

## THE PERFECT STORM — CIR AND IOLTA

BY ROBERT W. ALCORN

“The Perfect Storm” was a 2000 blockbuster movie starring George Clooney. It was based on the true story of the fishing vessel the “Andrea Gail” and its demise in an October 1991 storm off the coast of New England, which was historic in its proportions. The storm was the result of the confluence of an “extra-tropical cyclone” and a hurricane (Grace), resulting in one superstorm. In the end, poor Mr. Clooney and his crew were sent to Davey Jones’ locker when the vessel was caught on the open sea in this massive storm, which was later called “The Perfect Storm.”

With CIR (comprehensive immigration reform) legislation looming on the horizon, I can see the potential for another “perfect storm” as it relates to immigration attorneys. This storm will be formed from the confluence of four factors:

1. IOLTA (Interest on Lawyers’ Trust Accounts) accounting practices that are commonly used (or more accurately stated, “not used”) by some immigration attorneys I have discussed this issue with across the nation;
2. the grievance process;
3. IOLTA accounting rules as promulgated by the governing bodies; and
4. potential passage of CIR legislation.

As the State Bar of Texas (SBOT) rules are the only state’s rules with which I have had any direct experience, this article will be based on the SBOT IOLTA accounting rules. From a very brief survey of the IOLTA accounting rules of a few other states, the Texas IOLTA accounting rules seem to be similar to the rules of most other states, so the observations, concerns, and suggestions here should be useful in most states.

This article is not intended as a critique of the specifics of the various rules related to IOLTA accounting, but instead addresses the effects of those rules on immigration attorneys in light of the states’ grievance processes and the magnifying effect CIR could have. I will stipulate that the states’ IOLTA accounting rules

are what they are, and all attorneys should comply with them always.

While accounting for IOLTA is easy conceptually, in practice accounting for IOLTA properly is a time-consuming, expensive, and surprisingly difficult process to the soul who has to sit down and actually do it on a daily basis. Immigration attorneys’ practices tend to have a larger volume of cases open at any one time compared to practices in other areas of law. It is not uncommon for a solo practitioner immigration attorney of modest means to have 300 – 1,000 open cases at any given moment (this estimate does not include the effects of CIR).

IOLTA accounting for one client is easy. IOLTA accounting for 1,000 client cases is very difficult, especially when your clients are making payments on a weekly or monthly basis. Under CIR, I am hearing of caseloads expected to exceed 50,000 cases by a single firm, and from my experience in the immigration area, I do not bat an eyelash at such numbers, given the order of magnitude of the immigrant population that may be affected by CIR.

As difficult as it is to keep up with IOLTA accounts during ordinary times, it will be next to impossible to properly maintain the IOLTA accounting records when CIR legislation is passed if the immigration attorney is not already prepared with proper IOLTA accounting policy, procedure, personnel, and software.

The potential for an IOLTA-infracton finding is necessarily always automatically attached to each and every grievance that is filed, because each district grievance panel can add charges to the existing charges should such additional rules violations come to light during the investigatory process. If the initial grievance filed is for “neglect of a legal matter,” it is impossible to be sanctioned for stealing IOLTA funds if you have not stolen IOLTA funds. However, if your IOLTA accounting is not up to speed and a grievance is filed on a non-IOLTA rule violation, it is entirely possible that the district grievance panel can add a grievance for an IOLTA violation if it comes to light during the course of the district grievance process.

As a former public member of the Dallas district grievance panel for six years, I have these observations regarding IOLTA matters:

1. The SBOT, the Chief Disciplinary Counsel's (CDC) office, and the local district grievance panel members take IOLTA infractions deadly seriously;

2. Too many of the immigration attorneys I have discussed this issue with have a seriously flawed understanding of the IOLTA accounting rules;

3. In the estimated 500-750 grievance panel cases I reviewed as a public member in the Dallas district, IOLTA rules, as the initial precipitating claim of the grievance, occurred fewer than five times during the six years;

4. IOLTA infractions, while not a part of the initial grievance filing, came to light in the course of the investigation process fewer than five times.

5. Of the many grievance cases I reviewed in my six years on the Dallas panel, true and genuine theft of IOLTA funds occurred in only two or three, at most. All other IOLTA-related cases were technical compliance issues. What this tells me is that there is not a problem rampant among Texas attorneys in keeping their clients satisfied with the attorneys' handling of client funds. (Of course, clients have next to zero clue as to the IOLTA accounting obligations the attorneys must meet.) Therefore, there are very few grievances filed related to IOLTA infractions.

