NO. 56562

Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas

JOHN HATCHETT CARNEY,
APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,
APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 6-1
No. D0091144006

BRIEF OF APPELLEE COMMISSION FOR LAWYER DISCIPLINE
(ORAL ARGUMENT REQUESTED)

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BRIEF OF APPELLEE
COMMISSION FOR LAWYER DISCIPLINE

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

Appellee, the Commission for Lawyer Discipline ("the Commission"), submits this brief in response to the brief filed by Appellant, John Hatchett Carney ("Carney"). References to the record are labeled CR (clerk's record), RR (reporter's record), PX (Petitioner's exhibit to reporter's record), RX (Respondent's exhibit to

reporter's record), and Appx. (appendix to brief). References to rules refer to the Texas Disciplinary Rules of Professional Conduct[1] unless otherwise noted.

[1] *Reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app A-1 (West 2014).

STATEMENT OF THE CASE

Type of Proceeding:	Attorney Discipline
Petitioner/Appellee:	The Commission for Lawyer Discipline
Respondent/Appellant:	John Hatchett Carney
Evidentiary Panel:	6-1
Judgment:	Judgment of Partially Probated Suspension
Violations found (Texas Disciplinary Rules of Professional Conduct, relevant portions only)	**Rule 1.14(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. **Rule 1.14(c):** 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.

STATEMENT OF THE ISSUES

Issue 1: Whether substantial evidence supports the Panel's finding that Carney violated Rule 1.14(a) and Rule 1.14(c).

Issue 2: Whether Carney preserved his issue that the Panel erred in excluding from evidence as hearsay the transcript of the deposition of Dolph Haas and whether such evidence would have been admissible under a hearsay exception.

Issue 3: Whether the sanction imposed was an abuse of discretion or arbitrary and capricious.

Issue 4: Whether Carney preserved any due-process issue for review and whether any due-process violation occurred regarding the Panel's questioning of Carney about a matter he raised during testimony.

STATEMENT OF FACTS

It is undisputed that numerous deposits were made into and withdrawn from Carney's client trust account that were not in connection with any representation. Over the course of several years, Carney's paralegals—Dolph Haas, Barbara Stewart, and Bridget Smiley—deposited into Carney's various law-firm accounts, including the trust account, funds drawn from the employees' personal bank accounts totaling over $600,000. (RR 28, 45-46; RX1, RX2). Carney confirmed that the trust account also held client funds. (RR 11, 25).

It is further undisputed that monthly withdrawals from the trust account were made for Carney's personal and professional benefit totaling hundreds of thousands of dollars. (RR 13-17, 28, 36, PX1). These included multiple direct transfers of funds to Carney's daughter; routine payment of personal and operating expenses; funds transferred directly and indirectly to his employees; and funds withdrawn and converted to cash, some of which went to Carney, some to employees, and none of which was connected to a representation. (RR 13-17, 28, 58; PX1; RX3).

Carney does not dispute these transactions, but testified that they were made without his knowledge. (RR 13-17, 28, 41). He claimed that his employees had deposited their own funds into the trust account and withdrew funds from that account for payment of Carney's various business and personal expenses, as well as to themselves, by forging his signature or altering the amounts on authorized checks.

(RR passim). Carney testified that approximately $850,000 of such funds went "in and out" of his various law-firm accounts over several years, including the trust account. (RR 60). He claimed that he did not become aware of the transactions until the initiation of the present disciplinary proceeding, despite his admission that similar conduct involving the same employees had occurred some years earlier. (RR 28, 40). He testified that his employees engaged in such unorthodox conduct to provide Carney and his firm sufficient funds while Carney focused on his litigation practice and did so surreptitiously to avoid imposing additional stress upon him. (RR 28, 36).

The Panel found that Carney's conduct violated Rule 1.14(a) and 1.14(c) and imposed a four-year partially probated suspension. (CR 287).

SUMMARY OF THE ARGUMENT

Carney's first issue has no merit because substantial evidence supports the Panel's finding that Carney violated Rule 1.14(a) and Rule 1.14(c). The record plainly demonstrates (1) that Carney failed to keep his property separate from client property by depositing funds belonging to him into the client trust account and (2) that trust-account funds were improperly disbursed to Carney's family and creditors. The Commission was not required to prove scienter but, even if it was, the record demonstrates that the misconduct was knowing given the quantity and quality of the improper dealings. Carney's "third persons" analysis is misplaced because neither the pleadings nor the judgment were based on any third-party theory, and such analysis offends the text and purpose of Rule 1.14(a) and Rule 1.14(c).

Carney failed to preserve his second issue for review because he, at no time, made an offer of proof or otherwise apprised the trial court of the substance of the evidence he sought to admit. He also fails to show that the evidence would have been admissible under a hearsay exception.

Third, the record demonstrates that the sanction imposed by the Panel was not an abuse of discretion or arbitrary and capricious. In addition to the judgment stating that the Panel considered the relevant factors in determining the sanction, the record reveals that most of the factors plainly support the sanction imposed, including the frequency and amount of improper transactions—routine, sometimes daily,

transactions totaling hundreds of thousands of dollars; Carney's refusal to accept responsibility for the misconduct; the risk the misconduct posed to client property; the previous occurrence of similar misconduct; and the damage such misconduct inflicts on the profession.

Finally, Carney failed to preserve any due-process claim with respect to the Panel's inquiries by failing to object, move for recusal, or otherwise challenge such questioning at the hearing. Further, the record demonstrates no error, as any questions related to his payment of taxes centered on Carney's own injection of that issue into the proceedings.

