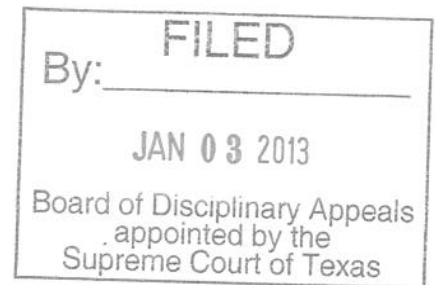


NO. 51156



BEFORE THE BOARD OF DISCIPLINARY APPEALS

APPOINTED BY

THE SUPREME COURT OF TEXAS

CYRIL O. CHUKWURAH

Appellant,

V.

COMMISSION FOR LAWYER DISCIPLINE

Appellee.

**BRIEF OF APPELLANT
(ON APPEAL FROM THE EVIDENTIARY PANEL FOR
THE STATE BAR DISTRICT 4D, NO. H0041132816)**

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ORAL ARGUMENT REQUESTED

NAMES OF ALL PARTIES

The following is a complete list of the names and addresses of all parties to the final decision and their counsel pursuant to Rule 4.06 (c)(1), Internal Procedural Rules, Board of Disciplinary Appeals.

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NO. 51156

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APPOINTED BY

THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

CYRIL O. CHUKWURAH

Appellant,

V.

COMMISSION FOR LAWYER DISCIPLINE

Appellee.

**BRIEF OF APPELLANT
(ON APPEAL FROM THE EVIDENTIARY PANEL FOR
THE STATE BAR DISTRICT 4D, NO. H0041132816)**

Appellant, Cyril O. Chukwurah, files his Brief. Appellant will be referred to as Chukwurah. Appellee, Commission for Lawyer Discipline, will be referred to as Commission.

**BRIEF GENERAL STATEMENT OF THE
NATURE OF THE CAUSE OR OFFENSE AND THE RESULT**

Pursuant to Rule 4.06(c)(3), *Internal Procedural Rules, Board of Disciplinary*

Appeals,

Appellant states:

Type of Proceeding: Attorney Discipline

Petitioner/Appellee: The Commission for Lawyer Discipline

Respondent/Appellant: Cyril O. Chukwurah

Evidentiary Panel: 4D

Judgment: Judgment of Active Suspension

Violations Found: Rule 1.14(a) [Failing to hold funds and other property belonging in whole or part to clients or third parties in a lawyer's possession separate from the lawyer's own property]; and

Rule 1.14(b) [upon receiving funds or other property in which a client or third person has an interest, 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 (CR00053)].

ISSUES PRESENTED FOR REVIEW

Pursuant to Rule 4.06(c)(4), *Internal Procedural Rules, Board of Disciplinary*

Appeals, the following issues are presented for review.

1. Whether or not there is any competent evidence (more than a scintilla) that Appellant's failure to release personal injury settlement funds to Josephine Jesuoba between December 23, 2010 and May 2011 was a violation of Rule 1.14(b) TDRPC, when the withholding was compelled pursuant to Rule 1.14(c) TDRPC?
2. Whether or nor there is any competent evidence (more than a scintilla) that Appellant

violated Rule 1.14(a) TDRPC when his average balance in his IOLTA trust account from December 2010 to May 2011 was always sufficient to pay the contractual amount due Jesuoba of \$2,234.34 and the \$1,000.00 negotiated medical provider settlement that she negotiated?

3. Whether or not there is any competent evidence (more than a scintilla) that Appellant from December 2010 to June 2011 regularly used his trust account to directly pay his personal and business obligations, commingling his own funds with client funds in violation of Rule 1.14(a) TDRPC?
4. Whether or not there is a specific sanction on each alleged rule violation, and if not, whether reversal and remand, alternatively, is required for such a determination?

STATEMENT OF FACTS

Josephine Jesuoba engaged the law firm of Frank C. Onyenezi and Associates to represent her in a personal injury case arising out of an automobile accident that occurred on May 3, 2009 by a written contingent fee contract of employment and power of attorney (R.R. 15, lines 7-25, R. Ex. 1). The case was referred to Chukwurah by Onyenczi for handling (RR, 16, lines 1-20). Under the contract, the lawyers were assigned 33 1/3 percent of any recoveries made (RR 16, lines 21-25). Jesuoba chose her own independent chiropractor (RR 17 lines 1-10). She had been involved in a number of previous accidents that she had other lawyers represent her on (RR 18, lines 7-25). Her independent chiropractor provided her a bill for \$2,780.00 for his services, which was dated February 16, 2010 (RR, R. Ex. 4). A settlement of her claim was made by Chukwurah for \$5,050.00, with her consent, and the settlement check was received in December 2010 and deposited into Chukwurah's IOLTA trust account on December 23, 2010 (RR 20, lines 9-25, P. Ex 4, CFLD 000007). At the time she called Chukwurah in January 2011, about December 2010 settlement, she knew her chiropractor wanted \$2,780.00, but testified that she had orally negotiated the bill for \$1,000.00, although she did not inform Chukwurah at that time. She therefore, refused to pay her chiropractor \$2,780.00 (RR, 22, lines 1-25). She testified that she could not answer the question of whether she had any problem with Chukwurah holding the settlement funds in his IOLTA trust account while the disputed sum was being negotiated by Chukwurah (RR 25, lines 1-7). Jesuoba further testified that she sent no communication to Chukwurah during

the five month time period wherein she told Chukwurah to release the funds to the chiropractor, prior to the time that she negotiated the claim down to the \$1,000.00 (R.R. 25, lines 15-22). She picked up her settlement check in May 2011 and signed an agreed settlement statement (R.R. 27 lines 1-18). At that time Chukwurah also wrote a check to Chiro-Med Clinic, P.A. for \$1,000.00 (R.R. 27 lines 15-24, R, Ex. B). Jesuoba testified that she mentioned that she had negotiated the chiropractor's claim to \$1,000.00 "when I signed the papers" (R.R. lines 19-24). However, she never received a document from the chiropractor which showed a reduction to \$1,000.00 (R.R., lines 14-25).

