

ORAL ARGUMENT REQUESTED

NO. 56562

IN THE BOARD OF DISCIPLINARY APPEALS
STATE BAR OF TEXAS
AUSTIN, TEXAS

JOHN HATCHETT CARNEY,

Appellant

v.

COMMISSION FOR LAWYER DISCIPLINE,

Appellee.

On Appeal from the Final Decision
of the Evidentiary Panel, District 6 Grievance Committee
State Bar of Texas at Dallas, Texas
Case No. D0091144006

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FILED

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Board of Disciplinary
Appeals

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THE RECORD ON APPEAL

The record on appeal consists of a Clerk’s Record in a single volume (cited as “CR Item No. ___”), a Reporter’s Record in a single volume (cited as “RR p. ___”), Commission Exhibits 1, 2 and 4 (cited as “CX ___”), Respondent Exhibits 1, 2 and 3, as well as a fourth exhibit (the Haas deposition), which was added to the record as an offer of proof during the hearing on Respondent’s Motion For New Hearing or For Amended Judgment (cited as “RX ___” or “Depo. ___”).

STATEMENT OF THE CASE

The State Bar of Texas initiated this grievance complaint against attorney John Hatchett Carney, alleging that Carney had failed to keep his personal funds separate from client funds in his firm’s client trust account, and that he had disbursed funds from the trust account to persons not entitled to receive them, both acts in violation of Rule 1.14 of the Texas Rules of Disciplinary Procedure.

STATEMENT OF BODA JURISDICTION

Pursuant to Rule 2.21 of the Texas Rules of Disciplinary Procedure, the parties to a disciplinary action may appeal any finding, conclusion, or sanction imposed by an evidentiary panel to the Board of Disciplinary Appeals.

STATEMENT OF THE ISSUES PRESENTED

1. The Evidentiary Panels Finding That Respondent Committed Professional Misconduct is Not Reasonably Supported by Substantial Evidence When Considering the Record as a Whole.

A. The Scope and Standard of Review.

B. The Evidentiary Panel's Determination That Respondent Failed to Keep Funds Belonging in Whole or in Part to Clients or Third Persons Separate From His Own Property, in Violation of TEX. R. DISC. P. 1.14(a), Is Not Reasonably Supported by Substantial Evidence When Considering the Record as a Whole.

C. The Evidentiary Panel's Determination That Respondent Failed to Disburse Funds In a Trust Account Only to Those Persons Entitled to Receive Them By Virtue of The Representation or by Law, In Violation of TEX. R. DISC. P. 1.14(b), Is Not Reasonably Supported By Substantial Evidence When Considering The Record As A Whole.

2. The Evidentiary Committee Erred In Excluding From Evidence On a Hearsay Objection The Deposition of Dolph Haas, Because The Deposition Was Admissible Under The Exception To Hearsay In Rule 804(b) (1).

3. The Evidentiary Panel's Finding That the Appropriate Sanction Against the Respondent is His Active Suspension From The Practice of Law For a Period of Two (2) Years is Arbitrary or Capricious, an Abuse of Discretion, or a Clearly Unwarranted Exercise of the Panel's Discretion.

4. The Evidentiary Panel's *Judgment of Partially Probated Suspension* Must Be Reversed, and the Case Remanded for a New Hearing, Because Carney's Due Process Right to an Impartial Fact Finder Was Violated When the Panel Considered Improper and Irrelevant Matters, and the Rules Provided Carney with No Opportunity to Recuse Any Panel Member Prior to the Evidentiary Hearing.

STATEMENT OF FACTS

The Commission's First Amended Evidentiary Petition makes two allegations: (1) that between March 1, 2010, and April 30, 2011, Respondent Carney failed to keep funds belonging in whole or in part to clients or third persons separate from his own property, in violation of Rule 1.14(a) of the Texas Disciplinary Rules of Professional Conduct; and (2) that Respondent Carney disbursed funds in a trust account, Bank of Texas N.A. account number 2880530771 styled "John H. Carney & Associates IOLTA Trust Account," to persons not entitled to receive them, in violation of Rule 1.14(c) of the Texas Disciplinary Rules of Professional Conduct. (CR 8). The State Bar of Texas filed the complaint on its own initiative; no client ever complained about Mr. Carney. (CR 8; RR 8).