ARGUMENT AND AUTHORITIES

I. Substantial Evidence Supports the Panel's Finding That Carney Violated Rule 1.14(a) and Rule 1.14(c)

In his first issue, Carney argues that he did not violate Rule 1.14(a) or Rule 1.14(c) because, he contends, (1) the funds that were deposited in the trust account at issue belonged to his employees; (2) Rule 1.14(a) allows funds belonging to "third persons" to be held in a trust account; and (3) his employees are "third persons" under the rule, thus neither deposit of those funds into the account nor withdrawal of those funds to pay Carney's business and personal expenses ran afoul of the rule. (App's Br. at 16, 20). Substantial evidence, however, shows that the trust account contained both client funds and funds belonging to Carney in violation of Rule 1.14(a) and that direct disbursements of funds from that account were made to Carney's creditors and family in violation of Rule 1.14(c). Furthermore, the "third persons" language in the rule does not contemplate Carney's employees under the circumstances of this case.

A. Substantial Evidence Shows That Carney Failed to Keep His Property Separate From Clients' Property and That Trust-Account Funds Were Improperly Disbursed to Carney's Creditors and Family

First, the sheer volume of funds improperly deposited into and withdrawn from Carney's various accounts, including the trust account, support a finding that the trust account contained Carney's personal funds. The record shows that Carney's

three paralegals deposited over $600,000 of funds ostensibly belonging to them into Carney's accounts. (RR passim; PX1; RX1; RX2). He testified that approximately $850,000 of employee funds went "in and out" the accounts and that employee funds remained in the accounts as of the date of the hearing. (RR 36, 45-46, 59-60). Indeed, the record shows that Stewart made a single deposit of $80,000 into the trust account in one day. (RR 60-61; PX1; RX2). Carney admitted that Smiley contributed $100,000 after the disciplinary proceedings had commenced because they had "[b]een good friends for 35 years." (RR 36, 53). The Panel was free to infer that Carney had funded those deposits and reject his testimony that his employees had altruistically contributed hundreds of thousands of dollars of their own funds to support Carney, his family, and his firm.

Second, the record shows that substantial funds in the trust account were disbursed to pay Carney's personal and business expenses, which (1) supports an inference that the account contained Carney's personal funds in violation of Rule 1.14(a) and (2) establishes that trust funds were disbursed to persons not entitled to receive them in violation of Rule 1.14(c). Every monthly statement from the trust account in the record reveals that funds were transferred directly from the account to an unauthorized recipient, including multiple transfers to his daughter totaling thousands of dollars; recurring payments of personal utilities totaling thousands of dollars; routine payments of various operating expenses, such as regular electronic

transfers to Staples and Office Depot totaling thousands of dollars; and recurring payments of health insurance premiums for firm employees totaling over $100,000. (RR 12-17; PX1).[2] This evidence alone supports the Panel's determination that Carney commingled and converted client funds.

Carney concedes that such evidence supports an inference that the account contained funds belonged to Carney as did similar evidence in *Neely v. Commission for Lawyer Discipline*, 302 S.W.3d 331 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (App's Br. at 17). *Neely* held that evidence that Neely was paying business and personal expenses from his trust account tended to show that funds in the account were "personal" and constituted violation of Rule 1.14(a). 302 S.W.3d at 346-48. Contrary to Carney's contention, the fact that other evidence tended to show that employees improperly deposited funds into the trust account did not preclude a finding that the trust account held funds belonging to Carney. (App's Br. at 17). The record plainly demonstrates that Carney treated the trust account as his personal account.

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[2] The record also shows nearly one hundred checks written to "Bank of Texas" totaling hundreds of thousands of dollars, which Carney testified were converted to cash. (RR 15, 17, 33-34, 38; PX1; RX1; RX3). He claimed that he had authorized some of those withdrawals, but that Haas had forged his signature or changed the amounts on many to reimburse himself. (RR 34-35, 57-58), Such regular disbursements of trust funds as cash not demonstrated to be fees due to Carney support a finding that Carney treated funds in the trust account as his own.

Third, even under Carney's theory that the funds were loaned to him by his employees, the Panel properly found a violation of Rule 1.14(a). Carney testified that "several years of amended [tax] returns were filed that correctly characterized those moneys as loans instead of income." (RR 46, 65-66). Funds loaned to Carney would have belonged to him, and the deposit of such funds into the trust account would constitute commingling under the rule. *See*, *e.g*., *In re Sirianni*, 123 A.D.3d 8, 12-14 (N.Y. 2014) (lawyer's depositing loan proceeds violated rule against commingling because funds received neither from client nor in the course of the practice of law).

Whether the improper deposits were funded by Carney or were loaned to him for his personal use, the record contains substantial evidence supporting the Panel's finding that he failed to keep his property separate from client property and disbursed trust funds to persons not entitled to receive them.

