer periods of time, but it discourages an employee from embezzling trust funds when the lawyer routinely takes responsibility for his or her trust account ledgers and statements each month. Rules 5.01 and 5.03 of the disciplinary rules make a supervising lawyer responsible for the misconduct of a lawyer or employee under his or her direct supervision.[54]

To facilitate balancing of a trust account, it helps to keep a running balance in the check register, trust account ledger (if applicable), and individual client ledgers. Furthermore, if a client asks how much money is available in his or her trust account, the lawyer will be able to answer easily, giving the client confidence in the lawyer, and avoiding embarrassing, on the spot mathematics.

Communicating Trust Account Information to the Client

The Texas Disciplinary Rules of Professional Conduct require accountings under two rules: 1.14 (b) (safekeeping of property) and 1.04 (d) (contingent fee). Rule 1.15 (d) requires the return of unearned fees when the representation is terminated.[55]

Rule 1.14 (b) requires the lawyer to notify the client promptly when in receipt of funds belonging to the client or to a third person to whom the client owes money. If the client or third person requests an accounting, then the lawyer must deliver it. Rule 1.14 (b) does not specify that the accounting has to be in writing; however, it would be imprudent not to do so. Rule 1.04 (d) requires a lawyer to deliver a written accounting to a client in all contingent fee cases regardless of whether the client has asked for it.

Rule 1.15 (d) specifies "refunding any advance payments of fee that has not been earned." Obviously if the fee has not been earned, it belongs in the trust account. The lawyer, having properly maintained trust account records as discussed here, will be able to quickly identify the amount owed to the client upon termination. The manner in which the termination arose is irrelevant to Rule 1.15 (d). As a result, if the client fired the lawyer without cause, the unearned fee must still be refunded.[56] The section on "When to Use a Trust Account" addresses the problem with nonrefundable retainers.

The disciplinary rules are silent about sending clients written, monthly invoices. However, it is good law office management to send each client a written invoice with a summary of the client's trust account activity. If a client is inactive, it may not be necessary to do a monthly invoice; however, here again, it may serve as a deterrent to employee embezzlement if the client is also reviewing the statement. In addition, the invoice may also want to state that the client has 14 days, for example, to dispute the bill as per the fee agreement, as suggested earlier in this material.[57]

Keeping Trust Account Records

Rule 1.14 (a) of the Texas Rules of Professional Conduct and Rule 15.10 of the Texas Rules of Disciplinary Procedure require a lawyer to keep a client's trust account records for five years after

termination of the client's representation.[58] As a result, it is advisable to issue a closing letter at the end of representation to establish a date to begin tolling time. A lawyer is required to keep records to establish how the trust account was used. Under Rule 15.10 of the Texas Rules of Disciplinary Procedure, a lawyer shall maintain and preserve:

> *"the records of such accounts, including checkbooks, canceled checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries, and disbursements of the funds or other property of a client".*[59]

Closing the Trust Account

Closing a trust account requires returning unearned fees or paying third parties to whom the client owes money.[60] It also includes notifying the Texas Access to Justice Foundation in writing or electronically within 30 days of closing an IOLTA account.[61] If the lawyer is choosing to leave the practice of law, or for some other reason will no longer need a trust account, it will be easy to comply with the rules and IOLTA notification, if applicable.

However, problems arise when a lawyer dies unexpectedly, or becomes mentally or physically incapacitated, and no other person can sign on the trust account.[62] Efforts should be made by family or friends to have a personal representative or guardian appointed for the deceased or disabled lawyer, respectively, as soon as possible if no one else can access the account. Many times, the person who is appointed as the legal representative does not know how, or where, to begin the process of accounting for and returning trust account funds. If the lawyer has kept his trust account records in order, the task is less overwhelming for the person who has assumed this responsibility. Consequently, a lawyer needs to plan for his own unexpected death or incapacity by having a succession plan, which may include another signer on the trust account or accounts. Written instructions may also be helpful to the person who has been given the legal authority to close the trust account. The lawyer should inform a trusted family member or friend as to how to retrieve the instructions in the event of the lawyer's death or incapacity. The State Bar of Texas has materials on closing a law practice available at: http://www.texasbarcle.com/materials/closingapractice.html.

Duty to Notify, Pay Promptly and Provide Accounting

When a lawyer receives funds that belong to another, Rule 1.14 requires the lawyer to promptly notify that person and deliver the funds.[63] The rule does not define *promptly*, so a reasonableness standard should be used.

Rule 1.14 requires that the lawyer promptly deliver to the client or third person any funds or other property that the client or third person is *entitled to receive*.[64] Third persons often claim some legal interest in the funds, such as an assignment or lien.[65] Who is entitled to receive funds is a question of law, not governed by the Texas Disciplinary Rules of Professional Conduct. Therefore, a lawyer should look to substantive law, rather than the disciplinary rules or ethics opinions, to determine ownership of funds.

Additionally, lawyers should be familiar with their duties under fiduciary law and other law that may relate to funds held.[66]

Likewise, lawyers sometimes face confusion when they are terminated before completion of a matter, with or without good cause. Is the lawyer *entitled to receive* fees from funds protected by Rule 1.14? Do they recover under their contract? Can they recover under quantum merit? These, too, are questions of substantive law, not determined by the disciplinary rules or ethics opinions. [67]

When a lawyer receives funds that belong to another, Rule 1.14 requires the lawyer, if requested, to render a full accounting of property.[68]

Unclaimed Funds

Occasionally, a lawyer's trust account may include unclaimed funds because the person to whom the funds belong cannot be located. The lawyer should make all reasonable efforts to locate the person so that proper payment under this rule can be made, including attempting to contact the person at last known addresses and telephone numbers. When all reasonable efforts have been exhausted, the lawyer should make sure to maintain the property in the trust account for a period of at least three years.[69] Afterwards, a lawyer is permitted to treat the property as abandoned and may look to the abandoned property provisions of the Texas Property Code for instructions on how to handle disbursing these funds.[70] However, a lawyer is still required to maintain trust account records of the funds for a period of five years after termination of the representation *even if the funds are treated as abandoned property under the Texas Property Code.*[71]*(See Appendix 7 for Ethics Opinion 602.)*

Disputed Funds

If ownership is clear or undisputed, then the lawyer must pay the funds to the person entitled to receive them.[72] However, if it is unclear to whom funds belong, or a dispute among claimants exists, then a lawyer pays at his own peril.[73] A lawyer should not assume the role of deciding fund ownership in the case of a dispute, whether the dispute exists between the client and a third party or between the client and the lawyer.[74]

In such cases, the lawyer must keep the disputed funds in trust until the dispute is resolved and must disburse any undisputed portions.[75] If the dispute ultimately cannot be resolved among the claimants, then the lawyer will need to submit the issue of ownership to a court for resolution.

One problem area arises in the situation where a third person pays the deposit of fees to the lawyer on behalf of a client. Frequently, a return or refund of those funds must be made by the lawyer and a dispute can arise as to whom the money should be returned. Who does the lawyer have a responsibility to return the fees to, the client or third party? The third person will often seek return of those funds, while the client claims the funds are a gift from the third party. This issue concerning ownership of such funds likewise is a question of substantive law, not determined by the disciplinary rules. However, a lawyer receiving funds in this fashion can attempt to avoid future controversy by making it clear in his initial agreement with the client and third person, as to whom the funds will be returned if a refund is appropriate.

To avoid the improper withdrawing or payment of disputed funds from the trust account, a lawyer should provide information to a client as to when funds will be transferred, so that the client may

dispute charges or object to payments before any transfer is made.[76] However, the lawyer should be aware that any deadline for objection that he gives to a client, may not be enforceable. If the client objects, even after the deadline and after the transfer of funds has already been made, the funds may still be considered disputed and may need to be replaced into the trust account.

(See Appendix 8 for Wilson v. Comm'n for Lawyer Discipline and Appendix 9 for Ethics Opinion 625.)

Enforcement

The Office of Chief Disciplinary Counsel of the State Bar of Texas (referred to as the CDC) has the authority to pursue discipline against lawyers licensed in Texas.[77] The district attorney may also pursue a criminal indictment based on disciplinary allegations. If criminal charges stemming from misuse of trust account funds result in conviction, the lawyer is subject to compulsory discipline.[78]

In the first instance, the CDC acts upon a grievance that is upgraded to a complaint for the purpose of investigating the allegations and making a determination of just cause.[79] There is no standing to file a grievance. But in alleged violations of Rule 1.14, it is typically the client or a third party who has an interest in the client's settlement funds (such as a chiropractor) who does so.

The CDC has 60 days to investigate a complaint.[80] Even if a lawyer decides belatedly to return unearned fees to a client, or pay a medical lien provider, for example, this action by the lawyer will not affect the CDC investigation. Nor will it necessarily mitigate the potential disciplinary sanctions that the lawyer may face.[81] Additionally, it does not matter if the lawyer is unaware of Rule 1.14 and its requirements, or makes a technical or inadvertent violation.[82]

Disciplinary case law regarding Rule 1.14 misconduct includes the following cases:[83]

Neely v. Comm'n for Lawyer Discipline, 302 S.W.3d 331 (Tex.App.-Houston [14th Dist.] 2009, pet. denied) – Lawyer's conduct in failing to keep his funds separate from client funds in trust account, in depositing personal funds into trust account, in paying for personal and business-related expenses from trust account and in failing to maintain records for trust account for five years violated rule of professional conduct governing the safekeeping of others' property.

Onwuteaka v. Comm'n for Lawyer Discipline, 2009 WL 620253 (Tex.App.-Houston [14th Dist.], pet. denied) – Lawyer who received and disbursed personal injury settlement monies was found to have violated rules by (1) failing to hold funds and other property belonging in whole or part to clients or third persons in a lawyer's possession separate from the lawyer's own property, (2) upon receiving funds or other property in which a client or third person has an interest, failing to promptly notify the client or third person, (3) failing to promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive, (4) failing to promptly render a full accounting upon request, and (5) failing to keep funds or other property in which both the lawyer and another person claim interests separate until there is an accounting and severance of their interests.

