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| Board of Disciplinary Appeals appointed by the Supreme Court of Texas |

No. 52880

**BEFORE THE BOARD OF DISCIPLINARY APPEALS,
APPOINTED BY THE SUPREME COURT OF TEXAS**

**IN THE MATTER OF LUIS FERNANDO HESS,
STATE BAR CARD NO. 24076436**

**RESPONDENT LUIS FERNANDO HESS'S ANSWER
TO PETITION FOR RECIPROCAL DISCIPLINE**

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ATTORNEYS FOR RESPONDENT LUIS FERNANDO HESS

September 30, 2013

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Requested Relief/Summary

Respondent Luis Fernando Hess ("Hess") requests the Board of Disciplinary Appeals to issue no reciprocal discipline at all or, alternatively, to issue a private reprimand only. The actions that gave rise to Hess's discipline in Missouri were limited in time and scope; occurred prior to the time that Hess opened his law practice in Texas; were immediately corrected; and the Chief Disciplinary Counsel of Missouri found that "[t]here is no indication [Hess] knew that he was not dealing properly with client property[,] nor did [Hess] fail to remit client funds promptly." For these and other reasons, Hess's misconduct in Missouri does not constitute professional misconduct in Texas and/or warrants substantially different discipline in Texas. Furthermore, the imposition of discipline identical to that imposed in Missouri would result in grave injustice. Hess should not be disciplined in Texas or, alternatively, Hess should be issued a private reprimand only.

Background

A. Hess.

The son of immigrants, Hess graduated from St. Louis University with an undergraduate degree, and earned a Master of Arts degree from the University of Arizona. *Exhibit 1.* Hess then earned a law degree from St. Louis University, working along the way as an intern to the United States Air Force Judge Advocate General Corps and the United States District Court for the Southern District of Texas. *Id.* Hess has also served as an adjunct law professor and college instructor at St. Louis University and the University of Arizona. *Id.*

Having graduated from St. Louis University School of Law in 2010, Hess became licensed to practice law in Missouri that same year. *Id.* Following law school, Hess opened his own general law practice in St. Louis, Missouri, having never before worked in a private law

office. *Id.*; see also *Petition at Exhibit 1: Joint Stipulation, p. 1*. Hess had no experience handling operating accounts and/or trust accounts. *Exhibit 1*.

In May 2011, Hess became licensed to practice law in Texas, but he did not move to Texas or open his law practice in Texas until December 2011. *Id.* Hess's Texas law practice, located in The Woodlands, focuses on immigration law and compliance. *Id.* Hess also serves as a member of the board of directors of The Woodlands Bar Association; the Asociacion de Empresarios Mexicanos; the Montgomery County Hispanic Chamber; and the Houston Young Lawyers Association. *Id.*

B. The Missouri Discipline.

In November of 2011, prior to the time that Hess opened his law office in Texas, a check written from Hess's Missouri trust account to pay for his office rent was returned for insufficient funds. See *Petition at Exhibit 1: Joint Stipulation, p. 4*. The overdraft was only \$63.97. *Exhibit 2*. As required by Missouri law, Hess's bank notified the Missouri State Bar of the small overdraft, and a disciplinary investigation and proceeding were initiated. See *Petition at Exhibit 1: Joint Stipulation, p. 1*.

During the investigation, it was discovered that Hess had used his trust and operating accounts interchangeably, at times depositing flat fees and/or client trust funds into his operating account and/or paying operating bills with his own funds that he had deposited into his trust account. See *Petition at Exhibit 1: Joint Stipulation, pp. 2–4*. Following the investigation, Hess and the Missouri Bar entered an agreed Joint Stipulation as to discipline in July 2012. *Petition at Exhibit 1: Joint Stipulation*.