B. Rule 1.14 Does Not Require Proof of Scienter, But Substantial Evidence Demonstrates That Carney Was Aware of Misconduct

Carney does not dispute the occurrence of these transactions, but contends that he was not aware of them. (App's Br. at 19). First, Rule 1.14 does not expressly prescribe a scienter, and numerous courts have held that proof of actual knowledge is not required to establish mishandling of client funds given a lawyer's fiduciary

responsibilities with respect to such funds. *See* Rule 1.14;[3] *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 680 (Tex. App.—San Antonio 1998, no pet.) ("Because of the fundamental nature of the principles underlying commingling and the serious dangers associated with the vice, courts typically give little or no weight to the fact that a commingling violation was technical, ignorant, or inadvertent, or that the client was not harmed."); *Archer v. State*, 548 S.W.2d 71, 73 (Tex. Civ. App.—El Paso 1977), writ refused n.r.e. (July 20, 1977) (construing predecessor rule, holding that "no finding of fraudulent, culpable, or wilful conduct is required."); *see also Brown*, 980 S.W.2d at 680 (explaining that Rule 1.14 is designed to prevent loss of client funds and to avoid even the appearance of impropriety).[4] The record contains overwhelming evidence that Carney, at an

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[3] *Compare*, *e.g.*, Rule 1.05(b) (expressly proscribing knowing disclosure of confidential information); Rule 3.03(a) (prohibiting knowing dishonesty toward tribunal); Rule 4.01(b) (prohibiting knowing facilitation of fraud).

[4] *See also In re Robinson*, 74 A.3d 688, 696-97 (D.C. 2013) (finding misappropriation where lawyer permitted employee to continue managing trust account after employee misappropriated funds despite that actual knowledge not shown); *In re McLennon*, 443 N.E.2d 553, 556 (1982) (commingling and conversion of client funds, "with or without a 'dishonest motive,' simply cannot be countenanced."); *Matter of Fleischer*, 102 N.J. 440, 447, 508 A.2d 1115, 1120 (1986) (where lawyer used trust account to routinely pay operating expenses and claimed ignorance, court held that "poor accounting procedures are no excuse for using clients' funds"); *Matter of Gold*, 557 A.2d 1378, 1382 (1989) (whether misappropriation knowing relevant only to sanction determination); *Catledge v. Mississippi Bar*, 913 So. 2d 179, 189-90 (Miss. 2005) (misappropriation where conduct negligent, not intentional); *cf. The State Bar v. Gailey*, 889 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1994, no writ) (construing predecessor rule, holding rule does not impose strict liability, thus no violation where legitimate discrepancy between bank records and lawyer's records).

absolute minimum, should have been aware that he had mishandled trust-account funds.

Even if Rule 1.14 did require proof of actual knowledge, the record contains substantial evidence demonstrating that Carney was aware of the unlawful dealings. First, the previously detailed evidence of the volume and frequency of the transactions and the routine, substantial payments of Carney's personal and operating expenses permitted an inference that Carney had knowledge of those dealings. Specifically, the fact that several large transfers were made directly to Carney's daughter and to pay his personal utility bills each month provides strong support for a finding that Carney was not only aware of the unlawful transactions, but was in fact responsible for them.

Second, Carney testified that when he allegedly learned that Smiley had made a single contribution of $100,000 to his firm, he instructed her not to remove the funds and advised that he would repay her when he was able.[5] (RR 52-54). Indeed, he admitted that some of the "loaned" funds remained in his accounts as of the date of the hearing. (RR 36).

[5] His testimony that "it's not a loan . . . if I don't agree to it at the time" does not overcome the fact that, under his theory, the employees did loan Carney funds at various times, and he continued to accept that benefit once he became aware of those loans. (RR 54).

Third, Carney admitted that similar misconduct had also occurred several years earlier wherein Haas and Stewart routinely deposited and withdrew nonqualified funds from the trust account allegedly without Carney's knowledge. (RR 40-42). Nevertheless, Carney admitted that, at no time, did he notify the police or the bank, terminate any employees, relieve Haas of his bookkeeping responsibilities or assume direct oversight thereof, or restrict the employees' access to the accounts. (RR 38, 42, 50-51, 59). The only measures that Carney purportedly took at any time included admonishing the employees and, after the present misconduct, requiring Smiley to review "each transaction as it occurs." (RR 43, 54). This lack of remedial action, together with the other above-cited evidence, supports a finding that Carney was aware of these practices. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT Preamble, "Terminology" ("A person's knowledge may be inferred from circumstances.").

C. Carney's Analysis Regarding His Employees as "Third Persons" Under Rule 1.14(a) Is Misplaced Because It Does Not Comport With the Panel's Judgment or the Text or Purpose of the Rule

Finally, Carney contends that his employees are "third persons" under Rule 1.14(a) such that the deposit and withdrawal of their funds from the trust account did not violate the rule. (App's Br. at 16, 20). However, the Commission did not plead—and the Panel did not find—that a rule violation had been established by failure to separate funds belonging to his employees from client funds. Rather, the

Commission pled, and the Panel found, that Carney "failed to hold funds belonging in whole or in part to clients and third persons that were in [Carney]'s possession separate from [Carney]'s own property" and that Carney "failed to disburse funds in a trust account only to those persons entitled to receive them by virtue of the representation or by law." (CR 33, 289; Appx. 1). Therefore, his argument is irrelevant to analysis of the sufficiency of the evidence to support the judgment.

Moreover, such an interpretation of the rule is contrary to the text of the rule. Rule 1.14(a) provides that "[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." Rule 1.14(a) (emphasis added). Even assuming that Carney's employees did loan Carney the funds for the purpose of paying his personal and professional expenses, such funds were not received by Carney in connection with a representation and were not held by him as a fiduciary incident to his practice of law.