The Evidentiary Panel's *Judgment of Partially Probated Suspension* sustained both findings. (CR 47).

The evidence at the disciplinary hearing showed the following:

John Hatchett Carney was licensed to practice law in 1981 and was actively engaged in a litigation practice at the time of the hearing. (RR 9). Prior to practicing law, he was a registered broker/dealer/principal for an investment banking firm, where he handled hundreds of millions of dollars as a fiduciary

without a single complaint. He had also owned and operated a federal savings bank with about a hundred employees. (RR 21).

Carney was the sole authorized signatory of the client trust account he maintained for his law firm at Bank of Texas, although his signature had also been forged by others. (RR 9-10). His office manager, Randolph Vinton “Dolph” Haas, was the only person who reconciled the bank statements for the account from 1999 through the present. (RR 10).

Trust account records for the period from March 2010 through April 2011 were admitted into evidence as Commission Exhibit No. 1 (CX 1). Some of the funds deposited into the account belonged to clients, and some of the funds deposited into the account belonged to third parties. (RR 11). Carney’s law firm had about a dozen employees during this time, consisting of five attorneys and seven staff personnel. (RR 23-24). The firm also maintained an operating account and a payroll account. (RR 27).

Several withdrawals from the account were shown to be payments for Mr. Carney’s law firm or personal expenses, including employee health insurance premiums, a wire transfer to his daughter, a payment for office supplies, utilities, . (RR 12-16). Carney denied making any of these transfers or payments for his personal or business expenses, saying that all of the checks had been forged. (RR 17). He conceded that similar personal and business expenses appear on each

monthly statement in the exhibit, but denied making or authorizing any of them. (RR 17). There was a check number 5320 payable to cash, which Carney denied signing, and a check number 5328 payable to cash, which he admitted signing but said the amount of the check had been altered after he signed it. (RR 14-15).

Carney's clients were either charged a contingent fee or an hourly fee with a replenishable retainer. All gross revenues received under either method were deposited into the client trust account. (RR 27). Credit card payments were processed through a separate client trust account because of the risk of payments being charged back. (RR 26). Haas was given strict instructions as to the type of funds that could be deposited into each trust account. (RR 26).

Clients were billed at the middle and end of each month. (RR 28) Haas was instructed to transfer funds from the trust accounts to the operating account as they were earned, and to pay all operating expenses out of the operating account, except that salaries and tax withholdings would first be transferred to the payroll account and paid out of that account. (RR 27-28). Carney was never aware of any problem in the handling of these accounts during the 2010-2011 timeframe until he received the Complaint in this case. (RR 28). When Carney investigated the allegations made by the State Bar of Texas, he discovered that three employees, Haas, paralegals Barbara Stewart and Bridget Smiley, had each deposited large amounts

of their personal funds into the client trust account without his knowledge. (RR 28, 36).

Carney also discovered that they had each begun surreptitiously withdrawing their own funds by altering or forging checks. (RR 28). All of the personal funds deposited by Haas and Stewart were identified and separately admitted as Respondent's Exhibit Numbers 1 and 2. (RX 1, 2). All of the payments and transfers made out of the trust account by Mr. Haas without Carney's knowledge were separately identified and included in Respondent's Exhibit Number 3. (RX 3). They included all of the disbursements about which the State Bar of Texas had complained. (RR 33).

All of the unauthorized disbursements made by check were either forged or altered. For example, a check number 5313 payable to cash that Carney had signed was originally for \$1,000.00, but was altered to read \$4,000.00 and was endorsed for deposit by Haas. (RR 34). A check numbers 5315 and 5320 had Carney's signature forged as payor. (RR 35). Haas used a stamp of Carney's signature without his knowledge or authorization on some checks. The wire transfers were initiated and processed by Haas without Carney's knowledge or authorization, and did not require his signature. (RR 35).