Chukwurah testified that after he deposited the settlement check in his trust account he called the provider to negotiate over ten times and each time he stated the provider wanted the \$2,780.00 (R.R. 78, lines 23-25, 79, lines 1-21). Jesuoba told him that she was going to negotiate with the provider because she did not like it that she would only be left with \$437.00 (R.R. 80 lines 12-15). In April-May Jesuoba told Chukwurah she had been able to negotiate the provider's bill down to \$1,000.00 (R.R. 81, lines 20-25). After she filed a Bar complaint against Chukwurah, he told her you only get \$437.00. She then said hold on and that she would talk to provider (R.R. 82, lines 17-23). She then informed Chukwurah that he would take \$1,000.00 (R.R. 82, lines 24-25, 83, lines 1-18). Chukwurah further testified that during the period of time from December 2010 to May 2011 he always had an "average balance" in his trust account capable of paying the \$1,000.00 to the provider and the \$2,234.34 to Jesuoba (R.R. 83, lines 19-25, 84, lines 1-10, R. Ex 3, P. Ex 4, CFLD000006,

P. Ex. 7, CFLD000038, P. Ex. 8, CFLD000053, P. Ex. 9, CFLD000069, P. Ex. 10, CFLD 000079). Chukwurah testified that all retainers taken into his office were placed in the trust account because the money has not yet earned (R.R. 85, lines 1-23). He further testified numerous times that no attorney funds were ever removed from the IOLTA trust account until all of the funds were earned and until all client funds and third party funds had been paid. (R.R. 47, lines 7-12, 50, lines 1-12, 51, lines 13-20, lines 21-22, 52, lines 1-3, lines 13-20, lines 21-22, 52, lines 1-3, lines 8-14, 55, lines 17-20, lines 23-25, 56, lines 1-20, 58, lines 21-25, 59 lines 1-4, 69, lines 16-21, 70, lines 20-25, 71, lines 1-3, 73, lines 1-14, lines 23-25, 74, lines 1-3, 88 lines 18-25, 89, lines 1-19, 94, lines 17-20). The only time any personal or business monies were paid out of the trust account was *after* his money was already earned (R. R. 88, lines 18-25, 89, 1-12). He always kept client money in the trust account (R.R. 89, lines 1-12). Ledgers were kept in his client files showing when the monies were earned (R. R. 92 lines 7-14, 93, lines 10-12).

Based upon the foregoing testimony, Panel 4D found violations of Rules 1.14(a) and 1.14(b) TDRPC, and assessed four years active suspension and fees and costs totaling \$1,173.80 (R. R. 111, lines 1-17, C.R. 45, 00489). The Panel Chair signed a Judgment of active supervision on June 25, 2012 (C. R. 45, 000531-000536). The Judgment of Active Suspension contained the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

“The Evidentiary Panel, having considered the pleadings, evidence and argument

of counsel, makes the following findings of fact conclusions of law:

1. Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.
2. Respondent resides in and maintains his principal place of practice in Harris County, Texas.
3. Josephine Jesuoba (“Jesuoba”) hired Cyril Okey Chukwurah (“Respondent”) for representation regarding a personal injury claim.
4. In December of 2010, Respondent settled Complainant’s personal injury claim. Respondent received settlement check on behalf of Complainant in the amount of \$5,050.00 and deposited the check into his attorney trust account (“IOLTA”) on December 23, 2010. Respondent did not release any funds to Complainant and her medical providers until May of 2011, after Complainant filed her grievance.
5. Respondent failed to safeguard Complainant’s settlement proceeds. On December 30, 2010 Respondent had a balance in his IOLTA of \$2,955.24, this amount was less than the \$3,233.34 owed to Complainant and her medical providers in February, April and May 2011.
6. Respondent’s trust account records for the period December 2010 through June 2011 indicate that Respondent regularly used his trust account to directly pay his personal and business obligations, commingling his own funds with client funds.
7. The Chief Disciplinary Counsel of the State Bar of Texas has incurred reasonable attorneys’ fees and direct expenses associated with this Disciplinary Proceeding in the

amount of \$1,783.40...”

8. The Evidentiary Panel concluded that, based on foregoing findings of fact, the following Texas Disciplinary Rules of Professional Conduct had been violated:

“**1.14(a)** [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]; and

1.14(b) [Upon receiving funds or other property in which a client or third person has an interest, 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]. (C.R. 48, 000531-000533).”

Chukwurah filed a Motion for New Trial, which was overruled by operation of law (C.R. 49, 000541-00542). Chukwurah thereafter filed his Notice of Appeal on September 24, 2012 and perfected this appeal (C.R. 51, 000550-000559).

BRIEF OF THE ARGUMENT

A.

Standard of Review

Appeals from judgments of evidentiary panels must be on the record, determined under the standard of substantial evidence. Rule 2.24 *Tex. R. Dis. P.* (“TRDP”). In an attorney disciplinary case, regarding appeals to the Board of Disciplinary Appeals, the substantial evidence standard of review applies *Commission for Lawyers Discipline v. Schaefer*, 364 S.W.3d 831, 835 (Tex. 2012). The reviewing court may not substitute its judgment for the agency’s, but must consider only the record upon which the decision is based *Railroad Commission of Texas v. Torch Operating Company*, 912 S.W.2d 790, 792 (Tex. 1995). In reviewing the order of the administrative agency under the substantial

evidence rule, the reviewing court may go no further than to examine the evidence to determine whether such evidence is not substantial because it is incredible, perjured, or unreasonable, unless there is simply no evidence to support the judgment. *Fireman's and Policeman's Civil Service Commission v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984).

B.