McIntyre v. Comm'n for Lawyer Discipline, 247 S.W.3d 434 (Tex.App.-Dallas 2008, pet. denied) – Lawyer representing client had a duty to forward check issued from district court's registry to the Internal Revenue Service as partial payment of unpaid income taxes and therefore lawyer's failure to forward check subjected lawyer to discipline under rules governing the safekeeping of property.

Cluck v. Comm'n for Lawyer Discipline, 214 S.W.3d 736 (Tex.App.-Austin 2007, no pet.) – Advance fee of $15,000 charged by lawyer to represent client in divorce proceedings was a prepayment of a fee and not a true retainer, and thus lawyer was obligated to hold the funds in a trust account until earned. Although the contract for legal services stated that the fee was a nonrefundable retainer, the contract did not say the payment compensated the lawyer for his availability or lost opportunities. The fee agreement also stated that the lawyer's hourly fee would be billed against the payment. The lawyer deposited the client's advance fee payment directly into his operating account, and consequently, violated Rule 1.14 (a). Contractual language deeming a fee "nonrefundable" does not change the nature of the client's payment, which was a prepayment of the lawyer's fees and not a true retainer.

Kaufman v. Comm'n for Lawyer Discipline, 197 S.W.3d 867 (Tex.App.-Corpus Christi-Edinburg 2006, pet. denied) – In case where lawyer kept $278,000 of $345,000 for his own lawyer's fees while acting as trustee for bankrupt client, the evidence was sufficient to support finding that lawyer violated rules requiring the lawyer to keep a client's money safe and separate, requiring the lawyer to promptly deliver any funds or other property that a client or third person is entitled to receive, and requiring a full accounting regarding such property upon request.

Bellino v. Comm'n for Lawyer Discipline, 124 S.W.3d 380 (Tex.App.-Dallas 2003, pet. denied) – In situations involving multiple clients' monies, the evidence was sufficient to support finding that lawyer violated disciplinary rules requiring him to (1) hold a client's funds separate from his own funds, (2) render a full accounting of funds received on behalf of client, (3) return unearned fees and (4) promptly deliver funds to a third party.

Meachum v. Comm'n for Lawyer Discipline, 36 S.W.3d 612 (Tex.App.-Dallas 2000, pet. denied) – In case where lawyer made trust account checks out to "cash", and had no record of how checks were used, the lawyer was found to have violated rules by (1) failing to hold client's or third party's property in a trust account separate from lawyer's property, (2) failing to maintain trust records, and (3) failing to render full accounting of monies in trust account.

Brown v. Comm'n for Lawyer Discipline, 980 S.W.2d 675 (Tex.App-San Antonio 1998, no pet.) – In case where lawyer received funds from insurer as settlement of client's case, deposited them in joint account with client, wrote checks on account and used money for his own purposes, the evidence was sufficient to establish that lawyer was "in possession" of funds and that funds in which lawyer and client had interest were not "kept separate" as required by disciplinary rule. Client consent is irrelevant. A joint checking account with the client is not a trust account. Courts give "little or no weight" to technical, ignorant or inadvertent violations of Rule 1.14.

Fry v. Comm'n for Lawyer Discipline, 979 S.W.2d 331 (Tex.App.-Houston [14th Dist.] 1998, pet. denied) – Lawyer claimed proceeds from sale of client's house was a nonrefundable retainer; however, client claimed ownership of funds and directed lawyer to pay the sale proceeds to his wife. Lawyer failed to promptly pay, and his trust account records showed he did not safeguard the funds.

Lawyer who receives funds which belong in whole or in part to a client or third person, is required to deposit them into a trust account and promptly deliver the appropriate portion to the client or third person, and, if there is a dispute over the ownership of the funds, the lawyer must keep the funds in the trust account until the dispute is resolved.

Wade v. Comm'n for Lawyer Discipline, 961 S.W.2d 366 (Tex.App.-Houston [1st Dist.] 1997, no pet.) – In a case where the lawyer's fees and expenses were disputed by the client the evidence was sufficient to support findings that lawyer violated rule requiring lawyer to render promptly full accounting of client funds and rule requiring lawyer to keep separate funds in which both lawyer and other parties claimed interests.

Butler v. Comm'n for Lawyer Discipline, 928 S.W.2d 659 (Tex.App.-Corpus Christi 1996, no writ) – Lawyer violated rule requiring safekeeping of disputed property, although assignment of portion of settlement funds to client's criminal defense lawyers was void as matter of law, where lawyer testified that he was unaware that assignment was void and had cautioned client against refusing to pay defense lawyers, indicating that lawyer knew that funds were in dispute.

Archer v. State, 548 S.W.2d 71 (Tex.App.-El Paso 1977, writ ref'd n.r.e.) – Consent by clients could not remove lawyer from the requirements of the Code of Professional Responsibility with respect to commingling of clients' and lawyer's funds.

For an example of a compulsory discipline case due to criminal misconduct, *see* Brenda Sapino Jeffreys, *Attorney Gets 35 Years for Misappropriating Fiduciary Property,* Tex. Lawyer, Sept. 1, 2008, http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202424168006.

Mandatory Duty to Report Trust Account Violations

Rule 8.03 (a) of the Texas Disciplinary Rules of Professional Conduct requires a lawyer to report the professional misconduct of another lawyer, when

- The reporting lawyer has *actual knowledge* of professional misconduct
- That raises a *substantial question* as to
- The other lawyer's *honesty, trustworthiness, or fitness to practice law.*

When a lawyer has actual knowledge that another lawyer is using his or her trust account funds for purposes which are not authorized by the client or unbeknownst by the client, the lawyer has a duty to report the misconduct. *Archer v. State*, 548 S.W.2d at 73, offers an example of a prohibited use of a client trust account, which falls under the mandatory reporting requirement of Rule 8.03 (a), if another lawyer had actual knowledge of the misconduct:

> …no finding of fraudulent, culpable, or willful conduct is required. There is no question… that the funds were commingled, or for that matter, that the Defendant used the funds so deposited for his personal affairs and business. For example, [Archer] deposited the settlement check in the case of Marcella Martinez in the amount of $13,750.00, and thirteen days later, the balance of his account was some $4.60, with the money having been spent of a variety of personal and business items while items listed on the "settlement sheet" remained unpaid. *Archer* 548 S.W.2d at 73 (discussing DR 9-102[84] which preceded 1.14).

Client Security Fund

The State Bar of Texas established the Client Security Fund (CSF) in 1975 to restore confidence in those clients who have lost money or property because of a Texas lawyer's dishonest conduct. "Dishonest conduct", as defined in the CSF rules, means "wrongful acts committed by a lawyer in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money or property including those instances where an advance fee was not refunded when the contracted-for services were not rendered."[85] During the State Bar's 2009 fiscal year, the CSF paid over $700,000 to clients who suffered financial harm due to a Texas lawyer's dishonest conduct.[86] To request an application to the CSF, please contact:

Client Security Fund
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487
Phone: 1-877-953-5535

State Bar of Texas Ethics Helpline

The State Bar of Texas created the Ethics Helpline to assist Texas lawyers with their questions concerning the Texas Disciplinary Rules of Professional Conduct. The goal of the Ethics Helpline is to provide advice to enable lawyers to follow the rules of professional conduct. In fiscal year 2010-11, the Ethics Helpline handled over 5,300 ethics calls by phone. The toll-free phone number is 1-800-532-3947, and is staffed during office hours.

Other Rules

The Supreme Court of Texas has the authority to regulate Texas lawyers.[87] Consequently, the following rules govern lawyers but primarily focus on the requirements of IOLTA accounts.

Rules Governing the Operation of the Texas Access to Justice Foundation, Amended January 13, 2009.

- Rules 4, 7 and 23 are applicable to lawyers who maintain IOLTA accounts.

State Bar Act – Tex. Gov't Code Ann., tit. 2, subtit. G, ch. 81.

- Rules governing the State Bar of Texas.

State Bar Rules – Tex. Gov't Code Ann., tit. 2, subtit. G, app. A.

- Rules that address maintaining a Texas law license.

Texas Rules of Disciplinary Procedure – Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1.

- These rules govern compulsory discipline and the grievance process.

Additional Resources

Texas Access to Justice Foundation

The Texas Access to Justice Foundation administers the Texas Interest on Lawyers' Trust Accounts (IOLTA) Program. Information can be found at http://www.teajf.org and the Foundation may be contacted at:

Mailing Address: Texas Access to Justice Foundation
P.O. Box 12886
Austin, Texas 78711-2886

Phone: (512) 320-0099 or (800) 252-3401 (in Texas only)
Fax: (512) 469-0112

The Foundation has published information on these topics:

Frequently Asked Questions
http://www.teajf.org/attorneys/faq.aspx

How to open an IOLTA account
http://www.teajf.org/attorneys/how_to_open_iolta.aspx

Trust Accounts
http://www.teajf.org/attorneys/trust_accounts.aspx

Do you need an IOLTA account?
http://www.teajf.org/attorneys/do_you_need_an_iolta_account.aspx

Financial Considerations
http://www.teajf.org/attorneys/financial_considerations.aspx

Eligible Financial Institutions
http://www.teajf.org/financial_institutions/docs/Eligible_Banks_List_Master.pdf

IOLTA Notice Form
http://www.teajf.org/attorneys/docs/iolta_notice_form.pdf

Client-Attorney Assistance Program

The Client-Attorney Assistance Program (CAAP) is a statewide dispute resolution program and service of the State Bar of Texas. It is available to the public and Texas lawyers to voluntarily resolve minor disputes, such as fee disputes, which may otherwise result in a grievance. CAAP also provides grievance forms and educates the public about the grievance process. More information is at: To contact CAAP, write or call:
http://www.texasbar.com/AM/Template.cfm?Section=Disputes_With_Your_Lawyer&Template=/CM/HTMLDisplay.cfm&ContentID=11003

Mailing Address:
Client-Attorney Assistance Program
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487

Phone: (800) 932-1900 or (800) 204-2222, ext.1790

Law Practice Management Program

The Law Practice Management Program's webpage at http://www.texasbarcle.com/CLE/LMHome.asp offers a wide variety of resources, including product reviews of billing and accounting software for lawyers, an online law office management self-assessment tool, "How To" brochures (e.g. How To Prepare a Cash-Flow Budget), information on closing a law practice, and a marketplace for products and consultants. To contact the program:

Mailing Address: The Law Practice Management Program
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487

Phone: (800) 204-2222, ext. 1300 or (512) 427-1300
Fax: (512) 427-4100

E-mail: lpm@texasbar.com

Appendices

Appendix 1: Texas Disciplinary Rules of Professional Conduct Rule 1.14 and Comments

Texas Disciplinary Rules of Professional Conduct

1.14 Safekeeping Property

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a trust or escrow account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

Comment:

1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) requires that complete records of the funds and other property be maintained.