The total amount of employee funds deposited into the account over the years was approximately \$850,000.00, although this includes funds that had been

withdrawn by the employees and later re-deposited. (RR 60). Not including re-deposited funds, the employees deposited approximately \$660,000.00 of their personal funds. (RR 45).

A CPA audited the trust account and determined that the employees' withdrawals never exceeded the amounts of their deposits, that no client funds were ever used for any of the disbursements in question, and that some of the employees' funds remained in the account even as of the date of the hearing. (RR 36, 38-39). The employees had decided to deposit their own funds without telling Carney because he had been focusing his attention and efforts on a particularly big litigation case, and they did not want to distract him with what would have otherwise been a large cash shortfall in the payment of operating expenses. Carney had no knowledge or control over these transactions, and did not at any time agree to borrow the employees' funds. In fact, the firm's accountant treated all of the employees' deposits as income to the firm, on which Carney initially had to pay income taxes. (RR 37). Carney has since had to file amended returns to eliminate the phantom income. (RR 39).

Haas' actions -- in making the disbursements in question, and in making them out of the trust account, rather than first transferring funds to the operating account and making the disbursements out of that account -- were not only unauthorized, but were directly contrary to Carney's specific instructions requiring all such payments

to be made out of the operating account and requiring his signature on each payment. (RR 37). The deposits of personal funds made by the employees were also not only unauthorized, but were also directly contrary to instructions Carney had given them, as they had made similar deposits six or eight years earlier, causing an IRS inquiry to be made. At the time, Carney warned them never to do it again. (RR 40).

After Carney discovered what his employees had done, he implemented changes to the access and oversight of the firm's accounts,, including the trust account. As of the date of the hearing, they were now controlled by an independent CPA, Mark Grigsby. (RR 39). The firm's accountants have confirmed to Carney that, other than the initial mischaracterization of the employee deposits as firm income, the firm's accounting records at all times accurately distinguished between client funds and firm funds. (RR 40).

State Bar of Texas records showed that Carney's disciplinary history included a single private reprimand. (CX 2).

ARGUMENT AND AUTHORITIES

1. The Evidentiary Panels Finding That Respondent Committed Professional Misconduct is Not Reasonably Supported by Substantial Evidence When Considering the Record as a Whole.

A. The Scope and Standard of Review.

An appeal of an evidentiary panel's judgment is subject to the substantial-evidence standard of review. TEX. R. DISC. P. 2.24; *Sally v. Tex. State Bd. of Med. Examiners*, 351 S.W.3d 434, 449 n. 19 (Tex. App. – Austin 2011, pet. denied).

Under the substantial evidence rule, this Board may not substitute its judgment for the judgment of the evidentiary panel on the weight of the evidence on questions committed to agency discretion but ... (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency's statutory authority;
- (C) made through unlawful procedure;
- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

TEX. GOV'T CODE §2001.174

When applying the substantial evidence rule, a reviewing court looks only at the record made before the administrative body and determines if its findings are reasonably supported by substantial evidence.. Review under the substantial evidence rule presents purely a legal issue, and a trial of the fact issues by a judge or jury is avoided. *Bank of North America v. State Banking Board*, 492 S.W.2d 458, 459 (Tex. 1973); *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 586 (Tex. App. – San Antonio 2006, no pet.).

B. The Evidentiary Panel’s Determination That Respondent Failed to Keep Funds Belonging in Whole or in Part to Clients or Third Persons Separate From His Own Property, in Violation of TEX. R. DISC. P. 1.14(a), Is Not Reasonably Supported by Substantial Evidence When Considering the Record as a Whole.

Rule 1.14(a) of the Texas Disciplinary Rules of Procedure reads, in pertinent part:

(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.

TEX. R. DISC. P. 1.14(a)

The Commission has taken the position that *Neely v. Comm'n for Lawyer Discipline*, 302 S.W.3d 331 (Tex. App.-- Houston [14th Dist.] 2009, pet. denied). stands for the proposition that a violation of Rule 1.14(a) is proven by the mere

fact that an attorney's personal or business expenses are paid directly out of the trust account. It made precisely this argument to the Evidentiary Panel. (RR 66).