There is no competent evidence (more than a scintilla) that appellant's failure to release personal injury settlement funds to his client between December 23, 2010 and May 2011, was in violation of Rule 1.14(b), TDRPC because, as a matter of law, Appellant was mandatorily compelled to comply with Rule 1.14(c) TDRPC.

In this case, Chukwurah, is being sanction for complying with the mandatory provisions of Rule 1.14(c) TDRPC, as an exception to Rule 1.14(b) TDRPC. Rule 1.14(c) TDRPC provides in part:

“When in the course of representation a lawyer is in possession of fundsin which both the lawyer and other 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 separated by the lawyer *until the dispute is resolved*, and the undisputed portion shall be distributed appropriately (emphasis ours).”

Comment 3 to this Rule states in part:

“3 Third parties, such as a client' creditors, may have just claims against funds...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.....”

In *Butler v. Commission for Lawyer Discipline*, 928 S.W.2d 659, 663 (Tex. App. - Corpus Christi 1996, no writ) the Court of Appeals affirmed disciplinary sanctions based in part for a violation of Rule 1.14(c) TDRPC and held that Butler, who did not do so, should have set money aside until a dispute was resolved See also: Opinion 546, *Texas Commission of Professional Ethics*, (2002) (“An employment agreement should contemplate that any disputes over distribution of settlement or other funds might be subject to the requirement that disputed funds be held in trust by the lawyer or lawyers receiving such funds pending the outcome of the dispute.”)

Rule 1.14(c) TDRPC creates an exception to Rule 1.14(b) TDRPC which provides that upon receiving funds in which a client or third party has an interest, a lawyer shall notify the client and promptly deliver the funds to the client or third party. The Judgment of Active Suspension in this case contains a Finding of Fact and Conclusion of Law that Chukwurah did not release any funds to Complainant and her medical provider until May 2011, after Complainant filed a grievance and such was in violation of Rule 1.14(b) TDRPC. What is important is that there is no dispute in the testimony that the medical provider issued a bill to Jesuoba, dated February 16, 2010, for a total of \$2,780.00 (R.R. Ex. 4). Jesuoba delivered the bill to Chukwurah’s office, thereby placing him on notice of the medical provider’s claim for \$2,780.00 (R.R. 19, lines 19-25, 20, lines 1-3, 33, lines 1-17). Jesuoba testified that she would not have paid the medical provider \$2,780.00 (R.R. 24, lines 1-8). She further testified

she could not answer the question of whether she had a problem with Chukwurah holding the funds until the provider was paid a negotiated amount (R.R. 25, lines 1-7). And she did not write a demand letter demanding disbursement of the funds (R.R. 25, lines 8-22).

Chukwurah, according to the undisputed competent evidence, fully complied with his obligations under Rule 1.14(c) TDRPC. He received a settlement check in December 2010. He deposited the check properly in his Texas IOLTA trust account. He was presented with a bill from his client's medical provider for \$2,780.00, that his staff had obtained from the client. (R.R. 76, lines 9-25, 77, lines 1-25). He tried to negotiate with the medical provider over ten times with no result (R.R. 78, lines 18-25, 79, lines 1-25). While this was going on, from January 2010 to April 2011, the client filed a grievance. Finally, in April or May 2011, Jesuoba informed Chukwurah that she had negotiated the provider's bill to \$1,000.00. (R.R. 81, lines 20-25). Accordingly, in May 2011 he wrote checks out of the IOLTA account to the client and the provider (R.R. 83, lines 1-18). Until that time if Chukwurah had complied with the client's request, she would have received only \$437.00, instead of \$2,234.34, while she disputed the providers claimed amount of \$2,780.00. Compliance with Rule 1.14(b), and not honoring Rule 1.14(c), would have lead to total client dissatisfaction, a violation of Rule 1.14(c) TDRPC, and a probable grievance. Chukwurah plead Rule 1.14(c) TDRPC as a total defense to this claim (C.R. 8, CFLD00042-CFLD00043). This Board should not tolerate a finding of a violation of Rule 1.14(b) TDRPC when Chukwurah fully complied with the exception under Rule 1.14(c) TDRPC and should therefore reverse and render on this

violation, as a matter of law and under the no evidence standard.

C.

There is no competent evidence (more than a scintilla) that appellant violated 1.14(a) TDRPC because the average balance in appellant's IOLTA trust account from December 2010 to May 2011 was always sufficient to pay the contractual amount due Jesuoba of \$2,234.34 and the \$1,000.00 negotiated medical provider settlement.

Rule 1.14(a) TDRPC provides in part

“(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in the 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

This rule was effective January 1, 1990. The previous DR 9-102, Texas Code of Professional Responsibility (“TCPR”), had the same requirement, except did not include third person interests. DR 9-102 TCPR provided:

“(a) All funds of clients paid to a lawyer, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein
- (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of a lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally

resolved.....”

The facts in this case are controlled by the case of *The State Bar of Texas v. Patrick L. Gailey*, 889 S.W.2d 519, 520-521 (Tex.App-Houston [14th Dist.] 1994). In that case the State Bar argued that under the predecessor rule DR 9-102 (a), Gailey was strictly liable if his monthly bank statement on his client trust account reflected a daily balance at any point in time below that which he held in trust. The Court of Appeals rejected the position and held that as long as the average monthly balance showed enough to cover the amounts due the client and medical providers, such is all that is required under the rule and that there is no misappropriation of client trust funds. This was also supported, as in this case, by a client office ledger. The Court of Appeals declined to subject this standard of professional conduct only to the daily accounting of a commercial bank.

In this case, after the deposit of the settlement check for \$5,050.00, Chukwurah’s average bank ledger balance dipped to \$3,353.20 (In December 2010 (R.R. P. Ex. 4). This was always sufficient to pay the \$2,234.34 contractually due the client and the \$1,000.00 due the provider (R.R. 83, lines 19-25) Even in the alternative, if Chukwurah would have had to pay the \$2,780.00 billed by the provider with no discount, leaving a contractual amount due the client of only \$437.00, there was still always a sufficient amount to pay same, with the \$3,353.20 average *monthly* amount at the trust account’s low point, in December 2010.