This creates the false impression among attorneys, the state regulatory bodies, and the local district grievance panels that there is not a problem industrywide with IOLTA accounting practices amongst immigration attorneys. However, the violations are chiefly technical in nature (i.e., IOLTA accounting is not being properly done, which clients are oblivious to; thus, no grievances are filed except in egregious cases of outright theft, which are rare).

6. Noncitizens, especially those with no legal status, will almost never file a grievance due to their trepidation of any law enforcement body.

This brings to light why there are so few IOLTA grievances, especially against immigration attorneys.

7. If the attorney's IOLTA accounting rules/practices/policies/procedures are not in place, the attorney is exposed by each and every client, and with any and all grievances that may be filed against him, without regard to the outcome of the grievance case. I.e., what would ordinarily be a summary disposition case could turn into a deadly serious, IOLTA-rules-violation case for the unwary attorney.

As a former member of a district grievance panel and a frequent speaker nationally at immigration law conferences, I have had the opportunity to speak with many, many immigration attorneys from across the United States.

As a non-attorney public member of the local panel I was quite surprised at the ferocity with which my attorney-member grievance panel mates would attack IOLTA violations. (Trust me, you do not want to be hauled up in front of any local grievance panel on IOLTA charges. It will not go well for you.)

At the same time, I am struck by the nonchalance given IOLTA accounting rules by many, many immigration attorneys I speak with around the country. There is a serious disconnect between what happens in the ordinary immigration attorney's office as it relates to IOLTA accounting and the reaction of the district grievance panels when they review IOLTA grievances.

The main source of confusion seems to stem from the two terms "true retainer" and "flat fee, nonrefundable retainer."

Having developed an interest, from the accountant's perspective, in matters IOLTA, I observed that, speaking strictly regarding immigration attorneys (and it has come to my attention lately that criminal attorneys exercise similar IOLTA accounting practices), the common practice is for the immigration attorney to charge a flat fee for whatever service is agreed upon to be provided. It may, or may not, be a part of the attorney's engagement letter that some or all of the flat fee is nonrefundable.

When I ask immigration attorneys whether they run the fees collected from these "flat fee, nonrefundable" cases through their IOLTA account, I consistently hear the same response from too many of them, word for word, which is "It is a flat fee, nonrefundable retainer, therefore I do not have to run the money through my IOLTA account." The second line of logic I sometime hear applied by immigration attorneys is that the entire fee is earned "on contact," i.e., at the time the client signs the engagement letter, on "Day One"; therefore, no need to use the IOLTA account.

From where I sit, on the sidelines as an observer, this is where the rubber meets the road on this IOLTA issue. I refer first to "A Lawyer's Guide to Client Trust Accounts,"<sup>1</sup> published by the State Bar of Texas

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<sup>1</sup> Available at <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides/TrustAccounts/TrustAccountBooklet.pdf>.

(updated June 22, 2012), at page 4, where the following comments are found:

- Examples of unearned fees include: . . . Flat fees that have not been earned, regardless of whether the fee is deemed “nonrefundable” in the fee agreement.
- Unearned fees are always subject to refund until earned and cannot be deemed nonrefundable by agreement.

Also, I refer to Opinion No. 611, issued September 2011 by the Professional Ethics Committee for the State Bar of Texas,<sup>2</sup> which states in part:

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 *in its entirety* 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.

It appears to me that the language used in the SBOT IOLTA guide, and in Opinion No. 611, is unambiguous. While a small part of the total flat fee that a client pays an immigration attorney for his service may be deemed “earned” as a result of the initial consultation, etc. and can be deposited into the attorney's operating account, the remainder of the payment has to go into the IOLTA account, without regard to whatever name is attached to it, be it “nonrefundable”, etc.

Therefore, each and every immigration attorney who is not now using the proper IOLTA accounting policies, practices, and procedures is “out of compliance” with the SBOT IOLTA accounting rules and all those same immigration attorneys are fully exposed to having a summary disposition panel non-IOLTA driven grievance transmogrify into a serious IOLTA disciplinary problem.