2. Lawyers often receive funds from third parties from which the lawyer's fee will be paid. These funds should be deposited into a lawyer's trust account. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed to those entitled to receive them by virtue of the representation. A lawyer should not use even that portion of trust account funds due to the lawyer to make direct payment to general creditors of the lawyer or the lawyer's firm, because such a course of dealing increases the risk that all the assets of that account will be viewed as the lawyer's property rather than that of clients, and thus as available to satisfy the claims of such creditors. When a lawyer receives from a client monies that constitute a prepayment of a fee and that belongs to the client until the services are rendered, the lawyer should handle the fund in accordance with paragraph (c). After advising the client that the service has been rendered and the fee earned, and in the absence of a dispute, the lawyer may withdraw the fund from the separate account. Paragraph (c) does not prohibit participation in an IOLTA or similar program.

3. Third parties, such as client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

4. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal service. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

5. The client security fund in Texas provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

Appendix 2: Ethics Op. 611

OPINION 611

September 2011

Tex. Comm. on Prof'l Ethics, Op. 611, V. 74 Tex. B.J. 944-945 (2011)

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to include in an employment contract an agreement that the amount initially paid by a client with respect to a matter is a "non-refundable retainer" that includes payment for all the lawyer's services on the matter up to the time of trial?

STATEMENT OF FACTS

A lawyer proposes to enter into an employment agreement with a client providing that the client will pay at the outset an amount denominated a "non-refundable retainer" that will cover all services of the lawyer on the matter up to the time of any trial in the matter. The proposed agreement also states that, if a trial is necessary in the matter, the client will be required to pay additional legal fees for services at and after trial. The lawyer proposes to deposit the client's initial payment in the lawyer's operating account.

DISCUSSION

Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall not enter an arrangement for an illegal or unconscionable fee and that a fee is unconscionable "if a competent lawyer could not form a reasonable belief that the fee is reasonable." Rule 1.04(b) sets forth certain factors that may be considered, along with any other relevant factors not specifically listed, in determining the reasonableness of a fee for legal services. In the case of a non-refundable retainer, the factor specified in Rule 1.04(b)(2) is of particular relevance: "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer . . . ."

Rule 1.14 deals in part with a lawyer's handling of funds belonging in whole or in part to the client and requires that such funds when held by a lawyer be kept in a "trust" or "escrow" account separate from the lawyer's operating account.

Two prior opinions of this Committee have addressed the relationship between the rules now embodied in Rules 1.04 and 1.14.

In Professional Ethics Committee Opinion 391 (February 1978), this Committee concluded that an advance fee denominated a "non-refundable retainer" belongs entirely to the lawyer at the time it is received because the fee is earned at the time the fee is received and therefore the non-refundable retainer may be placed in the lawyer's operating account. Opinion 391 also concluded that an advance fee that represents payment for services not yet rendered and that is therefore refundable belongs at least in part to the client at the time the funds come into the possession of the lawyer and, therefore, the amount paid must be deposited into a separate trust account to comply with the requirements of what is now Rule 1.14(a). Opinion 391 concluded further that, when a client provides to a lawyer one check that represents both a non-refundable retainer and a refundable advance payment, the entire check should be deposited into a trust account and the funds that represent the non-refundable retainer may then be transferred immediately into the lawyer's operating account.

This Committee addressed non-refundable retainers again in Opinion 431 (June 1986). Opinion 431 concluded that Opinion 391 remained viable and that non-refundable retainers are not inherently unethical "but must be utilized with caution." Opinion 431 additionally concluded that Opinion 391 was overruled "to the extent that it states that every retainer designated as non-refundable is earned at the time it is received." Opinion 431 described a non-refundable retainer (sometimes referred to in Opinion 431 as a "true retainer") in the following terms:

> "A true [non-refundable] retainer, however, is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment. . . . . If the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received. If, however, the client discharges the attorney for cause before any opportunities have been lost, or if the attorney withdraws voluntarily, then the attorney should refund an equitable portion of the retainer."

Thus a non-refundable retainer (as that term is used in this opinion) is not a payment for services but is rather a payment to secure a lawyer's services and to compensate him for the loss of opportunities for other employment. See also *Cluck* v. *Commission for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.-Austin 2007, no pet.).

It is important to note that the Texas Disciplinary Rules of Professional Conduct do not prohibit a lawyer from entering into an agreement with a client that requires the payment of a fixed fee at the beginning of the representation. The Committee also notes that the term "non-refundable retainer," as commonly used to refer, as in this opinion, to an initial payment solely to secure a lawyer's availability for future services, may be misleading in some circumstances. Opinion 431 recognized in the excerpt quoted above that a retainer solely to secure a lawyer's future availability, which is fully earned at the time received, would nonetheless have to be refunded at least in part if the lawyer were discharged for cause after receiving the retainer but before he had lost opportunities for other employment or if the lawyer withdrew voluntarily. However, the fact that an amount received by a lawyer as a true non-refundable retainer may later in certain unusual circumstances have to be at least partially refunded does not negate the fact that such amount has been earned and under the Texas Disciplinary Rules may be deposited in the lawyer's operating account rather than being subject to a requirement that the amount must be held in a trust or escrow account.

In view of Opinions 391 and 431, the result in this case is clear. A legal fee relating to future services is a non-refundable retainer at the time received only if the fee <u>in its entirety</u> is a reasonable fee to secure the availability of a lawyer's future services and compensate the lawyer for the preclusion of other employment that results from the acceptance of employment for the client. A non-refundable retainer meeting this standard and agreed to by the client is earned at the time it is received and may be deposited in the lawyer's operating account. However, any payment for services not yet completed does not meet the strict requirements for a non-refundable retainer (as that term is used in this opinion) and must be deposited in the lawyer's trust or escrow account. Consequently, it is a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with a client that a fee is non-refundable upon receipt, whether or not it is designated a "non-refundable retainer," if that fee is not in its entirety a reasonable fee solely for the lawyer's agreement to accept employment in the matter. A lawyer is not permitted to enter into an agreement with a

client for a payment that is denominated a "non-refundable retainer" but that includes payment for the provision of future legal services rather than solely for the availability of future services. Such a fee arrangement would not be reasonable under Rule 1.04(a) and (b), and placing the entire payment, which has not been fully earned, in a lawyer's operating account would violate the requirements of Rule 1.14 to keep funds in a separate trust or escrow account when funds have been received from a client but have not yet been earned.

When considering these issues it is important to keep in mind the purposes behind Rule 1.14. Segregating a client's funds into a trust or escrow account rather than placing the funds in a lawyer's operating account will not protect a client from a lawyer who for whatever reason determines intentionally to misuse a client's funds. Segregating the client's funds in a trust or escrow account may however protect the client's funds from the lawyer's creditors in situations where the lawyer's assets are less than his liabilities and the lawyer's assets must be liquidated to attempt to satisfy the lawyer's liabilities. In those situations, client funds in an escrow or trust account may be protected from the reach of the lawyer's creditors.

Accordingly, if a lawyer proposes to enter into an agreement with a client to receive an appropriate non-refundable retainer meeting the requirements for such a retainer and also to receive an advance payment for future services (regardless of whether the amount for future services is determined on a time basis, a fixed fee basis, or some other basis appropriate in the circumstances), the non-refundable retainer must be treated separately from the advance payment for services. Only the payment meeting the requirements for a true non-refundable retainer may be so denominated in the agreement with the client and deposited in the lawyer's operating account. Any advance payment amount not meeting the requirements for a non-refundable retainer must be deposited in a trust or escrow account from which amounts may be transferred to the lawyer's operating account only when earned under the terms of the agreement with the client.

CONCLUSION

It is not permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to include in an employment contract an agreement that the amount paid by a client with respect to a matter is a "non-refundable retainer" if that amount includes payment for the lawyer's services on the matter up to the time of trial.

Appendix 3: Cluck v. Comm'n for Lawyer Discipline

Court of Appeals of Texas,
Austin.
Tracy Dee CLUCK, Appellant,
v.
COMMISSION FOR LAWYER DISCIPLINE,
Appellee.
No. 03-05-00033-CV.

Jan. 19, 2007.

James M. Terry Jr., Lexington, James R. Smith, Austin, for appellant.
Linda Acevedo, Office of Chief Disciplinary Counsel, State Bar of Texas, Susan Kidwell, Locke Liddell & Sapp LLP, Austin, for appellee.

Before Justices PATTERSON, PURYEAR and HENSON.

OPINION

DAVID PURYEAR, Justice.

The State Bar of Texas Commission for Lawyer Discipline brought a disciplinary action against attorney Tracy Dee Cluck, alleging that he committed professional misconduct by violating multiple provisions of the Texas Disciplinary Rules of Professional Conduct [FN1] in connection with his representation of Patricia A. Smith. Both parties filed motions for summary judgment. The trial court denied Cluck's motion and granted the Commission's motion, holding that Cluck committed professional misconduct by violating each of the rules cited by the Commission. Cluck appeals, arguing that his conduct did not violate any disciplinary rules. We will affirm the judgment of the district court.

FN1. The Texas State Bar promulgates the Texas Disciplinary Rules of Professional Conduct to "define proper conduct for purposes of professional discipline." Tex. Disciplinary R. Prof'l Conduct preamble: scope ¶ 10, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (West 2005) (Tex. State Bar R. art. X, § 9).

BACKGROUND

Smith approached Cluck in June 2001, looking for an attorney to represent her in a divorce case. Cluck agreed to represent Smith and had her sign a contract for legal services, which states, "In consideration of the legal services rendered on my behalf in the above matter I agree to pay TRACY D. CLUCK a non-refundable retainer in the amount of $15,000...." Following that sentence, a handwritten provision explains, "Lawyer fees are to be billed at $150 per hour, first against non-refundable fee and then monthly thereafter. Additional non-refundable retainers as requested." The contract states that "no part of the legal fee is to be refunded" "should the case be discontinued, or settled in any other matter."