Accordingly, under Texas Law there is no violation of Rule 1.14(a) TDRPC, constituting a misappropriation of client funds. Therefore, this Board should reverse and

render on this finding in favor of Chukwurah. Finding of fact, Number 5, in the Judgment of Active Suspension is not supported by any evidence and, indeed, is contrary to the evidence. The trust account *average monthly balance* for December 2010 to May 2011 are as follows: December 2010-\$3,353.20, January 2011-\$10,261.40, February 2011-\$6,255.42, March 2011- \$9,294.40, April 2011- \$5,473.59, May 2011 - \$7,964.52 and June 2011-\$15,600.15 (R.R. P. Ex. 4-10). Average monthly balances under the *Gailey* case, supra, are sufficient. There is no violation.

D.

There is no competent Evidence (beyond a scintilla) that from December 2010 to June 2011 that Appellant *regularly* used his trust account to directly pay Personal and Business Expenses, *Commingling his own funds with Client Funds in violation of Rule 1.14(a) TDRPC.*

The Judgment of Active Suspension contains a Finding of Fact, Number 6 and a Conclusion of Law, that Appellant's trust account records for the period of December 2010 through June 2011 show that Chukwurah regularly used his trust account to directly pay his personal and business obligations, *commingling his own funds with client funds*, in violation of Rule 1.14(a) TDRPC, by failing to hold funds and other property belonging in whole or part to clients or third persons in a lawyers possession, separate from the lawyers own property. While Rule 1.14(a) TDRPC states that a lawyer shall hold funds and other property belonging to clients or third parties that are in a lawyer's possession, in connection with a representation, separate from the lawyer's own property and that such funds should be kept

in a separate account, there is absolutely no evidence that Appellant *commingled* funds of his clients with his own, by making any deposits of his operating funds into his trust account. Indeed, all retainers were placed in Appellant's trust account of yet unearned funds until they were earned. Appellant testified numerous times at the evidentiary hearing that no attorney funds were removed from the IOLTA trust account until those funds and all of those funds had been *earned* and until all client funds and third party funds had been *paid* (R.R. 47, lines 7-12, 50, lines 1-12, 51, lines 13-20, lines 21-22, 52, lines 1-3, lines 13-20, lines 21-22, 52, lines 1-3, lines 8-14, 55 lines 17-20, lines 23-25, 56, lines 1-20, 58, lines 21-25, 59, lines 1-4, 69, lines 16-21, 70, lines 1-3, 88, lines 18-25, 89, lines 1-19, 94 lines 17-20). The only time any personal or business monies were paid out of trust account was after his money was already earned (R.R. 88, lines 18-25, 89, lines 1-2).

The dictates of Rule 1.14(a) were totally complied with. There is no evidence of commingling. Comment 2 is not quasi statutory and is merely suggestive. There has been no violation because occasionally a check was written by Chukwurah on his *earned* funds, after they were earned, directly to a creditor, rather than to his operating account and then out of such to the creditor. This is not the wording of the rule and such procedure does not destroy the integrity of the trust account, as an account that kept the funds of clients separate from Chukwurah funds. There is no evidence that Chukwurah kept his earned funds in the trust account commingled with funds of clients or deposited earned funds into such account commingled with client funds. Indeed, if Chukwurah did not deposit advance retainers in the

trust account, there would be a claimed violation of Rule 1.14(a) TDRPC for not holding unearned funds in the trust account. The Rule does not state that once the funds are *earned*, they have to be paid to an operating account, rather than directly paid for payment of Appellant's business or personal obligations. There is no evidence that such was regularly done in order to convert the structure of the trust account to an operating account. Chukwurah testified that he always maintained another operating account. (R.R. 86, lines 20-25, 87, lines 1-6, R. Ex. 7).

In every case decided under Rule 1.14 (a) TDRPC on violations, there has always been evidence that the lawyer failed to keep clients funds separate from his own funds or that there was commingling. There was neither here by Chukwurah. Only funds *earned* were withdrawn occasionally, not regularly, and paid for personal and business expenses. Accordingly, this Court should reverse and render judgment for Chukwurah on this finding.

E.

Alternatively, there is no finding of a Specific Sanction on Each Alleged Rule Violation, thus Requiring Reversal and Remand for such Determination.

The Judgment of Active Suspension found violations of Rules 1.14(a) and 1.14(b) TDRCP and under Sanctions, the Evidentiary Panel found that the proper discipline for *each act* of Professional Misconduct is active suspension. The sanction ordered was a total of forty-eight (48) months for all violations. But no specific sanction was imposed for a violation of 1.14(a) (failure to deliver funds to the client promptly, 1.14(b) misappropriation,

or 1.14(a) commingling funds.

Accordingly, if the Board was to find that there is no evidence on any point, it would not be able to determine, how much, if any, of the sanction applied to that violation, as opposed to another violation. Said another way there is no separate sanction for each violation that ran currently or consecutively made. Accordingly, if the Board finds no evidence and reverses and renders for Chukwurah on one or two alleged violations, but not on others, the Board will be required to reverse and remand for a further determination of what sanction should be applied to the violation or violations it affirms upon. Rules 2.17 P. (3), 2.18, 2.19, TRDP.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant, prays that the Board of Disciplinary Appeals reverse the Judgment of Active Suspension in this case and render Judgment that Appellee take nothing, as a matter of law. In the alternative, Appellant prays the Board of Disciplinary Appeals reverse the Judgment of Active Suspension and remand for another determination of any disciplinary sanction, if any, should be applicable to the violation, if any it affirms upon. Appellant also prays for costs and such other relief as may be appropriate.