Carney's proposed interpretation would also wholly undermine the purpose of Rule 1.14, which is to afford client funds the greatest possible protection from loss. *See Brown*, 980 S.W.2d at 680; *Archer*, 548 S.W.2d at 74. The Washington Supreme Court recently rejected a similar interpretation of their rule against commingling on that basis. *In re Disciplinary Proceeding Against McGrath*, 308 P.3d 615 (2013). In *McGrath*, the lawyer deposited miscellaneous client funds into

the trust account not incident to any representation, arguing that the rule permitted his clients to "deposit and withdraw funds for anything they like: 'They can pay for their grandkids' daycare if they want to.'" 308 P.3d at 626. The Court held that this interpretation was contrary to "the plain meaning of the rule, which applies on its face only to 'property of clients or third persons in a lawyer's possession *in connection with a representation.*'" *Id*. (emphasis in original). It explained,

> Reading the rule to cover *any* client property is inconsistent with this plain meaning and would undermine the narrow purpose of the rule, which is to safeguard a client's property against the dangers of conversion, negligent misappropriation, or loss. We reject any reading of this rule that would transform trust accounts into ordinary bank accounts managed by the lawyer.

Id. (internal quotations and citations omitted) (emphasis in original).[6] Similarly, Texas's rule may not be construed as permitting the transformation of Carney's trust account into an ordinary bank account by the routine commingling of non-client funds and disbursement of trust-account funds for payment of Carney's expenses.

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[6] Numerous jurisdictions have reached similar conclusions. *See, e.g.*, *In re Varriano*, 755 N.W.2d 282, 289 (Minn. 2008) (holding funds belonging to third party not in connection with a representation in trust account violates Rule 1.15(a)); *Matter of McKiernan*, No. 91-O-04645, 1995 WL 646794, at *1-2 (Cal. Bar Ct. Oct. 26, 1995) (lawyer's non-client friend holding funds in lawyer's trust account, which friend ultimately loaned to lawyer for payment of lawyer's operating expenses and lawyer held in trust account, constituted commingling); *Mack v. State Bar*, 467 P.2d 225 (1970) (lawyer permitting client to hold funds in trust account for "business purposes" and using account for personal use violated rule against commingling); *Sirianni*, 123 A.D.3d at 12-14 (lawyer's depositing loan proceeds constituted unlawful commingling because "funds were received neither from a current client nor in the course of the practice of law.").

In sum, the record contains substantial evidence supporting the Panel's finding that Carney violated Rule 1.14(a) and Rule 1.14(c).

II. Carney Failed to Preserve His Issue Regarding the Panel's Exclusion of Hearsay Evidence For Review. He Also Fails to Demonstrate That It Would Have Been Admissible Under a Hearsay Exception.

At the hearing, Carney sought to introduce the deposition of Haas from a separate, unrelated suit to which the Commission was not a party, which the Panel excluded as hearsay. (RR 43-45). Carney now argues that the evidence should have been admitted under a hearsay exception. However, Carney has failed to preserve his issue for review and failed to demonstrate that the evidence is admissible under a hearsay exception.

A. Carney Was Required to Preserve His Issue

To preserve error on the ground that the trial court improperly excluded as hearsay, a party must inform the trial court of the substance of the evidence by an offer of proof, unless the substance was apparent from the context. TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.1(a)(1)(B). An offer of proof requires a party, after a ruling excluding evidence, to show the substance of evidence excluded. *Southwest Country Enterprises, Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 494-95 (Tex. App.—Fort Worth 1999, pet. denied). Absent an offer of proof, a party preserves nothing for appellate review. *Gipson-Jelks v. Gipson*, 468 S.W.3d 600, 606 (Tex.

App.—Houston [14th Dist.] 2015, no pet.) (affirming exclusion of evidence where no offer of proof made).

B. Carney Made No Offer of Proof Establishing the Substance of the Evidence He Sought to Admit and Thus Preserved Nothing For Review.

The Commission objected to the Haas deposition transcript as hearsay because the Commission (1) was not a party to the suit in which the deposition was taken, (2) did not have the opportunity to cross-examine Haas in that suit, and (3) was unable to obtain his testimony in the present proceeding because he invoked Fifth Amendment protection. (RR 43-45). Carney's counsel stated that his "recollection was that [counsel for the Commission] had a chance to cross-examine him afterwards. I forgot he pled the Fifth and [counsel for the Commission] didn't get a chance to question him on that." (RR 45). The Panel chair sustained the objection, and Carney's counsel responded, "They didn't cross him. I can't use it. That's ok." (RR 45). At no time did Carney make an offer of proof regarding the evidence he sought to introduce, and the substance of that evidence was not apparent from the context.[7] Therefore, Carney failed to preserve his issue for review. TEX. R. EVID. 103(a)(2); *Gipson-Jelks*, 468 S.W.3d at 606.

[7] Carney does not contend, nor does the record show, that he filed a formal bill of exception. *See* TEX. R. APP. P. 33.2.