Smith paid Cluck $15,000 on June 28, 2001. Cluck began work on Smith's divorce, including filing the petition and obtaining service on Smith's husband. On July 7, Smith asked Cluck to cease action on her divorce because she wished to reconcile with her husband. Because her husband had already been served, Cluck advised Smith to leave the action pending in case she changed her mind; Smith agreed. On July 2, 2002, after receiving notice that her case was set on the dismissal docket, Smith contacted Cluck about resuming work on her divorce. Cluck requested that Smith sign an amendment to their contract, in which she agreed to pay an additional $5,000 "non-refundable fee" and to increase Cluck's hourly rate to $200 per hour. Smith signed the amendment and paid Cluck the $5,000, and Cluck resumed work on her case.
On August 22, 2002, Smith terminated Cluck as her attorney because she was dissatisfied with the lack of progress made by Cluck on her case and his lack of responsiveness to her phone calls. She requested the return of her file, which she picked up two weeks later. On October 10, 2002, Smith wrote a letter to Cluck asking for a detailed accounting and a

refund of the $20,000, less reasonable attorney's fees and expenses. Cluck replied on December 4, 2002, explaining that he did not respond sooner because he was on vacation when Smith's letter arrived and because an electrical storm destroyed his computer and phone systems. He stated that an itemization of his expenses and time billed was included in her file and in bills he had previously mailed to her. Cluck advised Smith that he did not believe she was entitled to a refund.

The parties dispute the number of hours that Cluck spent working on Smith's case. The Commission asserts that Cluck's billing indicates that he worked 11 hours, while Cluck contends he worked 28.5 hours. It is undisputed that Cluck ultimately collected $20,000 from Smith, which he deposited in his operating account, and that Cluck failed to refund any portion of the collected fees to Smith.

Smith filed a complaint with the State Bar of Texas, and the Commission initiated this suit, alleging that Cluck committed professional misconduct by violating several Texas Disciplinary Rules of Professional Conduct. The Commission claimed that Cluck failed to promptly comply with a reasonable request for information; contracted for, charged, and collected an unconscionable fee; failed to adequately communicate the basis of his fee; failed to hold funds belonging in whole or in part to a client in a trust account; and failed to promptly deliver funds his client was entitled to receive and render a full accounting regarding those funds upon the client's request. *See* Tex. Disciplinary R. Prof'l Conduct 1.03(a), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (West 2005) (Tex. State Bar R. art. X, § 9) (requiring prompt compliance with reasonable requests for information), 1.04(a) (prohibiting contracting for, charging, or collecting unconscionable fees), 1.04(c) (mandating communication of basis of lawyer's fee), 1.14(a) (providing that lawyer must hold funds belonging in whole or in part to client in trust account), 1.14(b) (requiring prompt delivery of funds that client is entitled to receive and accounting upon request).

Cluck and the Commission both filed motions for summary judgment. The trial court denied Cluck's motion and granted the Commission's motion, finding that Cluck violated all the disciplinary rules cited by the Commission and thus committed professional misconduct. The court imposed a twenty-four-month fully probated suspension from the practice of law on Cluck and ordered him to pay court costs and restitution to Smith in the amount of $15,000. Cluck appeals, contending that he did not violate the disciplinary rules.

DISCUSSION

Cluck raises three issues on appeal. First, he argues that the fee he charged Smith was not unconscionable. Second, Cluck asserts that, because the fee was not unconscionable, he did not violate the rules regarding refunding unearned fees, holding funds in a trust account, and failing to adequately communicate the basis of the fee. Finally, Cluck insists that he promptly complied with the reasonable request for information under the circumstances. Thus, he argues that the trial court erred by holding that Cluck committed professional misconduct and granting summary judgment in favor of the Commission.

The violation of one disciplinary rule is sufficient to support a finding of professional misconduct. *See* Tex.R. Disciplinary P. 1.06(V)(1), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (West 2005) (defining "Professional Misconduct" to include "[a]cts or omissions by an attorney ... that violate one or more of the Texas Disciplinary Rules of Professional Conduct"). Summary judgment orders in attorney discipline appeals are governed by traditional summary judgment standards. *See Fry v. Commission for Lawyer Discipline*, 979 S.W.2d 331, 333-34 (Tex.App.-Houston [14th Dist.] 1998, pet. denied). When a trial court's order granting a summary judgment does not specify the ground or grounds relied on for the ruling, it must be affirmed on appeal if any of the grounds asserted in the motion are meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex.1993). When the order states the grounds relied on, it can be affirmed only on the specified grounds. *Id.* Here, because the order granting summary judgment states that the trial court relied on every ground alleged by the Commission and because each ground alone is sufficient to support a finding of professional misconduct, we must affirm the district court's summary judgment if we find that no genuine issue of material fact exists regarding Cluck's violation of at least one disciplinary rule and that the Commission was entitled to judgment as a matter of law. *See* Tex.R. Civ. P. 166a(c). We review the summary judgment de novo, take as true all evidence favorable to the nonmovant,

and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex.2005). When both parties move for summary judgment on the same issue and when the trial court grants one motion and denies the other, we review the evidence presented, determine the questions presented, and render the judgment the trial court should have rendered if we determine that it erred. *Id.*

We first address the trial court's finding that Cluck violated rule 1.14(a) by failing to hold the $20,000 paid by Smith in a trust account. *See* Tex. Disciplinary R. Prof'l Conduct 1.14(a) ("A lawyer shall hold funds ... belonging in whole or in part to clients .... in a separate account, designated as a 'trust' or 'escrow' account...."). Cluck argues that the fee paid by Smith was a nonrefundable retainer that was earned at the time it was received and that he was not obligated to hold the funds in a trust account because they did not belong in whole or in part to Smith. The Commission argues that, despite the contractual language, the fee was neither nonrefundable nor a retainer but was instead an advance fee that should have been held in a trust account.

An opinion by the Texas Committee on Professional Ethics discusses the difference between a retainer and an advance fee. *See* Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986). The opinion explains that a true retainer "is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment." *Id.* The opinion goes on to state that "[i]f the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received." *Id.* If a fee is not paid to secure the lawyer's availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer. *Id.* "A fee is not earned simply because it is designated as non-refundable. If the (true) retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney's account." *Id.* However, money that constitutes the prepayment of a fee belongs to the client until the services are rendered and must be held in a trust account. Tex. Disciplinary R. Prof'l Conduct 1.14 cmt. 2.

We are convinced that no genuine issue of material fact exists regarding whether the fees charged by Cluck were true retainers and, thus, whether Cluck was obligated to hold the funds in a trust account. First, the contract for legal services does not state that the $15,000 payment compensated Cluck for his availability or lost opportunities; instead, it states that Cluck's hourly fee will be billed against it. Second, the $5,000 additional payment requested by Cluck in 2002 makes clear that the $15,000 paid in 2001 did not constitute a true retainer; as the trial court noted in its judgment, "if the first $15,000 secured [Cluck]'s availability, it follows that he should not charge another 'retainer' to resume work on the divorce. He was already 'retained' for the purposes of representing Smith in the matter."

Finally, Cluck concedes in his brief that the fees did not represent a true retainer. However, he argues that he did not violate any disciplinary rules by depositing the money in his operating account because the contract states that the fees are nonrefundable. We disagree. "A fee is not earned simply because it is designated as non-refundable." Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986). Advance fee payments must be held in a trust account until they are earned. Tex. Disciplinary R. Prof'l Conduct 1.14 cmt. 2 (providing that trust account must be utilized "[w]hen a lawyer receives from a client monies that constitute a prepayment of a fee and that belongs to the client until the services are rendered" and that "[a]fter advising the client that the service has been rendered and the fee earned, and in the absence of a dispute, the lawyer may withdraw the fund from the separate account"); Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986); *see also* Tex. Disciplinary R. Prof'l Conduct 1.15(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... refunding any advance payments of fee that has not been earned.").

Cluck violated rule 1.14(a) because he deposited an advance fee payment, which belonged, at least in part, to Smith, directly into his operating account. Accordingly, we must affirm the trial court's summary judgment holding that Cluck committed professional misconduct because he violated a disciplinary rule. Because Cluck's other points of error address alternate grounds for the trial court's holding that Cluck committed

professional misconduct and because we have already upheld the summary judgment on one ground raised by the trial court, we do not reach his other arguments.

CONCLUSION

Having held that no genuine issue of material fact exists regarding whether Cluck committed professional misconduct, we affirm the district court's summary judgment.

Appendix 4: Texas Disciplinary Rule of Professional Conduct Rule 1.04 (d) – specifying requirements for a contingent fee agreement

Texas Disciplinary Rules of Professional Conduct

1.04 Fees (Amended March 1, 2005)

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Appendix 5: IOLTA Notice to Financial Institution from Lawyer

IOLTA NOTICE TO FINANCIAL INSTITUTION AND FOUNDATION

Attorneys and law firms must comply with the comprehensive IOLTA (Interest on Lawyers' Trust Accounts) Program effective July 1, 1989. Under this program, client funds which are nominal in amount or held for a short time must be placed in an interest-bearing trust account, such as a negotiable order of withdrawal (NOW) account with the interest earned paid to the Texas Access to Justice Foundation.

All IOLTA accounts in Texas will bear the tax identification number of the Texas Access to Justice Foundation, **74-2354575**. The account will be exempt from backup withholding and reporting. For additional information or assistance, contact **IOLTA, P.O. Box 12886, Austin, Texas, 78711-2886, 1-800-252-3401 (in Texas only), 512-320-0099, fax 512-469-0112.**

Directions for Attorneys

1. Take the IOLTA Notice to your financial institution to be completed when the account is opened.
2. Open an interest-bearing checking account, such as a NOW (negotiable order of withdrawal) account in the attorney's or law firm's name.

TEXAS ACCESS to JUSTICE FOUNDATION

Directions for Financial Institutions

1. The IOLTA account should be established in the name and address of the attorney or law firm.
2. Complete an IOLTA Notice to Financial Institution and mail or fax it to the Foundation.
3. Interest on the average monthly balance (net of any service charges or fees) should be remitted by check at least quarterly to the Foundation.
4. A completed IOLTA remittance report must be transmitted with each IOLTA remittance check.