Respectfully submitted,



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Houston, Texas 77046
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Facsimile: (713) 961-3082
E-mail: waynehparis@yahoo.com
Attorney for Appellant Cyril O. Chukwurah

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of Appellant* has been sent to Ms. Cynthia Hamilton, Assistant Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, via *Certified Mail Return Receipt Requested* on this the 2nd day of January, 2013.


Wayne H. Paris

Via CM/RRR: 7009 1410 0000 2195 8519

Ms. Cynthia Hamilton
Assistant Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711

APPENDIX

INDEX OF APPENDIX

- A. Petitioner's First Amended Evidentiary Petition
- B. Respondent's Original Answer
- C. Judgment of Active Suspension
- D. Opinion in *The State Bar of Texas v. Patrick L. Gailey*, 889 S.W.2d 519 (Tex. App-Houston [14th Dist.] 1994)

APR 16 2012

BEFORE THE EVIDENTIARY PANEL OF THE
STATE BAR DISTRICT NO. 4D GRIEVANCE COMMITTEE
STATE BAR OF TEXAS
HOUSTON CDC

COMMISSION FOR LAWYER DISCIPLINE,	§	H0041132816 [JESUOBA]
Petitioner,	§	
v.	§	
CYRIL O. CHUKWURAH,	§	
Respondent.	§	HARRIS COUNTY, TEXAS

PETITIONER'S FIRST AMENDED EVIDENTIARY PETITION

COMES NOW Petitioner, the COMMISSION FOR LAWYER DISCIPLINE, a committee of the STATE BAR OF TEXAS, and would respectfully show unto the Evidentiary Panel as follows:

I. PARTIES

Petitioner is the COMMISSION FOR LAWYER DISCIPLINE (hereinafter referred to as "Petitioner"), a committee of the STATE BAR OF TEXAS.

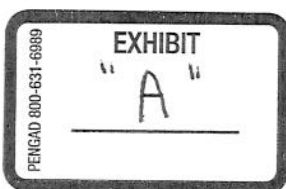
Respondent is CYRIL O. CHUKWURAH (hereinafter referred to as "Respondent"), Texas Bar Card No. 24048394, a licensed attorney and a member of the STATE BAR OF TEXAS.

II. NATURE OF PROCEEDING

Petitioner brings this disciplinary proceeding pursuant to the STATE BAR ACT, TEXAS GOVERNMENT CODE ANNOTATED §81.001, *et seq.* (Vernon 2003); the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT; and the TEXAS RULES OF DISCIPLINARY PROCEDURE. The Complaint that forms the basis of this cause of action was filed on or after January 1, 2004.

III. VENUE

Respondent's principal place of practice is Harris County, Texas; therefore, venue is appropriate in Harris County, Texas, pursuant to Rule 2.11B of the TEXAS RULES OF DISCIPLINARY PROCEDURE. Respondent may be served through his attorney of record



Wayne H. Paris, 8 Greenway Plaza, Suite 818, Houston, TX 77046, or wherever he may be found.

IV. PROFESSIONAL MISCONDUCT

The acts and omissions of Respondent, as hereinafter alleged, constitute professional misconduct as defined by Rule 1.06V of the TEXAS RULES OF DISCIPLINARY PROCEDURE.

V. CAUSE OF ACTION

1. Josephine Jesuoba ("Complainant") hired Cyril Okey Chukwurah ("Respondent") for representation regarding a personal injury claim.
2. In December of 2010, Respondent settled Complainant's personal injury claim. Respondent received a settlement check on behalf of Complainant in the amount of \$5,050.00 and deposited the check into his attorney trust account ("IOLTA") on December 23, 2010. Upon receipt of the settlement check, Respondent failed to notify Complainant and/or her medical providers and Respondent failed to disburse any funds to Complainant and/or her medical providers. Respondent did not release funds to Complainant and her medical providers until May of 2011, after Complainant filed her grievance.
3. Respondent failed to safeguard Complainant's settlement proceeds. On December 30, 2010, Respondent had a balance in his IOLTA of \$2,955.24, this amount was less than the \$3,233.34 owed to Complainant and her medical providers after Respondent withheld his fees and costs totaling \$1,816.66. Respondent also had balances in his trust account less than the amount owed to Complainant and her medical providers in February, April and May 2011. Respondent's trust account records for the period December 2010 through June 2011 indicate that Respondent regularly used his trust account to directly pay his personal and business obligations.

VI. RULE VIOLATIONS

The acts and/or omissions of Respondent described above constitute conduct in violation of Rules of the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT.

1.14(a) [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.]; and

1.14(b) [Upon receiving funds or other property in which a client or third person has an interest, 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.]

VII.

The Complaint that forms the basis of this cause of action was brought to the attention of the Office of the Chief Disciplinary Counsel of the STATE BAR OF TEXAS by Josephine Jesuoba's filing of a grievance on or about April 12, 2011.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner, the COMMISSION FOR LAWYER DISCIPLINE, respectfully prays that this Evidentiary Panel discipline Respondent, CYRIL O. CHUKWURAH, by reprimand, suspension or disbarment, as the facts shall warrant; order restitution to Complainant, if applicable; and grant all other relief, general or specific, at law or in equity, to which Petitioner may show itself to be justly entitled including, without limitation, costs and attorneys' fees.