Carney nevertheless contends that "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's Br. at 21). The record does not support his contention: it does not contain any such order or a copy of the deposition transcript. Instead, Carney cites an appendix to his brief for evidentiary support. (App's Br. at 21). However, it is well established that documents attached to an appellate brief as exhibits or appendices that are not part of the record generally may not be considered by the appellate court. *Robb v. Horizon Communities Improvement Ass'n, Inc.*, 417 S.W.3d 585, 589 (Tex. App.—El Paso 2013, no pet.) (collecting cases). Carney has failed to demonstrate that his attachment is entitled to appellate review.[8]

Furthermore, Carney's failure to preserve his issue precludes its analysis. He argues that the deposition is admissible under Texas Rule of Evidence 804(b)(1), which permits admission of statements of an unavailable declarant developed at prior proceedings if the party—or a person with similar interest—had an opportunity and similar motive to develop the testimony. TEX. R. EVID. 804(b)(1). However, because Carney failed to make an offer of proof or otherwise provide a timely,

[8] Moreover, the attachment—an email from the Panel chair—does not demonstrate that the Panel ordered that the transcript be added to the record as an offer of proof.

sufficient description of the evidence he sought to admit, he is unable to show that the deposition is admissible under that exception.[9]

In sum, Carney failed to preserve his issue, and the record is wholly deficient to determine whether, had he preserved his issue, the evidence he sought to introduce would have been admissible under a hearsay exception.

III. The Record Demonstrates That the Sanction Imposed By the Panel Was Not an Abuse of Discretion or Arbitrary and Capricious

In his third issue, Carney argues that the Panel's sanction is arbitrary or capricious and an abuse of discretion, or a clearly unwarranted exercise of the Panel's discretion. (App's Br. at 22).

A. Applicable law

An evidentiary panel has broad discretion to determine the appropriate sanction to impose in an attorney disciplinary matter. *Molina v. Comm'n for Lawyer Discipline*, Tex. Bd. Disp. App. 35426, 2006 WL 6242393 *4 (March 31, 2006). A panel's decision regarding an appropriate sanction may be overturned on appeal only if it is shown that the sanction is so light or so severe in relation to the attorney's misconduct that it constitutes an abuse of discretion. *Id.* at 7 *(*citing *McIntyre v.*

[9] Given the unique nature of disciplinary proceedings, it is exceedingly unlikely Carney would have been able to satisfy that burden even had he provided adequate context. Similar motives with respect to a single issue would not suffice.

Comm'n for Lawyer Discipline, 169 S.W.3d 803, 807 (Tex. App.—Dallas 2005, pet. denied)).

In imposing a sanction, an evidentiary panel abuses its discretion when it acts in a manner that is unreasonable, arbitrary, and without reference to guiding principles. *Id.* The principles upon which an evidentiary panel must base a sanction are set forth in Texas Rule of Disciplinary Procedure 2.18:

> (1) the nature and degree of the attorney's professional misconduct;
> (2) the seriousness of and circumstances surrounding the misconduct;
> (3) the loss or damage to clients;
> (4) the damage to the profession;
> (5) the assurance that those who seek legal services in the future will be insulated from the type of professional misconduct found;
> (6) the profit to the attorney;
> (7) the avoidance of repetition;
> (8) the deterrent effect on others;
> (9) the maintenance of respect for the legal profession;
> (10) the conduct of the attorney during the course of the disciplinary proceeding; and
> (11) the attorney's disciplinary history.

If an evidentiary panel applies these to assess a penalty that is not unreasonable and arbitrary, the sanction should be upheld even if the appellate court decides that a different sanction might be more suitable. *See Love v. State Bar of Tex.*, 982 S.W.2d 939, 945 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

B. The Record Demonstrates That the Evidentiary Panel Considered the Appropriate Factors Before Imposing a Partially Probated Suspension For Two Separate Violations of Rule 1.14 and That the Sanction Was Not an Abuse of Discretion.

Contrary to Carney's contention that the factors militate in favor of leniency, nearly all of the relevant factors militate in favor of the sanction imposed.

Carney contends that his "lack of scienter or personal involvement" warranted leniency. (App's Br. at 23). However, as previously detailed, the record contains substantial evidence of his knowledge of the misconduct. And the fact that he consistently eschewed all responsibility for the routine, intentional mishandling of funds in the client trust account and laid the blame entirely at the feet of his staff further justified the sanction.

He further cites as mitigating "the corrective measures already implemented to prevent repetition" of the misconduct that had previously occurred. (App's Br. at 23). But the fact that Carney had already been involved in similar misconduct militates in favor of a more stringent sanction, not a more lenient one as Carney suggests. Moreover, the misconduct at issue was not isolated or merely the result of slapdash bookkeeping. The record plainly demonstrates that the mishandling of funds in the client trust account was intentional, occurred routinely—sometimes daily—over the course of more than a year, and involved hundreds of thousands of dollars in unlawful transactions. His actions constituted repeated, egregious breaches of his fiduciary duties to multiple clients revealing the need for a powerful deterrent.

Furthermore, a lawyer's abuse of fiduciary trust is the type of misconduct that causes irreparable damage to the legal profession. As one jurisdiction has noted, "A client's trust in his lawyer is built on the foundation of centuries of honesty and faithfulness in the profession. . . . Few individual acts can impact the public's trust of the legal system more than an attorney who mishandles the money of a client." *In re Robinson*, 74 A.3d 688, 694 (D.C. 2013) (internal quotations and citations omitted) (noting that disbarment is generally appropriate sanction for mishandling client funds unless result of mere negligence).[10]

Carney also cites as mitigating the "absence of harm to any client." (App's Br. at 23). However, Texas courts have consistently held that the risk posed by the mishandling of fiduciary property *is* the harm irrespective of whether the client suffers any loss. *See, e.g.*, *Brown*, 980 S.W.2d at 680; *Archer*, 548 S.W.2d at 74; *Neely*, 302 S.W.3d at 346. The Supreme Court has explained that "[a]n agent's breach of fiduciary duty should be deterred even when the principal is not damaged." *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999). That no client reported a loss as a result of Carney's misconduct is fortuitous but does not justify a lenient sanction.