In January of this year, Hess received a reprimand from the Missouri Supreme Court for violating Rules 4–1.15(c), 4–1.15(d), and 4–1.15(f) of the Missouri Rules of Professional

Conduct (the “Missouri Rules”) by depositing advance/flat fees into his operating account (which in Missouri are not considered earned upon receipt), by commingling trust account and operating account funds, and by failing to keep complete trust account records. *See, generally, Petition.*

Although Hess was disciplined in Missouri, it is undisputed that Hess never misappropriated or used client funds for his own benefit, and that Hess did not know that he was not dealing properly with client funds. *See Exhibits 1, 2.* Hess had never held more than \$394.16 of third-party funds in his Missouri trust account, and at all times the balance in his operating account exceeded \$394.16. *Exhibit 2.* Thus, although Hess unknowingly deposited funds into the wrong accounts, Hess never diverted any client funds to his own use. *See id.* Likewise, Hess never failed to promptly remit any client funds. *Id.* In the Joint Stipulation, the Missouri Bar found that:

Respondent has been cooperative with the Disciplinary Counsel throughout its investigation and these proceedings and has clearly expressed his remorse in his failure to properly establish appropriate trust account procedures and the resultant commingling of client and personal funds. Furthermore, Respondent has voluntarily sought education on the proper handling of trust account funds and agreed to take webinar courses offered by the Missouri Bar relating to the management of attorney trusts [sic] accounts.

* * *

In this case Respondent was negligent in failing to maintain adequate trust accounting procedures the absence of which resulted in the commingling of personal funds with client funds. **There is no indication Respondent knew that he was not dealing properly with client property nor did Respondent fail to remit client funds promptly.**

Petition at Exhibit 1: Joint Stipulation, pp. 4–5 (emphasis added).

Hess acknowledged that his actions were erroneous, apologized, and fully corrected his accounting procedures such that the situation would never repeat itself. *Id.*; see also *Exhibits 1*, 2. Hess is currently in good standing with the Missouri Bar. *Exhibit 1*.

Hess's Answer To The Petition For Reciprocal Discipline

A. Reciprocal Discipline.

Under Rule 9.04 of the Texas Disciplinary Rules of Procedure, attorneys who are disciplined in other jurisdictions are not subject to discipline in Texas if they establish:

C. That the imposition by the Board of Disciplinary Appeals of discipline identical, to the extent practicable, with that imposed by the other jurisdiction would result in grave injustice;

D. That the misconduct established in the other jurisdiction warrants substantially different discipline in this state; or

E. That the misconduct for which the attorney was disciplined in the other jurisdiction does not constitute Professional Misconduct in this state.

See TEX. R. DISCIPLINARY P. 9.04.C, D, E.

B. Hess's Missouri Conduct Warrants No Discipline In Texas Or, Alternatively, Substantially Different Discipline.

First, it is undisputed that Hess's violations of the Missouri Rules occurred within a few months after he opened his own law practice, at a time when Hess had no prior experience handling trust funds. See, e.g., *Exhibits 1, 2*. And as found by the Missouri Bar, "[t]here is no indication [Hess] knew that he was not dealing properly with client property nor did [Hess] fail to remit client funds promptly." *Petition at Exhibit 1: Joint Stipulation*, p. 5. Comment 7 to Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct states that "[a] lawyer who acts in good faith is not subject to discipline, under those provisions for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment." TEX. DISCIPLINARY R. PROF'L

CONDUCT 1.01, Cmt. 7. Here, although Hess admittedly acted inadvertently and unskillfully and/or with error in judgment, he at all times acted in good faith. *See Exhibits 1, 2.* This factor weighs heavily in favor of no discipline or lesser discipline in Texas. *See TEX. R. DISCIPLINARY P. 9.04.D, E.*

Second, the conduct that gave rise to Hess's violation of Rule 4–1.15(c) of the Missouri Rules—*i.e.*, the placement of advance or flat fees into Hess's operating account instead of his trust account—occurred in March and April of 2011. *Petition at Exhibit 1: Joint Stipulation, p. 2.* Yet Hess was not licensed to practice law in Texas until May 2011, a date after both violations of Rule 4–1.15(c) of the Missouri Rules occurred. *See id.; see also Exhibit 1.* Hess should not be subject to discipline in Texas for events that occurred prior to the time that he was a lawyer in Texas. *See Exhibit 1.* For this reason, Hess's Missouri conduct does not constitute Professional Misconduct in Texas and/or warrants substantially different discipline in Texas.¹ *See TEX. R. DISCIPLINARY P. 9.04.D, E.*