Attorneys and law firms must take this form to their financial institution for completion in order to enroll in the IOLTA program. A copy of the notice must be sent to Texas Access to Justice Foundation, P. O. Box 12886, Austin, Texas, 78711-2886 or faxed to 512-469-0112.

The undersigned is complying with the IOLTA program ordered by the Supreme Court of Texas.

1. Attorney/Firm Name _____

1a. List ALL Attorneys & Texas State Bar Card Numbers _____

2. Attorney/Firm Address _____

_____

3. Attorney/Firm Phone Number _____

4. Account Name _____

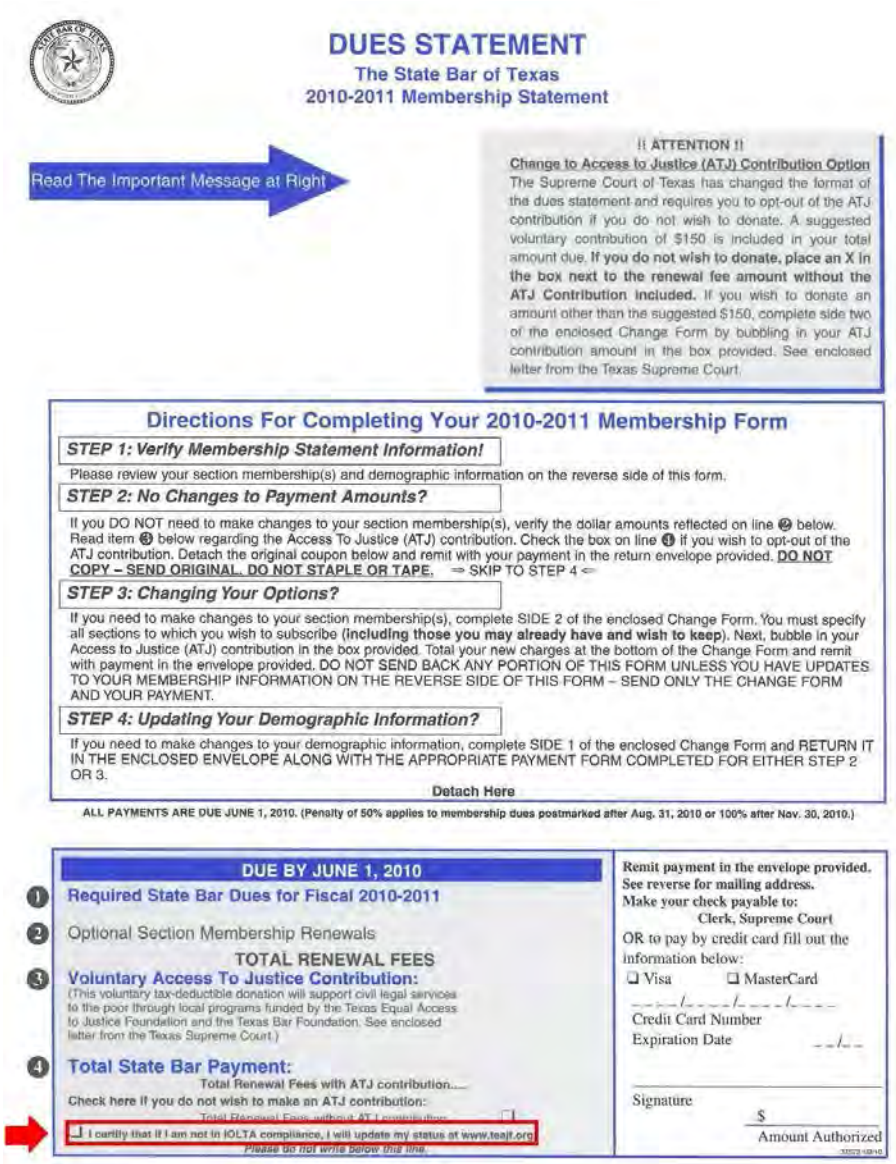
5. Account Number _____

6. Financial Institution _____ City _____

7. Trust Account Signatories _____

(Rev. 05/08)

Appendix 6: Annual IOLTA Compliance on SBOT Dues Statement



DUES STATEMENT
The State Bar of Texas
2010-2011 Membership Statement

Read The Important Message at Right

!! ATTENTION !!
Change to Access to Justice (ATJ) Contribution Option
The Supreme Court of Texas has changed the format of the dues statement and requires you to opt-out of the ATJ contribution if you do not wish to donate. A suggested voluntary contribution of $150 is included in your total amount due. **If you do not wish to donate, place an X in the box next to the renewal fee amount without the ATJ Contribution included.** If you wish to donate an amount other than the suggested $150, complete side two of the enclosed Change Form by bubbling in your ATJ contribution amount in the box provided. See enclosed letter from the Texas Supreme Court.

Directions For Completing Your 2010-2011 Membership Form

STEP 1: Verify Membership Statement Information!
Please review your section membership(s) and demographic information on the reverse side of this form.

STEP 2: No Changes to Payment Amounts?
If you DO NOT need to make changes to your section membership(s), verify the dollar amounts reflected on line ❷ below. Read item ❸ below regarding the Access To Justice (ATJ) contribution. Check the box on line ❹ if you wish to opt-out of the ATJ contribution. Detach the original coupon below and remit with your payment in the return envelope provided. **DO NOT COPY – SEND ORIGINAL. DO NOT STAPLE OR TAPE.** ⇒ SKIP TO STEP 4 ⇐

STEP 3: Changing Your Options?
If you need to make changes to your section membership(s), complete SIDE 2 of the enclosed Change Form. You must specify all sections to which you wish to subscribe **(including those you may already have and wish to keep)**. Next, bubble in your Access to Justice (ATJ) contribution in the box provided. Total your new charges at the bottom of the Change Form and remit with payment in the envelope provided. DO NOT SEND BACK ANY PORTION OF THIS FORM UNLESS YOU HAVE UPDATES TO YOUR MEMBERSHIP INFORMATION ON THE REVERSE SIDE OF THIS FORM – SEND ONLY THE CHANGE FORM AND YOUR PAYMENT.

STEP 4: Updating Your Demographic Information?
If you need to make changes to your demographic information, complete SIDE 1 of the enclosed Change Form and RETURN IT IN THE ENCLOSED ENVELOPE ALONG WITH THE APPROPRIATE PAYMENT FORM COMPLETED FOR EITHER STEP 2 OR 3.

Detach Here

ALL PAYMENTS ARE DUE JUNE 1, 2010. (Penalty of 50% applies to membership dues postmarked after Aug. 31, 2010 or 100% after Nov. 30, 2010.)

DUE BY JUNE 1, 2010

❶ **Required State Bar Dues for Fiscal 2010-2011**

❷ Optional Section Membership Renewals

TOTAL RENEWAL FEES

❸ **Voluntary Access To Justice Contribution:**
(This voluntary tax-deductible donation will support civil legal services to the poor through local programs funded by the Texas Equal Access to Justice Foundation and the Texas Bar Foundation. See enclosed letter from the Texas Supreme Court.)

❹ **Total State Bar Payment:**
Total Renewal Fees with ATJ contribution....
Check here if you do not wish to make an ATJ contribution:
Total Renewal Fees without ATJ contribution....
☐ I certify that if I am not in IOLTA compliance, I will update my status at www.teajf.org
Please do not write below this line.

Remit payment in the envelope provided.
See reverse for mailing address.
Make your check payable to:
Clerk, Supreme Court
OR to pay by credit card fill out the information below:
❑ Visa ❑ MasterCard
__ __ __ __ / __ __ __ __ / __ __ __ __ / __ __ __ __
Credit Card Number
Expiration Date __ __ / __ __
Signature
$
Amount Authorized

Appendix 7: Ethics Op. 602

OPINION 602

October 2010
Tex. Comm. on Prof'l Ethics, Op. 602, V. 73 Tex. B.J. 976-977 (2010)

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer deliver to the Texas Comptroller of Public Accounts, and file related reports concerning, funds or other property held in the lawyer's trust account for which the lawyer is unable to locate or to identify the owner?

STATEMENT OF FACTS

A lawyer holds in his trust account funds or other property belonging to a client or a third party. After three years, despite reasonable efforts, the lawyer either is unable to locate the client or third party that is the owner of the funds or other property or is unable to determine the identity of the owner.

DISCUSSION

Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct sets forth a lawyer's obligations regarding funds and other property belonging to clients or third persons. Among other requirements, Rule 1.14(a) requires that a lawyer holding such funds keep the funds in a separate trust or escrow account and that "[c]omplete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." Rule 1.14(b) provides:

> "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

Further, Rule 1.14(c) includes the requirement that "[a]ll funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law."

Section 72.001(e) of the Texas Property Code defines a "holder" of property as "a person, wherever organized or domiciled, who is: (1) in possession of property that belongs to another; (2) a trustee; or (3) indebted to another on an obligation." Section 72.101(a) of the Texas Property Code provides that, with exceptions not here relevant:

> ". . . personal property is presumed abandoned if, for longer than three years: (1) the existence and location of the owner of the property is unknown to the holder of the property; and (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised."

Section 74.301(a) of the Texas Property Code states, in relevant part, that "each holder who on June 30 holds property that is presumed abandoned under Chapter 72, 73, or 75 shall deliver the property to the comptroller on or before the following November 1 accompanied by the report required to be filed under Section 74.101." Under section 74.101(a) of the Texas Property Code, each holder of property presumed abandoned under chapter 72 (which includes section 72.101(a) quoted above) "shall file a report of that property . . . ." with the Comptroller of Public Accounts. Section 74.101(c) requires that the report include, if known by the holder, certain identifying information about each person who appears to be the owner of the property or any person who is entitled to the property. Under section 74.103 of the Texas Property Code, a holder of property who is required to make such a report must keep for ten years certain records concerning reported property and persons who appear to be owners of such property.

Although this Committee does not have authority to interpret statutory law and no opinion is here offered as to the interpretation of the provisions of the Texas Property Code cited above, for purposes of this opinion the Committee assumes a Texas lawyer could reasonably conclude that in certain circumstances these provisions apply to property held in his trust account for which the owner of the property cannot be located or cannot be identified.