The *Neely* case is clearly distinguishable from this case. In *Neely*, the attorney personally deposited his personal funds into the trust account and personally paid substantially all of his personal expenses out of the trust account. *Neely*, 302 S.W.3d at 345-46. The trust account contained \$259,435.43 of the attorney's money and only \$9,543.00 of client funds. *Neely*, 302 S.W.3d at 346.

In other words, (1) the attorney's ownership of funds in the account, (2) the presence of client funds in the account and (3) the attorney's personal control over both funds were all proven. These are the essential elements of the violation. All three elements were proven by the attorney's own direct testimony admitting them, so his use of the funds to pay his own expenses was not the basis on which commingling was proven. *Neely*, 302 S.W.3d at 346.

However, *Neely* does cite *Brown v. Commission for Lawyer Discipline* for the proposition that an attorney's use of trust funds to pay personal expenses proves his ownership of those funds while commingled in the trust account with client funds. *Neely*, 302 S.W.3d at 346, citing *Brown v. Commission for Lawyer Discipline*, 980 S.W.2d 675, 678 (Tex. App. San Antonio 1998, no pet.). However, *Brown* does not stand for that proposition. *Brown* did not involve a client trust account, but an actual joint account co-owned by the attorney and a client. *Brown*,

980 S.W.2d at 678. The funds deposited into the account initially belonged only to the client, but the client owed some of the money to care providers. *Id.* The attorney nevertheless wrote several checks on the account to pay his personal expenses, resulting in a grievance by the client accusing him of misappropriating the client's money. *Id.*

Citing Comment 2 to Rule 1.14, the court held that the attorney's use of the funds to pay personal expenses supported a finding that the attorney had violated Rule 1.14(c)'s requirement that attorney hold property in which both the attorney and a client claim an interest, until there is an accounting and a severance of those interests. *Brown* did not involve a violation of Rule 1.14(a) or an allegation of commingling. *Brown* involved disputed claims to the same money.

In contrast to both *Neely* and *Brown*, there is no evidence that the funds used to pay Carney's expenses in this case ever belonged to Carney. To the contrary, it was undisputed that the funds belonged to three employees of the firm. Rule 1.14(a) of the expressly permits the funds of "third parties" to be kept in a trust account along with client funds. TEX. R. DISC. P. 1.14(a). Respondent's employees are clearly "third parties," so no violation occurred when those employees deposited their funds into the account.

Even without the direct evidence that the funds were employee owned, the Commission could not have proven a violation of Rule 1.14(a). Had Carney made

the payments out of the trust account to pay his own expenses, as in *Neely*, such control and use of the funds might support an inference of ownership by the attorney. *See Neely*, 302 S.W.3d at 347. However, such an inference would be impermissible in this case because it would be contrary to the undisputed direct testimony that the funds were owned by the three employees. *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005); *Garcia v. Garcia*, 170 S.W.3d 644 (Tex App. – El Paso 2005). Such an inference would be impermissible under the substantial evidence standard of review as well. TEX. GOV'T CODE §2001.174 (2) (e) (inferences must be supported by substantial evidence when considering record as a whole).

C. The Evidentiary Panel's Determination That Respondent Failed to Disburse Funds In a Trust Account Only to Those Persons Entitled to Receive Them By Virtue of The Representation or by Law, In Violation of TEX. R. DISC. P. 1.14(b), Is Not Reasonably Supported By Substantial Evidence When Considering The Record As A Whole.

Rule 1.14(c) of the Texas Disciplinary Rules of Procedure reads, in pertinent part:

(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.

TEX. R. DISC. P. 1.14(c)

The Commission contends that the *Brown* case stands for the proposition that a violation of Rule 1.14(c) is also proven by the mere fact that an attorney has paid his personal or business expenses directly out of a client trust account. It made precisely this argument to the Evidentiary Panel. (RR 67).