Respectfully submitted,

STATE BAR OF TEXAS
Office of the Chief Disciplinary Counsel

LINDA A. ACEVEDO
Chief Disciplinary Counsel

J.G. MOLLESTON
Regional Counsel

State Bar No. 00795924
600 Jefferson, Suite 1000
Houston, Texas 77002
Phone: (713) 758-8200
Fax: (713) 758-8292

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, a true and correct copy of *Petitioner's First Amended Evidentiary Petition* was delivered to the following:

Via CM/RRR # 7004 1350 0002 6828 7223

Wayne H. Paris
Attorney at Law
8 Greenway Plaza, Suite 818
Houston, TX 77046

ATTORNEY FOR RESPONDENT



J.G. MOLLESTON

RECEIVED
NOV 16 2011
STATE BAR OF TEXAS
HOUSTON CDC

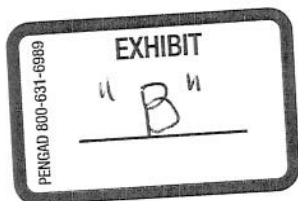
BEFORE THE EVIDENTIARY PANEL 4D OF THE
STATE BAR DISTRICT NO. 4 GRIEVANCE COMMITTEE

COMMISSION FOR LAWYER DISCIPLINE §
Petitioner, §
VS. § H0041132816 [JESUOBA]
CYRIL O. CHUKWURAH §
Respondent. § HARRIS COUNTY

RESPONDENT'S ORIGINAL ANSWER

COMES NOW the Respondent, Cyril O. Chukwurah and files this his Respondent's Original Answer to Petitioner's Original Evidentiary Petition on file herein and show unto the Evidentiary Panel as follows:

1. Respondent admits the allegations of Paragraph I, Parties of the Original Evidentiary Petition.
2. Respondent is without sufficient information to admit or deny the allegations of Paragraph II, Nature of Proceeding of the Original Evidentiary Petition.
3. Respondent admits the allegations of Paragraph III, Venue of the Original Evidentiary Petition.
4. Respondent denies the allegations of Paragraph IV, Professional Misconduct of the Original Evidentiary Petition.
5. Respondent admits the allegations of Paragraph V, Cause of Action, subparagraph 1, but denies the allegations of Paragraph V, Causes of Action, subparagraphs 2 and 3 of the Original Evidentiary Petition.
6. Respondent denies the allegations of Paragraph VI, Rule Violations of the Original Evidentiary Petition and further denies any violation of Rule 1.14 (a) and/or 1.14 (b) and/or any other



disciplinary rule of the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT.

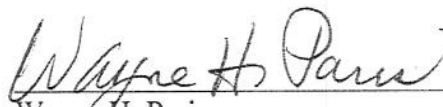
7. Respondent is without sufficient information to admit or deny the allegations of Paragraph VII of the Original Evidentiary Petition.

8. Respondent denies the allegations of the Prayer for Relief of the Original Evidentiary Petition.

9. Respondent fully complied with Rule 1.14(c), Texas Disciplinary Rules of Professional Conduct. Any funds in dispute were kept in Respondent's trust account until any dispute was resolved, and then promptly distributed.

10. WHEREFORE, PREMISES CONSIDERED, Respondent prays that upon trial on the merits Petitioner take nothing and that Respondent go hence with such other and further relief as he may show himself justly entitled, including a dismissal of Petitioner's claims with prejudice.

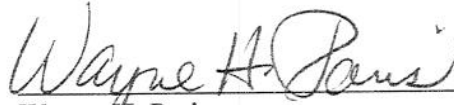
Respectfully submitted,



Wayne H. Paris
State Bar No. 15462000
8 Greenway Plaza, Suite 818
Houston, Texas 77046
Phone: (713) 951-9100
FAX#: (713) 961-3082
Attorney for Respondent Cyril O. Chukwurah

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Original Answer has been served upon all intended counsel of record on the 16th day of November 2011 by hand delivery and/or fax transmission.



Wayne H. Paris

Via Facsimile: (713) 758-8292

Ms. Jai L. Collier
Assistant Disciplinary Counsel
State Bar of Texas
600 Jefferson, Suite 1000
Houston, Texas 77002
By Fax: (713) 758-8292

BEFORE THE DISTRICT 4 GRIEVANCE COMMITTEE
EVIDENTIARY PANEL 4D
STATE BAR OF TEXAS

COMMISSION FOR LAWYER
DISCIPLINE,
Petitioner

V.

CYRIL O. CHUKWURAH,
Respondent

§
§
§
§
§
§
§
§

H0041132816 [JESUOBA]

HARRIS COUNTY, TEXAS

JUDGMENT OF ACTIVE SUSPENSION

Parties and Appearance

On June, 21, 2012, came to be heard the above styled and numbered cause. Petitioner, Commission for Lawyer Discipline, appeared by and through its attorney of record and announced ready. Respondent, Cyril O. Chukwurah, Texas Bar Number 24048394, appeared in person and through attorney of record, Wayne Paris, and announced ready.

Jurisdiction and Venue

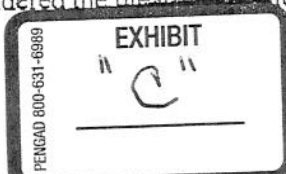
The Evidentiary Panel 4D having been duly appointed to hear this complaint by the chair of the Grievance Committee for State Bar of Texas District 4, finds that it has jurisdiction over the parties and the subject matter of this action and that venue is proper.

Professional Misconduct

The Evidentiary Panel, having considered all of the pleadings, evidence, stipulations, and argument, finds Respondent has committed Professional Misconduct as defined by Rule 1.06(V) of the Texas Rules of Disciplinary Procedure.

Findings of Fact

The Evidentiary Panel, having considered the pleadings, evidence and argument of counsel,



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makes the following findings of fact and conclusions of law:

1. Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.
2. Respondent resides in and maintains his principal place of practice in Harris County, Texas.
3. Josephine Jesuoba ("Jesuoba") hired Cyril Okey Chukwurah ("Respondent") for representation regarding a personal injury claim.
4. In December of 2010, Respondent settled Complainant's personal injury claim. Respondent received a settlement check on behalf of Complainant in the amount of \$5,050.00 and deposited the check into his attorney trust account ("IOLTA") on December 23, 2010. Respondent did not release any funds to Complainant and her medical providers until May of 2011, after Complainant filed her grievance.
5. Respondent failed to safeguard Complainant's settlement proceeds. On December 30, 2010, Respondent had a balance in his IOLTA of \$2,955.24, this amount was less than the \$3,233.34 owed to Complainant and her medical providers after Respondent withheld his fees and costs totaling \$1,816.66. Respondent also had balances in his trust account less than the amount owed to Complainant and her medical providers in February, April and May 2011.
6. Respondent's trust account records for the period December 2010 through June 2011 indicate that Respondent regularly used his trust account to directly pay his personal and business obligations, commingling his own funds with client funds.
7. The Chief Disciplinary Counsel of the State Bar of Texas has incurred reasonable attorneys' fees and direct expenses associated with this Disciplinary Proceeding in the amount of \$1,783.40.