Third, Hess took full responsibility for the actions that gave rise to the Missouri Rules violations. *See Exhibits 1, 2.* Within days of having his incorrect actions brought to his attention, Hess apologized for his error; improved and corrected his accounting procedures; and consulted with more senior counsel to ensure full compliance with his obligations as an attorney and fiduciary. *Exhibits 1, 2.* And again, at all times, Hess's funds-on-hand exceeded the amount of client funds that Hess held in his possession, regardless of the account in which the funds were

¹We have found no Texas case or ethics opinion that holds that a flat fee is not earned upon receipt. Flat fees in Texas, therefore, may be deposited upon receipt into the attorney's operating account. Thus, Hess's depositing flat fees into his Missouri operating account upon receipt would not have been a violation of the Texas Disciplinary Rules and would not warrant discipline in Texas. *See TEX. R. DISCIPLINARY P. 9.04.E.* Further, the Third Court of Appeals's Opinion in *Cluck v. Commission for Lawyer Discipline* does not address flat fees in Texas. 214 S.W.3d 736, 739–40 (Tex. App.—Austin 2007, no pet.). Instead, it addresses the issue of true non-refundable retainers. *See id.*, citing Tex. Comm. On Prof'l Ethics, Op. 431, Tex. B.J. 1084 (1986). It does not address flat fees. *See id.*

maintained. *Exhibits 1, 2.* Because Hess's Missouri errors were unintentional and limited in time and in scope and his practices were immediately rectified, substantially different discipline (if any) is warranted in Texas. *See* TEX. R. DISCIPLINARY P. 9.04.D.

C. **The Imposition Of Identical Discipline With That Imposed By Missouri Would Result In Grave Injustice.**

Hess has gone above and beyond in accepting responsibility for his actions and his punishment in Missouri; rectifying and improving his conduct and accounting procedures; and complying with all that was required of him with respect to the Missouri disciplinary proceedings. *See Exhibits 1 and 2; Petition at Exhibit 1: Joint Stipulation, pp. 4–5.* In the Joint Stipulation, the Missouri Bar acknowledged Hess's cooperation and corrective action:

Respondent has been cooperative with the Disciplinary Counsel throughout its investigation and these proceedings and has clearly expressed his remorse in his failure to properly establish appropriate trust account procedures and the resultant commingling of client and personal funds. Furthermore, Respondent has voluntarily sought education on the proper handling of trust account funds and agreed to take webinar courses offered by the Missouri Bar relating to the management of attorney trusts [sic] accounts.²

Petition at Exhibit 1: Joint Stipulation, pp. 4–5.

Hess demonstrated character and integrity in admitting his inadvertent transgressions and accepting the consequences. *See id.* These qualities continue to show through—not only in Hess's past accomplishments such as serving as an adjunct law and college professor at two universities, but also in his current immigration practice and his multiple community service efforts such as serving on the board of directors of The Woodlands Bar Association. *See Exhibit 1.* Under the circumstances, issuing a public reprimand to Hess in Texas—just three

² Although not expressly ordered to do so, Hess also took 2.0 hours of Missouri webinar courses on IOLTA and trust accounting and 3.2 hours of Missouri webinar courses on ethics. *Exhibit 1.*

years into what should be a long and promising career of both legal and volunteer work—would result in grave injustice. *See* TEX. R. DISCIPLINARY P. 9.04.C.

Specific Answers To Specific Averments And General Denial

The Petition in large part contains legal averments or statements to which no response is required. However, to the extent necessary, Hess specifically denies any averments that reciprocal discipline is appropriate—including the averments contained in paragraphs 4 and 5 of the Petition. *See Petition*, ¶¶ 4, 5. Hess also generally denies the material averments made in the Petition.

Proof

In support of this response, Hess relies on the exhibits identified on the index of exhibits that precedes this response. The exhibits are attached hereto and incorporated herein.

Conclusion

Hess requests that the Disciplinary Counsel issue no reciprocal discipline at all, or that any discipline issued be a private reprimand. Hess requests any other relief to which he is entitled.

Respectfully submitted,

SHEPHERD, SCOTT, CLAWATER & HOUSTON, L.L.P.