Brown, however, involved a completely different type of Rule 1.14(c) violation from the one alleged here. *Brown* involved a violation of Rule 1.14(c)'s requirement that an attorney hold property in which both the attorney and a client claim an interest, until there is an accounting and a severance of those interests. This case alleged a violation of Rule 1.14(c)'s requirement that trust account funds "be disbursed only to those persons entitled to receive them by virtue of the representation or by law."

Brown correctly holds that an attorney's payment of personal expenses from trust account funds claimed by a client proves a violation of the attorney's duty to hold the funds until there is an accounting and severance of interests. *Brown*, 980 S.W.2d at 678. It does not support a conclusion that the recipients of those payments were not entitled to receive them.

There is no evidence to support a conclusion that Carney disbursed funds from the client trust account to persons not entitled to receive them in violation of Rule 1.14(c). In fact, the Panel's Judgment contains a finding only that "Respondent failed to disburse funds in a trust account only to those persons

entitled to receive them by virtue of the representation or by law,” which when stated in the negative does NOT constitute a violation of the Rule - a “failure to disburse funds” is not the same thing as affirmatively disbursing funds to persons not entitled to receive them.

In any event, the undisputed evidence proved that the disbursements were made by the employees without Carney’s knowledge, and were not made by Carney himself, which is an essential element of a Rule 1.14(c) violation. Carney’s credibility as a witness was never placed in issue.

The Commission argued to the Panel that a violation occurred even if the firm’s employees did exactly what Carney said they did, because “ultimately, he’s responsible for what goes on in his office. He’s the one charged with complying with the Disciplinary Rules.” (RR 67). But this is clearly contrary to the law of agency.

Carney would not be responsible for the actions of the three employees unless those actions were within the course and scope of their employment. Not only was such a theory of liability never pleaded by the Commission, but it was negated by the undisputed evidence that the actions of the employees, both in depositing their own funds, and in disbursing their own funds, were not only unauthorized by the Respondent, but were directly contrary to his instructions. This precludes any inference that the acts were within the scope of the employees’

agency and precludes any conclusion that Carney could be held liable for those acts in *respondeat superior*.

Likewise, the undisputed evidence negated any finding that the persons to whom the trust funds were disbursed were not entitled to receive them by law. Because the funds disbursed to Carney's creditors belonged to the employees, those employees were legally entitled to direct that the funds be disbursed to whomever they wanted -- even if the recipient is one of Respondent's creditors. Consequently, the persons who received those funds were legally entitled to receive them, as a matter of law.

In addition, one of the terms of probation imposed by the Evidentiary Panel was requiring Carney to complete twenty-five (25) additional hours of continuing legal education in the area of Law Practice Management. (CR 47). This would be logical only if the Panel believed Carney's undisputed testimony about his employees' handling of the trust account.

2. The Evidentiary Committee Erred In Excluding From Evidence On A Hearsay Objection The Deposition Of Dolph Haas, Because The Deposition Was Admissible Under The Exception To Hearsay In Rule 804(B) (1).

Respondent requested to read the deposition of Dolph Haas into evidence. (RR 44). The Commission objected on hearsay and relevance grounds, because Haas had made himself unavailable to be deposed in this case by pleading the Fifth Amendment, and the deposition being offered was from a related but separate case

to which the Commission was not a party. (RR 44). A copy of this deposition, however, had been provided to the Commission in advance of the hearing. (RR 44). The Evidentiary Panel sustained the Commission's objections. (RR 45). The Panel subsequently ordered the deposition transcript added to the record during a post-judgment hearing, making it available as an offer of proof. (App. D).

The Evidentiary Committee erred in excluding from evidence on a hearsay objection the deposition of Dolph Haas, because the deposition was admissible under the exception to hearsay in Rule 804(b) (1). Mr. Haas was unavailable to testify in this matter because it was undisputed that the State Bar of Texas did not take his deposition in this matter because of his expressed intent to assert his constitutional right not to incriminate himself. A witness is rendered unavailable when he invokes his Fifth Amendment privilege not to testify. TEX.R.EVID. 804(a)(1) (A); *see also Granger v. State*, 653 S.W.2d 868, 873 (Tex.App.-Corpus Christi 1983), *aff'd*, 683 S.W.2d 387 (Tex. Cr. App. 1984), *cert. denied*, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985).