I can say from first-hand experience that, if an IOLTA rules violation comes to light during the grievance investigation process, the immigration attorney will be subject to possible discipline, even though the IOLTA infraction was not an issue in the original complaint filed by the client. The IOLTA infraction complaint can and will be levied and acted upon by the local grievance panel, given sufficient evidence.

So,

A. Given that the current IOLTA accounting policies and practices of what I believe to be those of many immigration attorneys are currently what they are as described above;

B. Given that the IOLTA accounting rules are what they currently are;

C. Given that the current IOLTA accounting practices of those many immigration attorneys are not in compliance the IOLTA accounting rules;

consider the following:

If the IOLTA accounting noncompliance problem is of magnitude “X” today, what will be the order of magnitude of this noncompliance problem when CIR is passed and ten to fifteen million immigrants hit the front door of every immigration attorney even pretending to provide competent immigration law services?

According to the American Immigration Lawyers Association website there are over 12,000 immigration

<sup>2</sup> At <http://www.legaethicstexas.com/Ethics-Resources/Opinions/Opinion-611.aspx>.

attorneys in the United States now (and climbing rapidly with the advent of CIR).

What will be the increase in each immigration attorney's probability of, sooner or later, having a grievance filed against him or her? What will be the increased probability that an IOLTA technical compliance infraction will come along as a result?

Heretofore, noncitizens have been most reluctant to file grievances against immigration attorneys for fear of attracting attention to themselves and maybe being deported. Once CIR legislation gives them legal status, their fear will be much less. Therefore, they will be much more likely to access the grievance process if they think that they have been abused. Thus, there will be more risk to an immigration attorney for IOLTA accounting shortcomings to be found out in any grievance filed against that attorney.

I have surveyed only briefly the available software options for accounting for immigration law firm IOLTA accounts, and it seems that most software packages tend to be "full-service" packages that encompass firm-wide financial accounting, time tracking, IOLTA tracking, client billing, payroll, and other functions. This is a good solution for the larger immigration firms, but in my experience, most immigration law service providers are fewer than four-attorney firms. These "full-service" software packages are too extensive for the smaller firms to use — thus the dearth of useful IOLTA software packages for small firms, it seems.

The Minnesota State Bar Association has published a forty-four-page guide, "Keeping Clients' Trust Accounts with QuickBooks 2010 Professional," which is a very clear step-by-step "how to" manual. The only useful software that I have heard about, at the small firm level, is home-made Excel programs for very low-volume firms (fewer than 100 client accounts); however, I think, having worked with Excel for thirty years, that Excel becomes unworkable

once you get over fifty or a hundred cases. With CIR, for an immigration law firm to have over 5,000 active client IOLTA accounts at any given time will not be uncommon, I truly believe.

So, "What to do?!?!?"

There is no "silver bullet" to make your pain go away, I am so sorry to say. For you immigration attorneys out there, if you want to comply, there is only one answer: You must build into your office operations the labor, software, and administrative costs to maintain your IOLTA account as per the governing rules. It is that simple. No way around it. Period!

My mission with this article has been to bring to the forefront this looming problem, in advance of a flood of CIR cases, so that immigration attorneys have time to try to prepare for "The Perfect Storm." Get ready now, and do not let a massive opportunity, such as CIR, also bring you exposure to serious IOLTA discipline.

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**REMINDER:**

The correct citation form for the BIB is Author, *Title*, 18 Bender's Immigr. Bull. 941 (Aug. 15, 2013).

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS Opinion No.  
611**

**September 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

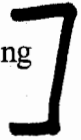
unusual circumstances have to be at least partially refunded does not negate the fact that such amount has been earned and under the Texas Disciplinary Rules may be deposited in the lawyer's operating account rather than being subject to a requirement that the amount must be held in a trust or escrow 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 in its entirety 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.

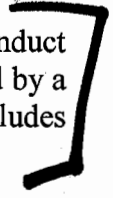
Accordingly, if a lawyer proposes to enter into an agreement with a client to receive an appropriate non-refundable retainer meeting the requirements for such a retainer and also to receive an advance payment for future services (regardless of whether the amount for future services is determined on a 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.





# 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 June 22, 2012

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## Introduction

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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),<sup>1</sup> the appropriate use of each are discussed later in this material.

### Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct

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#### 1.14 Safekeeping Property<sup>2</sup>

(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.<sup>3</sup> 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.<sup>4</sup>

### When to Use a Trust Account

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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".<sup>5</sup>

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.<sup>6</sup>

### 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.<sup>7</sup>  
(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.<sup>8</sup>  
(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).<sup>9</sup>  
(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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> As an earned fee, a *true nonrefundable retainer* should not be placed in the lawyer's trust account.<sup>14</sup>

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.<sup>15</sup> A lawyer cannot make a deposit/prepayment for services nonrefundable simply by declaring that it is a nonrefundable retainer.<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup>

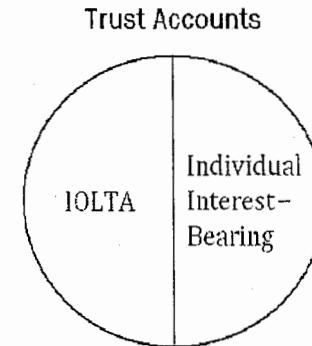
### Individual Interest-Bearing Trust Accounts vs. Interest on Lawyers' Trust Accounts (IOLTA)

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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.<sup>19</sup> 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 if the funds can reasonably earn interest for the beneficiary, then they should be placed in an individual interest-bearing trust account where the interest will be paid to that beneficiary.<sup>20</sup> Alternatively, if the funds cannot reasonably earn interest for the beneficiary, the funds go into an IOLTA trust account.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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<sup>24</sup> and is required under the State Bar Rules.<sup>25</sup>

## 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.<sup>26</sup> These types of funds cannot reasonably earn interest for the client.

Nominal in Amount

or

Short Period of Time



IOLTA

## Compliance with the IOLTA Rules

The IOLTA rules set forth additional requirements to which a lawyer using such an account is subject.<sup>27</sup>

Among those requirements are the following:

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

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.<sup>31</sup>

## Financial Institutions

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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.<sup>32</sup> 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's (FDIC) temporary unlimited insurance program, which is in effect from December 31, 2010 through December 31, 2012.<sup>33</sup> All IOLTA accounts at financial institutions that did not opt out of the Transaction Account Guarantee Program (TAGP) also have unlimited insurance for the same period of time.

Unless extended by Congress, after December 31, 2012, unlimited FDIC coverage will not be available on IOLTA or other non-interest bearing accounts. Starting January 1, 2013, the standard FDIC insurance amount will be \$250,000 per depositor.<sup>34</sup> 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.<sup>35</sup> The FDIC has more information online at: <http://www.fdic.gov/deposit/deposits/changes.html>. A list of the participating TAG Program banks may be found on the Texas Access to Justice Foundation website.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> Remember the \$250,000 coverage is *per depositor*, and the client is treated as one depositor.<sup>39</sup>

### 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.<sup>40</sup> 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](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.<sup>41</sup>

## **Opening, Maintaining and Closing Trust Accounts**

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### **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.<sup>42</sup> 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”.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup>



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.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup>

**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*

Lisl Johnson 1325 4 <sup>th</sup> Ave, Ste 600 Seattle, WA 98101 206-727-8242	8687	Date <u>November 18, 2003</u>
Pay to the order of <u>My Law Firm</u>	\$	5,000.00
<u>Five thousand and no/100</u>		Dollars
Any Bank USA Seattle, WA		
for <u>Attorney fees</u>		<u>Lisl Johnson</u>

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

DATE	11/18/03	Currency	Checks	Johnson	Tuckr													Total
				\$5,000	\$3,500													\$8,500
															Total Deposit		\$8,500.00	
<b>My Law Firm Trust Account - Any Bank USA</b>																		

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.<sup>52</sup> 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.<sup>53</sup> 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 <u>November 18, 200X</u>	
Pay to the order of <u>Superior Court Clerk</u>	\$ 210.00
<u>Two Hundred Ten and 00/100</u>	Dollars
Any Bank USA Seattle, WA	
for <u>Zelinski filing fee</u>	<u>My Lawyer</u>