No provision of the Texas Disciplinary Rules of Professional Conduct limits or prohibits the transfer to the Texas Comptroller of funds or property that a lawyer reasonably believes to be "presumed abandoned" under the Texas Property Code. Any delivery of funds required by provisions of the Texas Property Code will be within the scope of Rule 1.14(b), which requires, with exceptions not here applicable, that "a lawyer shall promptly deliver to the . . . third person any funds or other property that the . . . third person is entitled to receive . . . ." Accordingly, if a lawyer concludes that he holds property subject to the delivery requirements of the Texas Property Code, Rule 1.14(b) of the Texas Disciplinary Rules of Professional Conduct not only permits but requires the lawyer to deliver such funds or property to the Comptroller in accordance with the Property Code's requirements.

With respect to the filing of reports with the Comptroller on property required to be transferred to the Comptroller under the Texas Property Code, it is necessary to consider the requirements of Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct concerning confidential information relating to a lawyer's representation of current and former clients. Rule 1.05(a) defines "confidential information" to include both "privileged information" and "unprivileged client information." The latter category is broadly defined in Rule 1.05(a) to mean "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." Much of the information called for in a report to the Comptroller under section 74.101 of the Texas Property Code appears to come within the definition of "confidential information" under Rule 1.05(a), including, for example, the name, social security number, driver's license number, e-mail address, and last known address of the client or other person to whom the property is believed to belong.

Rule 1.05(c)(4) expressly authorizes a lawyer to reveal confidential information "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law." (emphasis added) Thus, if a lawyer files a report containing confidential client information that the lawyer reasonably believes is required under provisions of the Texas Property Code concerning abandoned property, filing such report would not violate the lawyer's obligations regarding confidentiality under Rule 1.05. It must be emphasized that this authorization applies only to disclosures that are "necessary" for compliance with applicable law. Particularly in

view of the general obligation imposed by Rule 1.05 for lawyers not to reveal confidential information acquired in the representation of clients unless an exception such as Rule 1.05(c)(4) applies, the lawyer must take care not to make disclosures that exceed what is required to comply with applicable law. As noted in Comment 14 to Rule 1.05, " . . . a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose."

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is permitted to deliver to the Texas Comptroller of Public Accounts, and to file required reports concerning, funds or other property held in the lawyer's trust account for which the lawyer is unable to locate or to identify the owner, provided the lawyer reasonably believes that such action is required by applicable provisions of Texas law on abandoned property.

Appendix 8: Wilson v. Comm'n for Lawyer Discipline, BODA Case No. 46432 (January 28, 2011)

Board of Disciplinary Appeals
Appointed by the Supreme Court of Texas

JOE MARR WILSON, APPLELLANT
v.
COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS, APPELLEE

No. 46432

Opinion and Judgment Signed January 28, 2011, and Delivered January 30, 2011
Considered En Banc October 18, 2010

On Appeal from the Evidentiary Panel for the State Bar of Texas, District 13 Grievance Committee No. D01008355970

Opinion and Order

COUNSEL:

Appellant Joe Marr Wilson, Amarillo, Texas, pro se.

For Appellee, Commission for Lawyer Discipline of the State Bar of Texas, Linda A. Acevedo, Chief Disciplinary Counsel, and Cynthia Canfield Hamilton, Senior Appellate Counsel, Austin, Texas.

Judgment Public Reprimand Affirmed.

OPINION AND ORDER:

Appellant, attorney Joe Marr Wilson, appeals from a Judgment of Public Reprimand, alleging that there was no evidence to support a finding that he violated Texas Disciplinary Rule of Professional Conduct ("TDRPC") 1.14(c).TEX. DISCIPLINARY R. OF PROF'L CONDUCT, *reprinted in*TEX. GOV'T CODE, tit. 2, subtit. G, app. A (Vernon 2005). The Evidentiary Panel found that Wilson had disbursed trust account funds belonging to his client to himself when he was not entitled to them. We find that Wilson's own testimony and billing statement that he paid himself attorney's fees from funds given to him by his client specifically designated for another purpose is substantial evidence that he disbursed client funds to himself. His conduct violated TDRPC 1.14(c) as a matter of law, and we affirm the Judgment of Public Reprimand signed on December 29, 2009 by the Evidentiary Panel of the State Bar of Texas District 13 (Amarillo) grievance committee.

UNDERLYING GRIEVANCE

The complainant, Donda Haney, hired Wilson in August of 2004 to represent her in a child custody and support matter. Haney paid Wilson $3,500 in advance, and he filed a petition to modify Haney's original visitation order on August 17, 2004. They did not execute a written employment contract. She was to be billed at the rate of $200 per hour. The advance payment was depleted by December 2005. Wilson did not require Haney to replenish this retainer.

Before the trial judge would consider Haney's request to modify the existing custody order, he required her to pay her past-due child support. On, March 5, 2007, the trial court entered an agreed order holding Haney in contempt and ordering her to pay $19,006.51 to her ex-husband. The commitment was suspended on condition that she made scheduled payments under that order. Haney did not comply and was jailed for contempt for 45 days.

In contemplation of negotiating a reduction in her support arrearages, Haney sent Wilson two checks in March 2008: one in the amount of $7,500 (to pay the support arrearages to her ex-husband) and one in the

amount of $500 (to pay her ex-husband's attorney's fees). Prior to sending the checks, Haney and Wilson discussed by email the purpose of the money. Wilson deposited both checks in his trust account. In April 2008 Wilson prepared a settlement agreement and transmitted it to her ex-husband's attorney who (Wilson claims) had agreed verbally to accept $8,000 total to settle the arrearage and attorney's fees. He did not forward the money, and it remained in his trust account pending execution of the agreement. Wilson told Haney that he would "maintain control of the money until the appropriate papers are signed." Wilson stated that the opposing attorney never returned the settlement documents or rejected the verbal agreement. Wilson did not communicate with Haney again until after she fired him.

In August 2008 Haney sent Wilson a letter terminating his services and asking for the return of the $8,000 and her file. Approximately 30 days after receiving the letter, Wilson sent Haney a check in the amount of $1,553.39 with a letter explaining that the check was "a refund of unearned attorney's fees."Included was a billing statement of services rendered that indicated that Wilson had applied the $8,000 designated for Haney's ex-husband to the amount Wilson determined that Haney owed to him for attorney's fees. This included a $768.75 charge for copying Haney's file. [FN1] There is no dispute that Wilson offset his fees against the $8,000 without Haney's prior knowledge or consent.

SUBSTANTIAL EVIDENCE

Wilson argues that there was no evidence to support a finding that he violated TDRPC 1.14(c) because the Commission for Lawyer Discipline failed to prove that he disbursed any trust account funds at issue to anyone. In support of his argument, Wilson points to finding of fact number three of the evidentiary panel's order: "Respondent [Wilson] disbursed trust account funds, belonging to his client Donda Haney, to himself when he was not entitled to them by virtue of the representation or by law."Specifically, Wilson says that there is no evidence in the record that the trust account funds were disbursed because he only withheld the funds from his client.

BODA reviews the evidence of a violation of a rule of professional conduct under the substantial evidence standard. TEX. R. DISCIPLINARY PROCEDURE 2.24, *reprinted* in TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (Vernon 2005) ("TRDP"). In deciding whether substantial evidence exists to support the findings of fact, the reviewing body determines whether reasonable minds could have reached the same conclusion. *Texas Health Facilities Commission v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984) (applying the substantial evidence standard under the APTRA); *Allison v. Comm'n for Lawyer Discipline*, BODA Case No. 41135 (August 21, 2008). The reviewing court may not substitute its judgment for the decisions within the lower court's discretion and is not bound by the reasons stated in the order for the result, provided that some reasonable basis exists in the record for the action taken. *Railroad Comm'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995). Under substantial evidence review, the findings, conclusions, and decisions of the lower court are presumed to be supported, and the burden is on the appellant to prove otherwise. Substantial evidence is something more than a mere scintilla, but the evidence in the record may preponderate against the decision and still amount to substantial evidence. *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994).

Wilson is incorrect that there is no evidence that he disbursed the funds contrary to TDRPC 1.14(c). Wilson admitted through his own testimony that he "offset" client trust funds, without the knowledge and consent of the client, to pay his fees. Wilson's transmittal letter to Haney with the refund check characterized the balance of the $8,000 as "payment" for his attorney's fees. The 12-page billing statement Wilson enclosed with the letter covered the period from August 2, 2004 until September 24, 2008 and included an entry for March 20, 2008 of "Payment Received, Thank You" with a credit of $8,000. Wilson violated his duty under Rule 1.14(c) to disburse the funds only to someone entitled to receive them when he sent the letter and billing statement to Haney stating that he had applied $6,446.61 ($8,000 deposited in Wilson's trust account less the $1,533.39 "refund") of those funds to his own credit and failed to return them to her.We find, therefore, substantial evidence to support the Evidentiary Panel's finding.

Wilson clearly failed to use the funds for the original purpose which Haney had directed and failed to return the money to her when she requested it. At the Evidentiary Panel hearing, Wilson argued that he believed that he was entitled to offset attorney's fees owed by Haney against the $8,000 he held in trust because the original purpose of the funds no longer existed once Haney fired him and because she did not dispute his fees. [FN2] Whether the original purpose no longer existed (which is unclear) or whether Haney disputed his fees is immaterial, because the funds were never given to Wilson to pay his fee. They at all times belonged to Haney who would have had to have affirmatively agreed (not merely fail to object) to allow Wilson to apply the money to his fee. Funds, once entrusted to the lawyer for a particular purpose, can be used only for that purpose, and any unused portion must be returned to the client with a full accounting. *See, Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 680 (Tex. App.—San Antonio 1998, no pet.)(lawyer who retained settlement funds with client's consent and directive to use them for future litigation violated TDRPC 1.14 when he used them for different purpose); 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 6:14 p. 979 (2010-2011) ("[F]unds entrusted to a lawyer for a specific purpose can be used only for that purpose: the lawyer must return the unused portion—less any agreed-upon fees earned or expenses incurred—to the client, together with a full accounting.").

We hold that the lawyer may not unilaterally apply the client's funds held for a designated purpose for another unauthorized purpose without the client's specific consent. This result is consistent with the plain language of TDRPC 1.14 and the intent of the rule. We therefore conclude that Wilson has failed to meet his burden and affirm the Judgment of the Evidentiary Panel in all respects.