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[10] *See also Matter of Simeone*, 531 A.2d 729, 732 (1987) (disbarment mandated where misappropriation knowing; *In re Feldman*, 431 N.E.2d 388, 388-89 (1982) (conversion of client funds warrants disbarment absent mitigating circumstances); *Neely*, 302 S.W.3d at 349 (approving disbarment, noting that "[a]mong an attorney's foremost ethical obligations is the proper handling of clients' funds and trust accounts.").

Carney similarly asserts that counsel for the Commission "exaggerated" the seriousness of the misconduct at the hearing by referring to his "misappropriation" of funds. (App's Br. at 24). He further complains that the Commission cited an internal operating rule that prohibits imposition of a private reprimand if misconducts includes misapplication of fiduciary property. (App's Br. at 24). He claims that no funds were misappropriated because "[t]here is no evidence that any client funds were ever used or that the disbursements ever exceeded the amount" of funds improperly deposited. (App's Br. at 24).

That argument rests on two erroneous assumptions: (1) that funds lawfully held in a trust account can be segregated from funds unlawfully commingled and (2) that, because no client suffered pecuniary loss, his misconduct did not constitute misapplication or misappropriation of funds. As to the former, all funds in the account were fungible, and the account was effectively treated as an operating and personal account, thus client funds were misused.[11] It is precisely because such segregation is not possible that the prohibition against commingling exists.[12]

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[11] Although Carney testified that a CPA determined that client funds were never improperly disbursed, no corroborating evidence was introduced, and the trust account monthly statements reveal that the account frequently incurred returned-item fees. (RR 38; CX1).

[12] *See* Rule 1.14 cmt. 2 (instructing that a lawyer should not even use trust funds owed to the lawyer to pay the lawyer's general creditors because creditors may view them as the lawyer's property and thus available to satisfy their claims); *In re Disciplinary Proceeding Against Trejo*, 185 P.3d 1160, 1172 (2008) ("[T]he dangers of commingling are not merely that the lawyer will squander the money 'borrowed' from a trust account and not be able

As to the latter, Carney cites no authority in support of his proposed definition, and the Commission has found none. Although the internal rules do not provide one, Black's Law Dictionary defines misapplication as "[t]he improper or illegal use of funds or property lawfully held," and "misappropriation" as "[t]he application of another's property or money dishonestly to one's own use." BLACK'S LAW DICTIONARY (10th ed. 2014) ("misapplication" and "misappropriation"). In light of the evidence demonstrating that Carney commingled his funds in the trust account then used trust funds to pay his own creditors, his misconduct meets both definitions. And, again, Texas jurisprudence has consistently rejected a showing of loss as a prerequisite to a finding of misuse of fiduciary property. Thus, the Commission's characterizations of Carney's misconduct was appropriate.

Finally, in her closing remarks, counsel for the Commission explained how the factors warranted a "harsh sanction."[13] (RR 67-69). And the judgment itself recites that "after considering all of the factors listed in Rule 2.18 of the Texas Rules of Disciplinary Procedure," the Panel decided to impose a partially probated four-year suspension. (CR 289; Appx. 1). Given the foregoing, the record amply

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to restore it, but that the commingled funds might be subject to attachment by a lawyer's creditors, thus preempting the lawyer's ability to do so.") (internal quotations omitted).

[13] Carney notes that the Commission urged a lesser sanction than that imposed by the Panel; however, the Panel was not bound by the Commission's recommendations regarding sanctions. He cites no authority that the Commission's recommendation has any place in appellate analysis of the reasonableness of a sanction.

demonstrates that the Panel properly considered the necessary factors in imposing a four-year, partially probated suspension and did not act in an arbitrary or unreasonable manner in tailoring that sanction. *See State v. Ingram*, 511 S.W.2d 252, 253 (Tex. 1974) (three-year suspension where lawyer misappropriated $400 of client funds and was dishonest to grievance committee).

IV. Carney Failed to Preserve Any Due-Process Claim, and the Record Demonstrates No Error

Carney argues that he was denied his due-process right to an impartial fact finder because the panel considered irrelevant matters and the rules afforded him no remedy. (App's Br. at 25). Specifically, he cites a panel member's inquiries regarding Carney's payment of his taxes and contends that the recusal procedure provided an inadequate remedial measure. (App's Br. at 26).

First, Carney failed to preserve the issue for review. Texas Rule of Disciplinary Procedure 2.06 specifically provides that failure to raise the issue of recusal after discovery of the grounds for recusal "conclusively waive[s]" such grounds. TEX. RULES DISCIPLINARY P. R. 2.06; *see also* TEX. R. APP. P. 33.1. Although the alleged grounds for recusal surfaced toward end of hearing, Carney's failure to move for recusal or lodge any objection at that time conclusively waived his complaint. (RR 64-66).

Carney also failed to preserve any constitutional challenge to that provision or any due-process claim. *See Johnson v. Lynaugh*, 800 S.W.2d 936, 939 (Tex.

App.—Houston [14th Dist.] 1990), *writ denied* (July 1, 1992) (most constitutional challenges not raised properly in trial court waived on appeal); *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 875 (Tex. App.—Corpus Christi 2006, pet. denied) ("A party waives the right to raise a constitutional claim such as due process on appeal if that claim is not presented to the trial court."). He has not cited authority or developed an argument in support of a constitutional challenge, or attempted to show the harm caused by any alleged violation. He does not contest the facial validity of Rule 2.06, and any as-applied challenge would be misplaced given that he did not attempt to exercise his rights under that rule. He cannot challenge the sufficiency of a rule's protections of which he made no attempt to avail himself.