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.<sup>54</sup>

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.<sup>55</sup> 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							38,918.71
11/11/0X	18560	My Law Firm	Olson, M	attorney fees		866.68	38,050.05
11/5/0X	18561	My Law Firm	Fely	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	16,000.00		42,853.93
11/10/0X	18563	Dr. Grey	Weatherholi	medical		238.00	42,615.93
11/11/0X	18564	Dr. Radke	Tyner	medical		168.50	42,447.43
11/17/0X	18565	WSP	Zelinski	records		67.89	42,379.54
11/18/0X	Deposit	Johnson	Johnson	attorney fees	5,000.00		47,379.54
		Tuck	Tuck	attorney fees	3,500.00		50,879.54
11/18/0X	18566	Superior Ct Clerk	Zelinski	filing fee		210.00	50,669.54
11/24/0X	18567	No-Pain Chiro	Olson, E	medical		156.38	50,513.16
11/25/0X	18568	Pinkerton Inv.	Dexter	investigation		2,450.25	48,062.91
11/31/0X	18569	Karen Kane	Kane	settlement		16,000.00	33,062.91

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		60,736.43
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	03/1/0X	15,000.00
	Total	(17,674.52)
Adjusted Bank Balance		33,061.91
Check Register Balance		<u>33,061.91</u>
Difference		0

Client Ledger Reconciliation		August 0X
Client	Last Activity	Balance
Dexter, N	12/10/0X	1,500.00
Felty, J	12/5/0X	3,426.11
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	1/28/0X	3,870.50
Zelinski, A	11/18/0X	<u>2,798.97</u>
		<u>33,061.91</u>

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.<sup>56</sup>

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.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup>

### **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.<sup>60</sup> 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".<sup>61</sup>*

### **Closing the Trust Account**

Closing a trust account requires returning unearned fees or paying third parties to whom the client owes money.<sup>62</sup> It also includes notifying the Texas Access to Justice Foundation in writing or electronically within 30 days of closing an IOLTA account.<sup>63</sup> 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.<sup>64</sup> 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**

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When a lawyer receives funds that belong to another, Rule 1.14 requires the lawyer to promptly notify that person and deliver the funds.<sup>65</sup> 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*.<sup>66</sup> Third persons often claim some legal interest in the funds, such as an assignment or lien. 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.<sup>67</sup>

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.<sup>68</sup>

When a lawyer receives funds that belong to another, Rule 1.14 requires the lawyer, if requested, to render a full accounting of property.<sup>69</sup>

### **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.<sup>70</sup> 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.<sup>71</sup> 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.*<sup>72</sup> (See Appendix 7 for Ethics Opinion 602.)

### **Disputed Funds**

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If ownership is clear or undisputed, then the lawyer must pay the funds to the person entitled to receive them.<sup>73</sup> However, if it is unclear to whom funds belong, or a dispute among claimants exists, then a lawyer pays at his own peril.<sup>74</sup> 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.

In such cases, the lawyer must keep the disputed funds in trust until the dispute is resolved and must disburse any undisputed portions.<sup>75</sup> 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.<sup>76</sup> 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.)

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## Enforcement

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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.<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> Additionally, it does not matter if the lawyer is unaware of Rule 1.14 and its requirements, or makes a technical or inadvertent violation.<sup>82</sup>

Disciplinary case law regarding Rule 1.14 misconduct includes the following cases:<sup>83</sup>

*Neely v. Comm'n for Lawyer Discipline*, 302 S.W.3d 331 (Tex.App.-Houston [14<sup>th</sup> 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 [14<sup>th</sup> 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.



# PLEASE READ DETAILS OF CASES BELOW

*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 [14<sup>th</sup> 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 [1<sup>st</sup> 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 on 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<sup>84</sup> 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."<sup>85</sup> 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.<sup>86</sup> 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

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The Supreme Court of Texas has the authority to regulate Texas lawyers.<sup>87</sup> 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

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### 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](http://www.teajf.org/attorneys/how_to_open_iolta.aspx)

Trust Accounts  
[http://www.teajf.org/attorneys/trust\\_accounts.aspx](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](http://www.teajf.org/attorneys/do_you_need_an_iolta_account.aspx)

Financial Considerations  
[http://www.teajf.org/attorneys/financial\\_considerations.aspx](http://www.teajf.org/attorneys/financial_considerations.aspx)

Eligible Financial Institutions  
[http://www.teajf.org/financial\\_institutions/docs/Eligible\\_Banks\\_List\\_Master.pdf](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](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](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

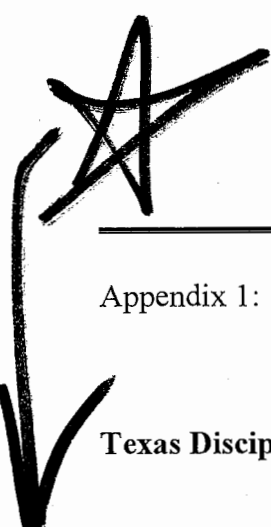
## **Law Practice Management Program**

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

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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.