IT IS SO ORDERED.

W. Clark Lea
Chair

JoAl Cannon Sheridan
Vice Chair

Alice A. Brown

Ben Selman

Charles L. Smith

Deborah J. Race

Thomas J. Williams

Kathy J. Owen

David A. Chaumette

Jack R Crews

Gary R. Gurwitz

FN1. Ten days before the evidentiary hearing, Wilson refunded the $768.75 that he had charged Haney for copying her file. He conceded at the hearing that, although he thought at the time he could charge for copying the file, he later came to understand it was improper under the TDRPC.

FN2. It is not clear that Wilson ever gave Haney an opportunity to object to his fees before he paid himself. Although Wilson claimed to have sent Haney bills he could not produce copies and admitted that his office did not keep copies. At the hearing, Haney testified that she didn't understand that she owed Wilson money.

Appendix 9: Ethics Op. 625

OPINION 625

February 2013
Tex. Comm. on Prof'l Ethics, Op. 625, V. 76 Tex. B.J. 362 (2013)

QUESTION PRESENTED

Is it permissible for a lawyer who replaces a client's prior lawyer in a litigation matter to distribute funds resulting from settlement of the litigation matter without regard to a promise of payment, of which the second lawyer is aware, given to the client's healthcare provider in a letter signed by the client's prior lawyer?

STATEMENT OF FACTS

A client in a personal injury case sought treatment from a healthcare provider for injuries sustained in an accident. Prior to providing treatment, the healthcare provider requested and obtained from the lawyer who initially represented the client with respect to the personal injury case a "Letter of Protection" addressed to the healthcare provider. This "Letter of Protection" promised that for medical care provided to the client the healthcare provider would be paid directly out of any settlement proceeds or payment resulting from a jury verdict in the personal injury case.

Thereafter a second lawyer replaced the client's first lawyer in the personal injury litigation. The second lawyer, who was aware of the "Letter of Protection," contacted the healthcare provider and attempted to negotiate a compromise of the amount billed by the healthcare provider for services rendered to the client but the healthcare provider refused to discount the amount previously billed. The second lawyer later settled the case, took his agreed fee, and distributed the remaining funds to the client without paying the healthcare provider any amount for the medical services provided to the client for which payment had been promised in the "Letter of Protection" signed by the client's first lawyer.

DISCUSSION

Rule 1.14(c) of the Texas Disciplinary Rules of Professional Conduct provides as follows:

> "When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and other person claims interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separated by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately."

In the circumstances here considered, Rule 1.14(c) requires that the client's second lawyer keep settlement proceeds to which the client's healthcare provider has a claim separate until there is an accounting and severance of the interests claimed in these funds by the healthcare provider. Although it is a legal question, rather than a matter of interpretation of the Texas Disciplinary Rules of Professional Conduct, whether and to what extent the "Letter of Protection" signed by the client's first lawyer binds the client, the client's second lawyer is aware that as a consequence of the "Letter of Protection" the healthcare provider is claiming an interest in a

portion of the settlement funds. In such circumstances, the second lawyer would violate the requirements of Rule 1.14(c) if, before the validity of the healthcare provider's claim has been conclusively determined, the lawyer distributed to someone other than the healthcare provider the portion of the funds claimed by the healthcare provider. Following the approach suggested in Comment 2 to Rule 1.14 with respect to a dispute between a client and lawyer as to the disposition of funds, it would be appropriate in these circumstances for the lawyer to hold in trust the portion of the settlement funds claimed by the healthcare provider and to suggest a means for prompt resolution of the dispute, such as arbitration.

CONCLUSION

It is a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer who replaces a client's prior lawyer in a litigation matter to distribute funds resulting from settlement of the litigation matter without regards to a promise of payment, of which the second lawyer is aware, given to the client's healthcare provider in a letter signed by the client's prior lawyer.

Endnotes

[1] Tex. Gov't Code Ann., tit. 2, subtit. G, app. A, art. xi, § 5 (B) & (C) (effective July 1, 1989). (State Bar Rules)

[2] Tex. Gov't Code Ann., tit. 2, subtit. G, app. A, art. x, § 9 (1990). (Tex. Disciplinary R. of Prof'l Conduct)

[3] 48 Robert P. Schuwerk & Lillian B. Hardwick, Texas Practice Series Handbook of Texas Lawyer and Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards 2009-2010, § 6:14, at 940 FN 1, quoting, Burrow v. Arce, 997 S.W.2d 229, 239-40 (Tex. 1999).

[4] *See* Archer v. State, 548 S.W.2d 71, 74 (Tex.App.-El Paso 1977, writ ref'd n.r.e.). *See also* Brown v. Comm'n for Lawyer Discipline, 980 S.W.2d 675, 679 (Tex.App.—San Antonio 1998, no pet.).

[5] Tex. Disciplinary R. Prof'l Conduct 1.14 (a). *See also* Neely v. Comm'n for Lawyer Discipline, 302 S.W.3d 331, 345-46 (Tex.App.—Houston [14th Dist.] 2009, pet. denied); Onwuteaka v. Comm'n for Lawyer Discipline, 2009 WL 620253 at 6 (Tex.App.—Houston [14th Dist.], pet. denied); Cluck v. Comm'n for Lawyer Discipline, 214 S.W.3d 736, 740 (Tex.App.-Austin 2007, no pet.); Kaufman v. Comm'n for Lawyer Discipline, 197 S.W.3d 867, 877 (Tex.App.-Corpus Christi-Edinburg 2006, pet. denied); Bellino v. Comm'n for Lawyer Discipline, 124 S.W.3d 380, 387 (Tex.App.—Dallas 2003, pet. denied); Fry v. Comm'n for Lawyer Discipline, 979 S.W.2d 331, 335 (Tex.App.—Houston [14th Dist.] 1998, pet. denied); Brown v. Comm'n for Lawyer Discipline, 980 S.W.2d 675, 679-680 (Tex.App.—San Antonio 1998, no pet.).

[6] *See* Tex. Comm. on Prof'l Ethics, Op. 582, 71 Tex. B.J. 760 (2008). *See also* Tex. Comm. on Prof'l Ethics, Op. 349, 23 Baylor Law Rev., 827-898 (1972).

[7] Tex. Comm. on Prof'l Ethics, Op.611, 74 Tex. B.J. 944-45 (2011); *See generally* Cluck v. Comm'n for Lawyer Discipline, 214 S.W.3d 736 (Tex.App.-Austin 2007, no pet.); *See also* Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986).

[8] *See id.*

[9] Rule 1.04 (d) of the Texas Disciplinary Rules of Professional Conduct requires that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

[10] Cluck, 214 S.W.3d at 739-40; Tex. Comm. on Prof'l Ethics, Op. 611, 74 Tex. B.J. 944-45 (2011).

[11] Tex. Comm. on Prof'l Ethics, Op. 611, 74 Tex. B.J. 944-45 (2011).

[12] *See id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Supra* note 10.

[17] *Supra* note 5.

[18] Rules Governing the Operation of the Texas Access to Justice Foundation, § 4.

[19] *See* Tex. Comm. on Prof'l Ethics, Op. 404, 45 Tex. B.J. 1132 (1982).

[20] *Id.*, and Tex. Comm. on Prof'l Ethics, Op. 421, 48 Tex. B.J. 208 (1985).

[21] *See* Tex. Comm. on Prof'l Ethics, Op. 421, 48 Tex. B.J. 208 (1985); and Rules Governing the Operation of the Texas Access to Justice Foundation, §4.

[22] *See* Tex. Comm. on Prof'l Ethics, Op. 421, 48 Tex. B.J. 208 (1985).

[23] Tex. State Bar R. art. XI, §5, and Rules Governing the Operation of the Texas Access to Justice Foundation, §4.

[24] *See* Tex. Comm. on Prof'l Ethics Op., 421, 48 Tex. B.J. 208 (1985). *See also* United States Supreme Court case Brown v. Legal Foundation of Washington,

538 U.S.216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) regarding a similar IOLTA program in Washington State.

[25] *Supra* note 17.

[26] Tex. State Bar R. art. XI, §5. *See also* http://www.teajf.org/attorneys/do_you_need_an_iolta_account.aspx

[27] *See generally* Tex. State Bar R. art. XI, and Rules Governing the Operation of the Texas Access to Justice Foundation.

[28] Find form at http://www.teajf.org/attorneys/docs/iolta_notice_form.pdf

[29] Rules Governing the Operation of the Texas Access to Justice Foundation, §23.

[30] Rules Governing the Operation of the Texas Access to Justice Foundation, § 5.

[31] *See* http://www.teajf.org/index.aspx

[32] For further information about permissible investment products which comply with Rules Governing the Operation of the Texas Access to Justice Foundation, §4, contact: Texas Access to Justice Foundation at (800) 252-3401 (Texas calls only), or (512) 320-0099 (for calls from outside of Texas), or http://www.teajf.org.

[33] Press Release, Fed. Deposit Ins. Corp., *Basic FDIC Insurance Coverage Permanently Increased to $250,000 Per Depositor* (July 21, 2010), http://www.fdic.gov/news/news/press/2010/pr10161.html (last visited May 2, 2012).

[34] *See id.*

[35] Fed. Deposit Ins. Corp., *Changes in FDIC Deposit Insurance Coverage* (December 31, 2012), http://www.fdic.gov/deposit/deposits/changes.html (last visited March 25, 2013); and Patricia A. Sallen & Shauna R. Miller, Client Trust Accounts and the Financial Crisis, 71 Tex. B.J. 906-908 (2008).

[36] *See id.*

[37] *See id.*

[38] Rules Governing the Operation of the Texas Access to Justice Foundation, §7.

[39] *See supra* note 4, Brown, 980 S.W.2d at 679-80.

[40] IOLTA NOTICE TO FINANCIAL INSTITUTION AND FOUNDATION form at http://www.teajf.org/attorneys/docs/iolta_notice_form.pdf.; State Bar Rules art. xi, § 5(C) (Vernon 1991) – requires lawyers to notify the Texas Access to Justice Foundation within 30 days of establishing an IOLTA account.