Conclusions of Law

The Evidentiary Panel concludes that, based on foregoing findings of fact, the following Texas Disciplinary Rules of Professional Conduct have been violated:

1.14(a) [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.]; and

1.14(b) [Upon receiving funds or other property in which a client or third person has an interest, 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.]

Sanction

The Evidentiary Panel, having found that Respondent has committed Professional Misconduct, heard and considered additional evidence regarding the appropriate sanction to be imposed against Respondent. After hearing all evidence and argument and after having considered the factors in Rule 2.18 of the Texas Rule of Disciplinary Procedure, the Evidentiary Panel finds that the proper discipline of the Respondent for each act of Professional Misconduct is an active suspension.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Respondent shall be actively suspended from the practice of law for a period of forty-eight (48) months beginning June 21, 2012 and ending June 21, 2016.

Terms of Active Suspension

It is further ORDERED that during the term of active suspension ordered herein, Respondent shall be prohibited from practicing law in Texas; holding himself out as an attorney at law; performing any legal services for others; accepting any fee directly or indirectly for legal services; appearing as counsel or in any representative capacity in any proceeding in any Texas or Federal court or before any administrative body; or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "attorney," "counselor at law," or

"lawyer."

It is further ORDERED that, on or before July 21, 2012, Respondent shall notify each of Respondent's current clients and opposing counsel in writing of this suspension.

In addition to such notification, it is further ORDERED Respondent shall return any files, papers, unearned monies and other property belonging to current clients in Respondent's possession to the respective clients or to another attorney at the client's request.

It is further ORDERED Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) on or before July 21, 2012, an affidavit stating all current clients and opposing counsel have been notified of Respondent's suspension and that all files, papers, monies and other property belonging to all current clients have been returned as ordered herein.

It is further ORDERED Respondent shall, on or before July 21, 2012, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice of each and every court or tribunal in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing.

It is further ORDERED Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) on or before July 21, 2012, an affidavit stating Respondent has notified in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing in Court.

It is further ORDERED that, on or before July 21, 2012, Respondent shall surrender his law license and permanent State Bar Card to the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) to be forwarded to the Supreme Court of Texas.

Attorney's Fees and Expenses

It is further ORDERED Respondent shall pay all reasonable and necessary attorney's fees and direct expenses to the State Bar of Texas in the amount of \$1,783.40. The payment shall be due and payable on or before July 21, 2012, and shall be made by certified or cashier's check or money order.

Respondent shall forward the funds, made payable to the State Bar of Texas, to the Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

It is further ORDERED that all amounts ordered herein are due to the misconduct of Respondent, are assessed as a part of the sanction in accordance with Rule 1.06(Y) of the Texas Rules of Disciplinary Procedure. Any amount not paid shall accrue interest at the maximum legal rate per annum until paid and the State Bar of Texas shall have all writs and other post-judgment remedies against Respondent in order to collect all unpaid amounts.

Publication

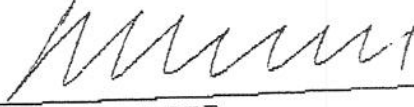
This suspension shall be made a matter of record and appropriately published in accordance with the Texas Rules of Disciplinary Procedure.

Other Relief

All requested relief not expressly granted herein is expressly DENIED.

SIGNED this 25 day of June, 2012.

EVIDENTIARY PANEL
DISTRICT NO. 4D
STATE BAR OF TEXAS



RICHARD MOORE
District 4D Presiding Member

889 S.W.2d 519
(Cite as: 889 S.W.2d 519)

H

Court of Appeals of Texas,
Houston (14th Dist.).

THE STATE BAR of Texas, Appellant,
v.
Patrick L. GAILEY, Appellee.

No. A14-94-00109-CV.
Oct. 13, 1994.
Rehearing Overruled Nov. 3, 1994.

In attorney disciplinary action, the 269th District Court, Harris County, David West, J., found attorney did not commit professional misconduct, and state bar appealed. The Court of Appeals, Murphy, J., held finding that attorney committed no misappropriation of client's trust funds was supported by evidence.

Affirmed.

West Headnotes

[1] Appeal and Error 30 1008.1(2)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(2) k. Findings of Fact and Conclusions of Law. Most Cited Cases

Appeal and Error 30 989

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k988 Extent of Review
30k989 k. In General. Most Cited Cases

Appeal and Error 30 1008.1(2)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(2) k. Same Effect as Verdict. Most Cited Cases

Appeal and Error 30 1012.1(4)

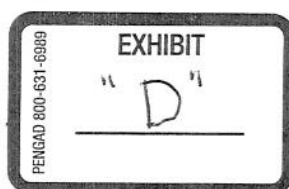
30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1012 Against Weight of Evidence
30k1012.1 In General
30k1012.1(4) k. Clearly, Plainly, or Palpably Contrary. Most Cited Cases

When reviewing findings of fact for legal and factual sufficiency, court of appeals must apply same standards that are applied in reviewing evidence supporting jury's answer; all evidence must be considered and weighed, and finding set aside only if it is so contrary to overwhelming weight of evidence as to be clearly wrong and unjust, and conclusions of law drawn from findings are reviewed to determine their correctness.