## **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 in its entirety 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 <sup>FN1</sup> 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.

**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.

**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



**!! 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 ② below. Read item ③ below regarding the Access To Justice (ATJ) contribution. Check the box on line ③ 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 90% applies to membership dues postmarked after Aug. 31, 2010 or 100% after Nov. 30, 2010.)

<b>DUE BY JUNE 1, 2010</b>		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: <input type="checkbox"/> Visa <input type="checkbox"/> MasterCard Credit Card Number _____ Expiration Date _____/_____/_____ Signature _____ \$ _____ Amount Authorized _____ <small>2010-08-11</small>
①	<b>Required State Bar Dues for Fiscal 2010-2011</b>	
②	<b>Optional Section Membership Renewals</b>	
<b>TOTAL RENEWAL FEES</b>		
③	<b>Voluntary Access To Justice Contribution:</b> <small>(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.)</small>	<input type="checkbox"/> <input type="checkbox"/>
④	<b>Total State Bar Payment:</b> Total Renewal Fees with ATJ contribution _____ Check here if you do not wish to make an ATJ contribution: Total Renewal Fees without ATJ contribution _____ <input type="checkbox"/> I certify that I am not in IOLTA compliance, I will update my status at www.tbaj.org. <small>Please do not write below this line.</small>	Signature _____ \$ _____ Amount Authorized _____ <small>2010-08-11</small>



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.”

## **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

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, APPELLANT

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.

## Endnotes

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

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

<sup>3</sup> 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).

<sup>4</sup> 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.).

<sup>5</sup> 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 [14<sup>th</sup> Dist.] 2009, pet. denied); Onwuteaka v. Comm'n for Lawyer Discipline, 2009 WL 620253 at 6 (Tex.App.—Houston [14<sup>th</sup> 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 [14<sup>th</sup> 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.).

<sup>6</sup> 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).

<sup>7</sup> 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. 481, 57 Tex. B.J. 87 (1994).

<sup>8</sup> See *id.*

<sup>9</sup> 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.”

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

<sup>11</sup> Tex. Comm. on Prof'l Ethics, Op. 611, 74 Tex. B.J. 944-45 (2011).

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Supra* note 10.

<sup>17</sup> *Supra* note 5.

<sup>18</sup> Rules Governing the Operation of the Texas Access to Justice Foundation, § 4.

<sup>19</sup> See Tex. Comm. on Prof'l Ethics, Op. 404, 45 Tex. B.J. 1132 (1982).

<sup>20</sup> *Id.*, and Tex. Comm. on Prof'l Ethics, Op. 421, 48 Tex. B.J. 208 (1985).

<sup>21</sup> 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.

<sup>22</sup> See Tex. Comm. on Prof'l Ethics, Op. 421, 48 Tex. B.J. 208 (1985).

<sup>23</sup> Tex. State Bar R. art. XI, §5, and Rules Governing the Operation of the Texas Access to Justice Foundation, §4.

<sup>24</sup> 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,

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

<sup>25</sup> *Supra* note 17.

<sup>26</sup> Tex. State Bar R. art. XI, §5. *See also* [http://www.teajf.org/attorneys/do\\_you\\_need\\_an\\_iolta\\_account.aspx](http://www.teajf.org/attorneys/do_you_need_an_iolta_account.aspx)

<sup>27</sup> *See generally* Tex. State Bar R. art. XI, and Rules Governing the Operation of the Texas Access to Justice Foundation.

<sup>28</sup> Find form at [http://www.teajf.org/attorneys/docs/iolta\\_notice\\_form.pdf](http://www.teajf.org/attorneys/docs/iolta_notice_form.pdf)

<sup>29</sup> Rules Governing the Operation of the Texas Access to Justice Foundation, §23.

<sup>30</sup> Rules Governing the Operation of the Texas Access to Justice Foundation, § 5.

<sup>31</sup> *See* <http://www.teajf.org/index.aspx>

<sup>32</sup> 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>.

<sup>33</sup> Fed. Deposit Ins. Corp., Fin. Inst. Letters, FIL-76-2010 (November 9, 2010). <http://www.fdic.gov/news/news/financial/2010/fil10076.html> (last visited May 2, 2012).