When a witness is unavailable to testify under Rule 804, his deposition in another case is admissible when the opposing party in that case had an opportunity to cross-examine the witness and had a "similar motive" to the State Bar of Texas in developing the testimony of the witness by cross-examination. TEX.R.EVID. 804(b). The case in which the deposition was taken was filed by the Internal

Revenue Service, which sought to determine, for income tax purposes, whether the funds in the IOLTA account belonged to Mr. Carney, to his clients, or to Mr. Haas.

Ownership of the funds is precisely the same issue before this Board. So the IRS clearly had a “similar motive” to the State Bar of Texas in developing the testimony of Mr. Haas, and the deposition is admissible under Rule 804(b).

Had the deposition testimony been properly admitted into evidence, it would have corroborated all of Carney’s testimony regarding the deposits and disbursements from the client trust account. It would have confirmed Carney’s testimony that he was unaware of Haas’ actions, and that Haas had intentionally concealed his actions from Carney. It would have precluded any inference that Haas had acted as Carney’s agent in making the deposits or disbursements, and it would have precluded any inference that Haas and Carney conspired or acted in concert in making the deposits or disbursements.

3. The Evidentiary Panel’s Finding That the Appropriate Sanction Against the Respondent is His Active Suspension From The Practice of Law For a Period of Two (2) Years is Arbitrary or Capricious, an Abuse of Discretion, or a Clearly Unwarranted Exercise of the Panel’s Discretion.

Rule 2.18 lists the factors that an Evidentiary Panel should consider in determining an appropriate sanction for professional misconduct. Tex. R. Disc. P. 2.18. They include the nature and degree of the Professional Misconduct, the seriousness of and circumstances surrounding the Professional Misconduct, the loss or damage to clients; the damage to the profession; the assurance that those

who seek legal services in the future will be insulated from the type of Professional Misconduct found; the profit to the attorney; the avoidance of repetition; the deterrent effect on others; the maintenance of respect for the legal profession; the conduct of the Respondent during the course of the Disciplinary Proceeding; and the Respondent's prior disciplinary record.

Even assuming a violation occurred, most of these factors weighed heavily in favor of leniency: the respondent's lack of scienter or personal involvement; the absence of harm to any client; the absence of profit to Carney; the corrective measures already implemented to prevent repetition; and Carney's long and successful record of fiduciary responsibility in the banking and securities industries, as well as the complete absence of any complaints regarding Carney's fiduciary duties during his legal career.

The Panel's sanctions against Carney must be reversed under the substantial evidence rule is they are clearly excessive or arbitrary. They are both.

For one thing, the sanction imposed by the Panel nearly doubled the sanction that was actually requested by the Commission at the conclusion of the evidentiary hearing. The Commission argued that "[b]ased on these factors in 2.18, the Commission believes an appropriate sanction to be a two-year fully probated suspension with trust account monitoring and attorney fees and costs of

\$5,840.96.” (RR 69). The Panel imposed a four-year, partially-probated suspension. (CR 47).

Moreover, the far lesser sanction sought by the Commission was itself based on the Commission’s unsupported and exaggerated claims regarding the seriousness of the alleged misconduct. The Commission based its request for a two-year probated suspension on its claim that Carney had misappropriated client funds, and argued that “misappropriating funds in the trust account is one of the most serious Disciplinary Rules a lawyer can violate.” (RR 67-68). The Commission also argued that a private reprimand was unavailable to Carney because “Rule 13(c) states that private reprimands shall not be utilized if the misconduct includes misapplication of fiduciary property. According to these internal operating rules, a private reprimand is not an available sanction in this case.” (RR 69).