[2] Attorney and Client 45 44(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k44 Misconduct as to Client
45k44(2) k. Misappropriation and Failure to Account. Most Cited Cases

Although monthly bank statement reported that balance in attorney's trust account fell below amount



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held in trust for client, attorney committed no misappropriation of client's funds where attorney's office records indicated sufficient funds in account and client was not harmed. State Bar Rules, V.T.C.A., Government Code, Title 2, Subtitle G App., Art. 10, § 9, Code of Prof.Resp., Canon 9; DR 9-102(A).

*519 Linda A. Acevedo, Austin, for appellant.

Terrence Gaiser, Houston, for appellee.

Before J. CURTISS BROWN, C.J., and MURPHY and ELLIS, JJ.

OPINION

MURPHY, Justice.

In this appeal, we consider whether an attorney violated Disciplinary Rule 9-102(A) of the Texas Code of Professional Responsibility ("Preserving Identity of Funds and Property of a Client").

In July 1992, the State Bar of Texas brought disciplinary action against appellee, Patrick L. Gailey, for professional misconduct in five unrelated matters. After a bench trial, the court entered judgment in appellee's favor on all five matters. The appellant disputes the findings in two of the matters, both of which involve bank records which show that appellee's client trust account balance fell below the amount necessary to pay out the sums he held in trust. We find that the trial court's findings of fact and conclusions of law that appellee did not *520 commit professional misconduct are fully supported by the evidence, and affirm the judgment of the trial court.

On December 16, 1988 and February 22, 1989, appellee deposited two clients' settlement checks of \$18,000 and \$13,000, respectively, into his client trust fund. Appellee attempted to resolve fee disputes with medical providers on behalf of these clients. Subsequently, he withheld total payments of \$7993.50 from the providers with the clients' knowledge. In July 1989, when the disputes were resolved, appellee paid the medical providers. During the interval between making the deposits and paying the providers, appellee's March and April 1989 bank statements indicated that the funds held in his client trust fund account fell below \$7993.50, the amount necessary to pay the clients' bills from the medical providers. Nevertheless, appellee's own office records indicated sufficient funds in the client trust fund.^{FN1} The record shows no

evidence that appellee misappropriated or misdirected the funds, or that the clients were harmed. The trial court found that appellee had deposited sufficient funds in the trust account and withheld payment pending a resolution of a fee dispute with a medical provider. In addition, the appellee's office ledger indicated the trust account's average monthly balance between January and July to be \$31,446.68, an amount ample to cover fees for professional services for his clients.

FN1. Appellee's office ledger is not among the records sent to this Court for review. Nevertheless, we find appellee's uncontroverted testimony in the statement of facts to be sufficient in determining the contents of the office ledger.

Appellant contends that the trial court's findings of facts and conclusions of law are ambiguous, and raises three points of error related to that ambiguity. In its first point of error, appellant maintains that the court's finding that the actual balance in appellee's client trust account was adequate to pay the amount held in trust to be against the great weight and preponderance of the evidence. Points of error two and three, allege that the trial court findings, as a matter of law, cannot lead to the court's conclusion.

[1] When reviewing findings of fact for legal and factual sufficiency, the court of appeals must apply the same standards that are applied in reviewing the evidence supporting a jury's answer. Zieben v. Platt, 786 S.W.2d 797, 799 (Tex.App.—Houston [14th Dist.] 1990, no writ). All of the evidence must be considered and weighed, and the finding set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex.1989); Cain v. Bain, 709 S.W.2d 175, 176 (Tex.1986). Conclusions of law drawn from the findings of fact are reviewed to determine their correctness. Zieben, 786 S.W.2d at 799.

The applicable portion of the Texas Code of Professional Responsibility states:

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is

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(Cite as: 889 S.W.2d 519)

situated and no funds belonging to the lawyer or law firm shall be deposited therein.

State Bar Rules, art. X, § 9, DR 9–102(A) (Texas Code of Professional Responsibility), (Vernon 1988).^{FN2}

FN2. On October 17, 1989, by Order of the Supreme Court, Article X, § 9, DR 9–102(A) was repealed and Article X, § 9 of the current State Bar Rules was adopted, effective January 1, 1990. See TEX.DISCIPLINARY R.Prof.Conduct, REPRINTED IN TEX.GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp.1994) (STATE BAR RULES art. X, § 9).

Appellant argues, in effect, that an attorney violates DR 9–102(A) and is strictly liable if the monthly bank statement of his client trust fund reflects a balance below that which he holds in trust. Appellant would apply this rule of strict liability regardless of a showing that the bank failed to credit deposits timely, that the client suffered no harm, or that the attorney did not misappropriate client funds. Other jurisdictions have applied a similar rule by finding professional misconduct by misappropriation, whether intentional or unintentional, when the bank balance of the client trust account falls below the amount held in trust. *521 *In re Hines*, 482 A.2d 378, 386 (D.C.1984); *Giovanazzi v. State Bar of California*, 28 Cal.3d 465, 169 Cal.Rptr. 581, 585–86, 619 P.2d 1005, 1009 (1980); *Iversen v. New York State Bar Ass'n*, 51 A.D.2d 422, 381 N.Y.S.2d 711, 713 (1976).

[2] Appellant cites no Texas authority, nor have we been able to find any, that applies a strict liability standard under the DR 9–102(A). Furthermore, we find no Texas authority which addresses the document by which the adequacy of an attorney's conduct is to be judged under DR 9–102(A), or that declares a bank statement to be above reproach. We decline to subject the standard of professional conduct only to the monthly accounting of a commercial bank. We find sufficient evidence to support the trial court's conclusion that appellee committed no professional misconduct under DR 9–102(A) of the Texas Code of Professional Responsibility.

We overrule appellant's points of error and affirm the judgment of the trial court.

Tex.App.–Houston [14 Dist.],1994.
The State Bar v. Gailey
889 S.W.2d 519

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