<sup>34</sup> 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).

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> Patricia A. Sallen & Shauna R. Miller, *Client Trust Accounts and the Financial Crisis*, 71 Tex. B.J. 906-908 (2008).

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<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 907.

<sup>40</sup> Rules Governing the Operation of the Texas Access to Justice Foundation, §7.

<sup>41</sup> *See supra* note 4, *Brown*, 980 S.W.2d at 679-80.

<sup>42</sup> IOLTA NOTICE TO FINANCIAL INSTITUTION AND FOUNDATION form at [http://www.teajf.org/attorneys/docs/iolta\\_notice\\_form.pdf](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.

<sup>43</sup> Rule 1.14 (a); *also see* Sallen & Miller, *Client Trust Accounts*, at 907.

<sup>44</sup> *Supra* note 14.

<sup>45</sup> 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 [1<sup>st</sup> Dist.] 1981), no writ).

<sup>46</sup> 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).

<sup>47</sup> *See id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Supra* note 14.

<sup>50</sup> *See id.*

<sup>51</sup> Sallen & Miller, *Client Trust Accounts*, *supra*, at 906-908.

<sup>52</sup> *See also* Tex. Gov’t Code § 82.065.



<sup>53</sup> Ellen Eidelbach Pitluk, *Is the Confidence Man Your Client? Con Artists Target Lawyers on the Internet*, 74 Tex. B.J. 80-81 (2011).

<sup>54</sup> 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>.

<sup>55</sup> 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.

<sup>56</sup> *Supra* note 41; also see Tex. Comm. on Prof'l Ethics, Op. 472, 55 Tex. B.J. 520 (1992).

<sup>57</sup> 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)

<sup>58</sup> See generally Cluck.

<sup>59</sup> 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).

<sup>60</sup> See Neely, 302 S.W.3d at 345-348.

<sup>61</sup> Tex. R. Disciplinary P. 15.10.

<sup>62</sup> Tex. Disciplinary R. Prof'l Conduct 1.14 (c) and Tex. Disciplinary R. Prof'l Conduct 1.15 d).

<sup>63</sup> Rules Governing the Operation of the Texas Access to Justice Foundation, §5B.

<sup>64</sup> The State Bar of Texas has excellent online resources available for closing a law practice at: <http://www.texasbarcle.com/materials/closingapractice.html>.

<sup>65</sup> Tex. Disciplinary R. Prof'l Conduct 1.14 (b). See also Onwuteaka at 6.

<sup>66</sup> 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).

<sup>67</sup> See for example Tex. Gov't Code § 82.063.

<sup>68</sup> 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 (5<sup>th</sup> Cir. 1996); and Royden v. Ardoin, 331 S.W.2d 206 (Tex. 1960).

<sup>69</sup> 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 [1<sup>st</sup> 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.

<sup>70</sup> Tex. Comm. on Prof'l Ethics, Op. 602, 73 Tex. B.J. 976-77 (2010); Tex. Prop. Code chs. 72 and 74.

<sup>71</sup> See id.

<sup>72</sup> Tex. Disciplinary R. Prof'l Conduct 1.14 (a).

<sup>73</sup> See generally Wilson.

<sup>74</sup> See id.

<sup>75</sup> 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).

<sup>76</sup> Tex. Disciplinary R. Prof'l Conduct 1.14 (b). See also Tex. Disciplinary R. Prof'l Conduct 1.04 (d).

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<sup>77</sup> Tex. Disciplinary R. Prof'l Conduct 8.05.

<sup>78</sup> 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.

<sup>79</sup> Tex. R. Disciplinary P. 2.10 and Tex. R. Disciplinary P. 2.12.

<sup>80</sup> Tex. R. Disciplinary P. 2.12.

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

<sup>82</sup> Archer, 548 S.W.2d at 73; Brown, 980 S.W.2d at 680.

<sup>83</sup> This list of case law is nonexhaustive.

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

<sup>85</sup> Policy Manual of the State Bar of Texas Board of Directors § 3.08.02 R. 2(a).

<sup>86</sup> *2009 Grants Hit Record Number*, STATE BAR OF TEXAS CLIENT SECURITY FUND NEWSLETTER, Vol. 1, Issue 2, Sept. 2009, at 1.

<sup>87</sup> Tex. Gov't Code § 81.011.