Finally, even had Carney preserved his issue, the record demonstrates no error. Carney voluntarily injected the issue of his taxes into the proceedings by claiming that he was required to file amended returns to correct the characterization of the deposits as income. (RR 37-39). Multiple panel members pressed him on that issue, questioning how he would have not discovered that such substantial income had been erroneously reported, particularly given that it would have also been reported on his personal return. (RR 55, 64-66). The question at issue was relevant to what and when he knew about the misconduct.

Because Carney failed to preserve any issue for review, and because the record does not demonstrate error, his fourth issue must be overruled.

CONCLUSION AND PRAYER

For these reasons, the Commission prays that the Board affirm the judgment of the District 6-1 Evidentiary Panel of the State Bar of Texas.

RESPECTFULLY SUBMITTED,

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STATE BAR CARD NO. 24070781
ATTORNEY FOR APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to the Board of Disciplinary Appeals Internal Procedural Rules, the foregoing brief on the merits contains approximately 5,795 words (total for all sections of brief that are required to be counted), which is less than the total words permitted by the Board's Internal Procedural Rules. Counsel relies on the word count of the computer program used to prepare this petition.

/s/ Julie Liddell
Julie Liddell

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing brief of Appellee, the Commission for Lawyer Discipline has been served on John Hatchett Carney, by and through his attorney of record Charles W. McGarry, 701 Commerce Street, Suite 400, Dallas, Texas 75202, by email to cmcgarry@ix.netcom.com on the 6th day of January, 2016.

/s/ Julie Liddell
Julie Liddell
Appellate Disciplinary Counsel
State Bar of Texas

NO. 56562

Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas

JOHN HATCHETT CARNEY,
APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,
APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 6-1
No. D0091144006

APPENDIX TO BRIEF OF APPELLEE COMMISSION FOR LAWYER DISCIPLINE

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TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

The Commission for Lawyer Discipline attaches the following documents in support of the foregoing brief:

APPENDIX 1: Judgment of Partially Probated Suspension (CR 288-96)

Appendix 1

BEFORE THE DISTRICT 6 GRIEVANCE COMMITTEE
EVIDENTIARY PANEL 6-1
STATE BAR OF TEXAS

COMMISSION FOR LAWYER DISCIPLINE, Petitioner	§ § §	
V.	§ §	CASE NO. D0091144006
JOHN HATCHETT CARNEY, Respondent	§ §	

JUDGMENT OF PARTIALLY PROBATED SUSPENSION

Parties and Appearance

On May 7, 2015, 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, John Hatchett Carney, Texas Bar Number 03832200, appeared in person and through attorney of record and announced ready.

Jurisdiction and Venue

The Evidentiary Panel 6-1, having been duly appointed to hear this complaint by the chair of the Grievance Committee for State Bar of Texas District 6, 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(W) of the Texas Rules of Disciplinary Procedure.

Findings of Fact

The Evidentiary Panel, having considered the pleadings, evidence and argument of counsel, 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 Dallas County, Texas.

3. Respondent failed to hold funds belonging in whole or in part to clients and third persons that were in Respondent's possession separate from Respondent's own property.

4. 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.

5. The Chief Disciplinary Counsel of the State Bar of Texas has incurred reasonable attorneys' fees associated with this Disciplinary Proceeding in the amount of Five Thousand Sixty-Five and no/100 Dollars ($5,065.00).

6. The Chief Disciplinary Counsel of the State Bar of Texas has incurred direct expenses associated with this Disciplinary Proceeding in the amount of Seven Hundred Seventy-Five and 96/100 Dollars ($775.96).

Conclusions of Law

The Evidentiary Panel concludes that, based on the foregoing findings of fact, the following Texas Disciplinary Rules of Professional Conduct have been violated: 1.14(a) and 1.14(c).

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 Rules of Disciplinary Procedure, the Evidentiary Panel finds that the proper discipline of the Respondent for each act of

Professional Misconduct is a Partially Probated Suspension.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Respondent be suspended from the practice of law for a period of four (4) years, beginning July 1, 2015, and ending June 30, 2019. Respondent shall be actively suspended from the practice of law for a period of two (2) years beginning July 1, 2015, and ending June 30, 2017. If Respondent complies with all of the following terms and conditions timely, the two (2) year period of probated suspension shall begin on July 1, 2017, and shall end on June 30, 2019:

1. Respondent shall pay all reasonable and necessary attorneys' fees to the State Bar of Texas in the amount of Five Thousand Sixty-Five and no/100 Dollars ($5,065.00). The payment shall be due and payable five (5) days after the date the judgment is signed 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, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

2. Respondent shall pay all direct expenses to the State Bar of Texas in the amount of Seven Hundred Seventy-Five and 96/100 Dollars ($775.96). The payment shall be due and payable five (5) days after the date the judgment is signed 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, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

3. Respondent shall make contact with the Chief Disciplinary Counsel's Office's Compliance Monitor at 877-953-5535, ext. 1334, and Special Programs Coordinator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

Should Respondent fail to comply with all of the above terms and conditions timely, Respondent shall remain actively suspended until the date of compliance or until June 30, 2019, whichever occurs first.