[41] Rule 1.14 (a); *also see* Sallen & Miller, Client Trust Accounts, at 907.

[42] *Supra* note 14.

[43] Tex. Disciplinary R. Prof'l Conduct 1.14 (b) (a lawyer shall deliver "other property" promptly to client when the "other property" comes into the lawyer's possession. "Other property" is defined in Hebisen v. State, 615 S.W.2d 866, 868 (Tex.App.-Houston [1st Dist.] 1981), no writ).

[44] Tex. Disciplinary R. Prof'l Conduct 5.01 and Tex. Disciplinary R. Prof'l Conduct 5.03 (lawyer has duty to ensure that nonlawyer and lawyer employees' conduct is compatible to the Tex. Disciplinary R. of Prof'l Conduct).

[45] *See id.*

[46] *Id.*

[47] *Supra* note 14.

[48] *See id.*

[49] Sallen & Miller, Client Trust Accounts, *supra*, at 906-908.

[50] *See also* Tex. Gov't Code § 82.065.

[51] Ellen Eidelbach Pitluk, *Is the Confidence Man Your Client? Con Artists Target Lawyers on the Internet*, 74 Tex. B.J. 80-81 (2011).

[52] Brenda Sapino Jeffreys, *Attorney Gets 35 Years for Misappropriating Fiduciary Property*, Tex. Lawyer, Sept. 1, 2008, at http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202424168006.

[53] For time and billing software reviews by members of the State Bar of Texas, see the Law Practice Management webpage at: http://www.texasbarcle.com/CLE/LMProductSearch.asp. This webpage requires registration in order to access it. Registration is free. Click on Law Practice Management and next click on Product Reviews in the column to the right.

[54] *Supra* note 41; *also see* Tex. Comm. on Prof'l Ethics, Op. 472, 55 Tex. B.J. 520 (1992).

[55] Tex. Comm. on Prof'l Ethics, Op. 606, 74 Tex. B.J. 660-61 (2011); Tex. Comm. on Prof'l Ethics, Op. 611 74 Tex. B.J. 944-45 (2011)

[56] *See generally* Cluck.

[57] Tex. Disciplinary R. Prof'l Conduct 1.14 (c) (requires disputed funds, which may be the lawyer's fees, to be kept in trust until the dispute is resolved).

[58] *See* Neely, 302 S.W.3d at 345-348.

[59] Tex. R. Disciplinary P. 15.10.

[60] Tex. Disciplinary R. Prof'l Conduct 1.14 (c) and Tex. Disciplinary R. Prof'l Conduct 1.15 d).

[61] Rules Governing the Operation of the Texas Access to Justice Foundation, §5B.

[62] The State Bar of Texas has excellent online resources available for closing a law practice at: http://www.texasbarcle.com/materials/closingapractice.html.

[63] Tex. Disciplinary R. Prof'l Conduct 1.14 (b). *See also* Onwuteaka at 6.

[64] Tex. Disciplinary R. Prof'l Conduct 1.14(b). *See* Wilson v. Comm'n for Lawyer Discipline, BODA Case No. 46432 (January 28, 2011) (available at: http://txboda.org/cases/joe-marr-wilson); McIntyre v. Comm'n for Lawyer Discipline, 247 S.W.3d 434, 441-443 (Tex.App.—Dallas 2008, pet. denied). *See also* Kaufman, 197 S.W.3d at 876-877; Bellino, 124 S.W.3d at 388; Tex. Comm. on Prof'l Ethics, Op. 580, 71 Tex. B.J. 586 (2008); Tex. Comm. on Prof'l Ethics, Op. 606, 74 Tex. B.J. 660-61 (2011).

[65] Tex. Comm. on Prof'l Ethics, Op. 625, 76 Tex.B.J. 362 (2013).

[66] *See for example* Tex. Gov't Code § 82.063.

[67] *See for example* Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557 (Tex. 2006); and Mandell &Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969). *Also see* Auguston v. Linea Aerea Nacional-Chile, S.A., 76 F.3d 658 (5th Cir. 1996); and Royden v. Ardoin, 331 S.W.2d 206 (Tex. 1960).

[68] Tex. Disciplinary R. Prof'l Conduct 1.14 (b). *See* Wade v. Comm'n for Lawyer Discipline, 961 S.W.2d 366, 375 (Tex.App.—Houston [1st Dist.] 1997, no pet.). *See also* Tex. Disciplinary R. Prof'l Conduct 1.04 (d); Kaufman, 197 S.W.3d at 877; Bellino, 124 S.W.3d at 387.

[69] Tex. Comm. on Prof'l Ethics, Op. 602, 73 Tex. B.J. 976-77 (2010); Tex. Prop. Code chs. 72 and 74.

[70] *See id.*

[71] Tex. Disciplinary R. Prof'l Conduct 1.14 (a).

[72] *See generally* Wilson.

[73] *See id.*

[74] *Supra* note 65.

[75] *See id.*; Tex. Disciplinary R. Prof'l Conduct 1.14(c). *See* Fry, 979 S.W.2d at 335; Wade, 961 S.W.2d at 375. *See also* Butler v. Comm'n for Lawyer Discipline, 928 S.W.2d 659, 662-663 (Tex.App.—Corpus Christi 1996, no writ); Tex. Comm. on Prof'l Ethics, Op. 580, 71 Tex. B.J. 586 (2008); Tex. Comm. on Prof'l Ethics, Op. 582, 71 Tex. B.J. 760 (2008).

[76] Tex. Disciplinary R. Prof'l Conduct 1.14 (b). *See also* Tex. Disciplinary R. Prof'l Conduct 1.04 (d).

[77] Tex. Disciplinary R. Prof'l Conduct 8.05.

[78] Tex. R. Disciplinary P. 8.01; Tex. R. Disciplinary P. 8.02; Tex. R. Disciplinary P. 1.06 (T) and (Z); Tex. Disciplinary R. Prof'l Conduct 8.04 (a) (2) & (b); *supra* note 48.

[79] Tex. R. Disciplinary P. 2.10 and Tex. R. Disciplinary P. 2.12.

[80] Tex. R. Disciplinary P. 2.12.

[81] 48 Robert P. Schuwerk & Lillian B. Hardwick, Texas Practice Series Handbook of Texas Lawyer and Judicial Ethics, *supra,* § 6:14, at 940.

[82] Archer, 548 S.W.2d at 73; Brown, 980 S.W.2d at 680.

[83] This list of case law is nonexhaustive.

[84] Tex. Rev. Civ. Stat. Ann., art. 320a-1, App., art.12, Sec. 8, Canon 9, DR9-102(1973).

[85] Policy Manual of the State Bar of Texas Board of Directors § 3.08.02 R. 2(a).

[86] *2009 Grants Hit Record Number,* STATE BAR OF TEXAS CLIENT SECURITY FUND NEWSLETTER, Vol. 1, Issue 2, Sept. 2009, at 1.

[87] Tex. Gov't Code § 81.011.

Appendix 2

Prime Partner Banks

Allegiance Bank Texas	Houston, Bellaire
Alliance Bank Central Texas	Waco, Jewitt, Donnie
Amarillo National Bank	Amarillo, Borger
American Momentum Bank	Bryan/College Station
Austin County State Bank	Bellville
Bank of San Angelo	San Angelo
Bank of the Ozarks	Dallas area, Texarkana
Bank of Tyler	Tyler
Central Bank	Houston
Citizens Bank	Kilgore, Humble, Bryan/College Stattion
Commerce National Bank	Bryan/College Station, Austin
Community Bank of Warren	Warren
East West Bank	Houston
Falcon International Bank	Laredo, San Antonio, McAllen, Brownsville
Fidelity Bank of Texas	Waco, Robinson
First Community Bank	San Benito, Harlingen, Brownsville
First Bank & Trust	Lubbock, Wilson, Tahoka
First Federal Community Bank	Paris, Clarksville, Mount Pleasant
First-Lockhart National Bank	Lockhart
First National Bank (Gilmer)	Gilmer, Mount Vernon, Big Sandy, Pittsburg
First National Bank of Ballinger	Ballinger
First National Bank of Burleson	Burleson
First National Bank Southwest	Frisco, Plaso
First Savings Bank (El Paso)	El Paso
First State Bank (Ennis)	Ennis, Rice, Italy, Waxahachie
First State Bank (Paradise)	Paradise, Bridgeport, Chico
Gladewater National Bank	Gladewater
Happy State Bank	Amarillo, Lubbock, Happy
Hondo National Bank	Hondo, Bandera, Uvalde, Leakey
Horizon Bank	Austin, Holland, Salado
Huntington State Bank	Huntington, Lufkin, Nacogdoches
Independence Bank	Houston
Independent Bank	McKinney, Waco, Georgetown
LegacyTexas Bank	Plano, Dallas, Fort Worth

Lone Star National Bank	Pharr, Brownsville, McAllen
Lowery Bank	Sugar Land
Lubbock National Bank	Lubbock
Neighborhood Credit Union	Dallas area, Waxahachie
NewFirst National Bank	El Campo. Houston, Rosenberg
Normangee State Bank	Normangee
Northstar Bank of Texas	Denton, Grapevine, Lewisville
PlainsCapital Bank	Statewide
Preston State Bank	Dallas
R Bank, Texas	Round Rock, Georgetown, Austin, Bertram
Sage Capital Bank	Gonzales, New Braunfels, San Marcos
Santa Anna National Bank	Santa Anna
Security State Bank	Littlefield
Share Plus Bank	Plano, Dallas
Southwestern National Bank	Houston, Plano, Austin
Spring Hill State Bank	Longview
Star Bank of Texas	Fort Worth
Texas Bank	Henderson, Longview, Nacogdoches, Tyler
Texas Bank Financial	Weatherford
Texas Exchange Bank	Fort Worth, Crowley
Texas Security Bank	Dallas. Garland, Farmers Branch
Texas State Bank	San Angelo
The National Banks of Central Texas	Gatesville, Killeen, Waco
Third Coast Bank	Humble, Houston, Beaumont
Town North Bank	Dallas
TrustTexas Bank	Cuero, Victoria, Kyle
Union Square Federal Credit Union	Wichita Falls, Burkburnett
Union State Bank	Kerrville
United San Antonio Federal Credit Union	San Antonio, Boerne, Schertz
Vision Bank Texas	Richardson