There is no evidence that any client funds were ever used or that the disbursements ever exceeded the amount of the employees’ personal funds that had been deposited. In fact, the undisputed testimony was that no client funds had been touched. So no funds were ever misappropriated, and consequently there was no factual basis for even the two-year probated suspension sought by the Commission. A sanction more than twice as harsh as that requested by the Commission, based

on evidence of professional misconduct that is flimsy to non-existent, can only be described as arbitrary and excessive.

4. The Evidentiary Panel's *Judgment of Partially Probated Suspension* Must Be Reversed, and the Case Remanded for a New Hearing, Because Carney's Due Process Right to an Impartial Fact Finder Was Violated When the Panel Considered Improper and Irrelevant Matters, and the Rules Provided Carney with No Opportunity to Recuse Any Panel Member Prior to the Evidentiary Hearing.

One of the Panel Members improperly asked Respondent on three occasions during the hearing, "have you paid your taxes" or a variation of the same question. (RR 65, 66). The undisputed evidence before the Panel was that the employee funds deposited into the firm's trust account had erroneously been reported as income on Carney's tax returns, and that Carney had subsequently filed amended tax returns to eliminate the error. (RR 39, 46). There was no evidence suggesting any unpaid taxes were owed; indeed, the more reasonable inference from this testimony might be that Carney was owed a tax refund.

Regardless, whether Carney owed any taxes had no relevance to this proceeding. But the form of the question, which clearly assumed the existence of an unpaid tax debt, clearly indicated that the panel member was aware of published media reports alleging such a debt. More importantly, the questioning proved that the panel member considered these irrelevant and unproven reports despite the fact

that they were outside of the record, and considered them relevant enough to make repeated inquiries.

Rule 2.03(a) of the Internal Procedural Rules, Texas Board of Disciplinary Appeals makes BODA members subject to disqualification and recusal as provided in Rule 18b of the Texas Rules of Civil Procedure. Rule 2.06 of the Texas Rules of Disciplinary Procedure likewise makes panel members subject to recusal or disqualification for an evidentiary hearing if a district judge would be disqualified or recused under similar circumstances.

However, the Rules provided Carney with no method or procedure by which he could timely exercise the remedy of recusal prior to the hearing, such as an opportunity to *voir dire* the evidentiary panel, because the grounds for recusal or disqualification were not reasonably discoverable until the conclusion of the hearing. Consequently, the issue of recusal was moot before the ten day period allowed by Rule 2.06 for a motion to recuse had even commenced.

While the record establishes that improper and irrelevant matters were considered by the panel in this case, the law requires that the panel's consideration of improper and irrelevant matters be presumed anyway. This presumption is required because the absence of a meaningful procedural remedy violated Carney's due process right to an impartial fact finder. The violation of Carney's due process rights also that a new hearing with a new panel be ordered. *See Williams v.*

Rodocker, 84 S.W.2d 556 (Tex. Civ. App. – Eastland 1935, no writ) (erroneous argument to jury without a remedy must be presumed harmful); *see also* TEX. GOV'T CODE §2001.174(substantial evidence rule requires reversal when decision is made in violation of constitutional provision or through unlawful procedure).

CONCLUSION AND PRAYER FOR RELIEF

The undisputed evidence in this case established that the funds used to pay Carney's personal and business expenses out of Carney's client trust account belonged to third parties and not to Carney, so there is no evidence that Carney failed to separate his own funds from those of his clients and the third parties. Likewise, the undisputed evidence in this case established that the payment of Carney's personal and business expenses out of the trust account was not done by Carney, but was done by the very third parties who owned the funds. Consequently, the recipients of these funds were entitled to receive them by law, because the owners of the funds had the right to direct to whom they should be paid.

WHEREFORE, PREMISES CONSIDERED, Appellant John Hatchett. Carney prays that this Board reverse the final decision of the Evidentiary Panel, and either render judgment that no professional misconduct occurred, or modify the sanction assessed, or remand the case to a new evidentiary panel for further

proceedings. Appellant prays that this Board grant him such other and further relief to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 4th day of November, 2015, a true and correct copy of the foregoing brief was delivered to the following counsel of record by e-service:

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