

JUDGMENT OF PUBLIC REPRIMAND AFFIRMED.

Opinion and Judgment Signed January 28, 2011, and Delivered January 30, 2011.



BEFORE THE BOARD OF DISCIPLINARY APPEALS

**APPOINTED BY
THE SUPREME COURT OF TEXAS**

No. 46432

JOE MARR WILSON, APPELLANT

v.

**COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS, APPELLEE**

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

Opinion and Order

Considered En Banc October 18, 2010

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.

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.¹ 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

¹ 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.

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.² 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

² 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.

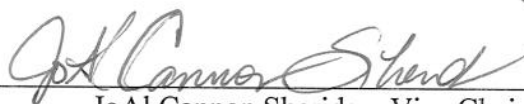
ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 6:14 p. 979 (2010-2011) (“[F]unds entrusted to a lawyer for a specific purpose can be used only for that purpose: the lawyer must return the unused portion—less any agreed-upon fees earned or expenses 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.

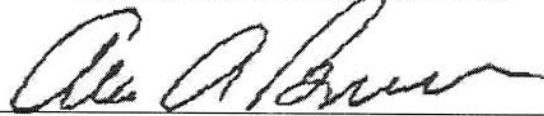
IT IS SO ORDERED.



W. Clark Lea, Chair



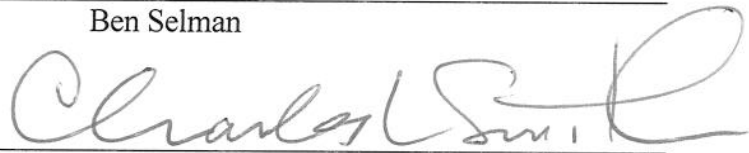
JoAl Cannon Sheridan, Vice Chair



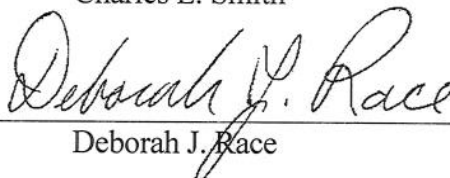
Alice A. Brown



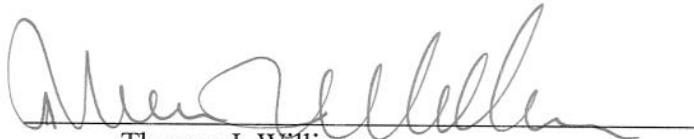
Ben Selman



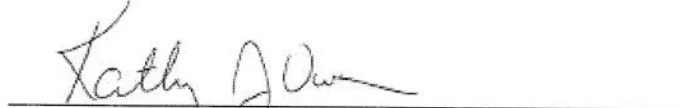
Charles L. Smith



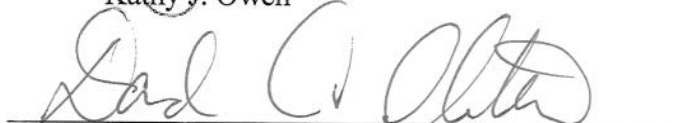
Deborah J. Race



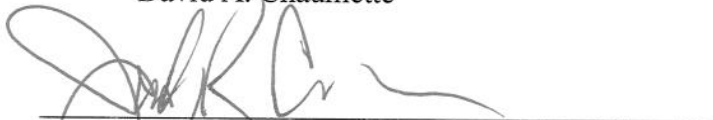
Thomas J. Williams



Kathy J. Owen



David A. Chaumette



Jack R Crews



Gary R. Gurwitz

Not sitting: Marvin W. Jones