Terms of Active Suspension

It is further ORDERED that during the term of active suspension ordered herein, or

that may be imposed upon Respondent by the Board of Disciplinary Appeals as a result of a probation revocation proceeding, 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 1, 2015, 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 1, 2015, 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 1, 2015, 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 1, 2015, 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 1, 2015, 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.

Terms of Probation

It is further ORDERED that during all periods of suspension, Respondent shall be under the following terms and conditions:

1. Respondent shall not violate any term of this judgment.
2. Respondent shall not engage in professional misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.
3. Respondent shall not violate any state or federal criminal statutes.
4. Respondent shall keep State Bar of Texas membership department notified of current mailing, residence and business addresses and telephone numbers.
5. Respondent shall comply with Minimum Continuing Legal Education requirements.
6. Respondent shall comply with Interest on Lawyers Trust Account (IOLTA) requirements.

7. Respondent shall promptly respond to any request for information from the Chief Disciplinary Counsel in connection with any investigation of any allegations of professional misconduct.

8. In addition to complying with the Minimum Continuing Legal Education (MCLE) requirements of the State Bar of Texas, Respondent shall complete ten (10) additional hours of continuing legal education in the area of Ethics. These additional hours of CLE are to be completed between July 1, 2015, and June 30, 2017, and are not to be completed by self-study activities. Within ten (10) days of the completion of these additional CLE hours, Respondent shall verify completion of the course 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).

9. In addition to complying with the Minimum Continuing Legal Education (MCLE) requirements of the State Bar of Texas, Respondent shall complete twenty-five (25) additional hours of continuing legal education in the area of Law Practice Management. These additional hours of CLE are to be completed between July 1, 2015, and June 30, 2017, and are not to be completed by self-study activities. Within ten (10) days of the completion of these additional CLE hours. Respondent shall verify completion of the course 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).

10. Not later than June 30, 2015, Respondent shall engage the services of an independent Certified Public Accountant (the CPA), approved by the State Bar of Texas, to assist Respondent in implementing an accounting method to properly maintain trust account records, and to properly balance any and all of Respondent's trust accounts. Respondent shall insure that written confirmation of the implementation of such accounting method is provided directly by the CPA to the State Bar of Texas not later than ninety (90) days after entry of the judgment. Respondent shall take all necessary action, including the execution of a valid release of information, to allow and direct the CPA to provide such confirmation.

11. Additionally, not later than June 30, 2015, Respondent shall have a review of any and all of Respondent's trust accounts completed by the CPA. Not later than thirty (30) days after completion of the review, Respondent shall insure that a report summarizing the results of the review, and specifically noting any irregularities in Respondent's handling of trust account funds, is provided by the CPA directly to the State Bar of Texas. Thereafter, reviews shall be completed every month, with reports provided by the CPA directly to the State Bar of Texas within thirty (30) days of the completion of each review. Respondent shall take all necessary action, including the execution of a valid release of information, to allow and direct the CPA to provide such reports.

12. Respondent shall be responsible for all costs and expenses incurred in completing

these terms and shall pay all reasonable costs and expenses to the CPA in the manner determined by the CPA.

13. All reports and verifications of compliance with the above shall be sent to the State Bar of Texas, State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701), or via facsimile no. (512) 427-4167.

Probation Revocation

Upon information that Respondent has violated a term of this judgment, the Chief Disciplinary Counsel may, in addition to all other remedies available, file a motion to revoke probation pursuant to Rule 2.23 of the Texas Rules of Disciplinary Procedure with the Board of Disciplinary Appeals ("BODA") and serve a copy of the motion on Respondent pursuant to Tex.R.Civ.P. 21a.

BODA shall conduct an evidentiary hearing. At the hearing, BODA shall determine by a preponderance of the evidence whether Respondent has violated any term of this Judgment. If BODA finds grounds for revocation, BODA shall enter an order revoking probation and placing Respondent on active suspension from the date of such revocation order. Respondent shall not be given credit for any term of probation served prior to revocation.

It is further ORDERED that any conduct on the part of Respondent which serves as the basis for a motion to revoke probation may also be brought as independent grounds for discipline as allowed under the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure.

Attorneys' Fees and Expenses

It is further ORDERED Respondent shall pay all reasonable and necessary attorneys' fees to the State Bar of Texas in the amount of Five Thousand Sixty-Five and

no/100 Dollars ($5,065.00). The payment shall be due and payable five (5) days after the date the judgment is signed, 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, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

It is further ORDERED Respondent shall pay all direct expenses to the State Bar of Texas in the amount of Seven Hundred Seventy-Five and 96/100 Dollars ($775.96). The payment shall be due and payable five (5) days after the date the judgment is signed, 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, 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(Z) 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.

It is further ORDERED that Respondent shall remain actively suspended from the practice of law as set out above until such time as Respondent has completely paid attorney fees' and direct expenses in the amount of Five Thousand Eight Hundred Forty and 96/100 ($5,840.96) to the State Bar of Texas.

Publication

This suspension shall be made a matter of record and appropriately published in

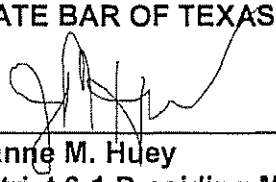
accordance with the Texas Rules of Disciplinary Procedure.

Other Relief

All requested relief not expressly granted herein is expressly DENIED.

SIGNED this 21st day of May, 2015.

EVIDENTIARY PANEL
DISTRICT 6-1
STATE BAR OF TEXAS



Jeanne M. Huey
District 6-1 Presiding Member