By: _____

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Texas Bar No. 24046440

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ATTORNEYS FOR RESPONDENT LUIS FERNANDO HESS

Certificate Of Service

I hereby certify that on Monday, September 30, 2013 a true and correct copy of the foregoing instrument was served as follows:

Ms. Linda A. Acevedo
Chief Disciplinary Counsel
Ms. Judith Gres DeBerry
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas
Texas Law Center
1414 Colorado, P.O. Box 12487
Austin, Texas 78711
Telephone No. (512) 427-1350
Facsimile No. (512) 427-4167
Via Facsimile And Certified Mail—Return Receipt Requested

The Board of Disciplinary Appeals
P.O. Box 12426
Austin, Texas 78711
Via Email: filing@txboda.org



Billy Shepherd

EXHIBIT 1

AFFIDAVIT OF LUIS FERNANDO HESS

THE STATE OF TEXAS

§

§

COUNTY OF MONTGOMERY §

Before me, the undersigned authority, on this day personally appeared Luis Fernando Hess, known to me to be the person whose name is subscribed to the following document, and who, after being duly sworn under oath did depose and say:

1. My name is Luis Fernando Hess. I am over 21 years old, and I am fully competent and able to make this affidavit. I am able to swear, as I do hereby swear, that all facts and statements contained in this affidavit are true and correct and within my personal knowledge.
2. I am a lawyer licensed to practice law in Texas. I have been so licensed since May 6, 2011. The son of immigrants, I was born and raised in Oklahoma. I earned my undergraduate degree from St. Louis University and a Master of Arts degree from the University of Arizona. I then graduated from St. Louis University School of Law in 2010 and became licensed to practice law in Missouri that same year. I am a member in good standing of the Missouri Bar. During law school, I worked as an intern to the United States Air Force Judge Advocate General Corps and the United States District Court for the Southern District of Texas. I have also worked as an adjunct law professor and college instructor at St. Louis University and the University of Arizona.
3. Following law school, I opened my own general law practice in St. Louis, Missouri, having never before worked in a private law office. I had no experience handling operating account and/or trust account funds.
4. I became licensed to practice law in Texas in May 2011, although I did not move to Texas or open my law practice here until December 2011. My Texas law practice, located in The Woodlands, Texas, focuses on immigration law and compliance. I am also currently a member of the Board of Directors of The Woodlands Bar Association; the Asociacion de Empresarios Mexicanos; the Montgomery County Hispanic Chamber; and the Houston Young Lawyers Association.
5. Although I was disciplined in Missouri, I never misappropriated or used client funds for my own benefit, and I did not know that I was not dealing properly with client funds. My violations of the Missouri Rules of Professional Conduct (the "Missouri Rules") occurred within a few months after I opened my own law practice, at a time when I had no prior experience handling trust funds. Further,

EXHIBIT

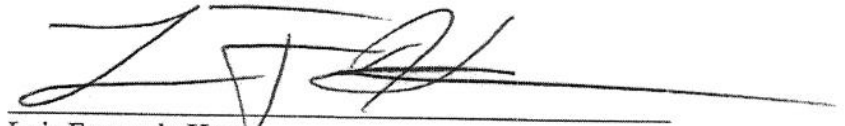
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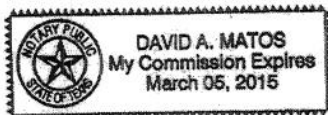
although I admittedly acted unskillfully and/or with error in judgment, I at all times acted in good faith and in the best interests of my clients.

6. I took full responsibility for my actions that gave rise to the Missouri Rules violations, which I acknowledged resulted from my lack of experience and understanding of proper handling of client funds. Within days of having the incorrect actions brought to my attention, I apologized for my error; took immediate actions to correct my treatment of funds in my law practice; improved my accounting methods; and consulted with more senior counsel to ensure compliance with the obligations I have as an attorney and fiduciary. I also voluntarily took 2.0 hours of Missouri webinar courses on IOLTA and trust accounting and 3.2 hours of Missouri webinar courses on ethics.
7. At all relevant times, the funds I possessed in one or both of my law practice accounts exceeded the amount of client funds that I held in my possession, regardless of the account in which the funds were maintained.
8. Attached as *Exhibit 2* to the foregoing Answer is a true and correct copy of a November 7, 2011 letter I wrote to the Office of the Chief Disciplinary Counsel of the State of Missouri.

Further, Affiant sayeth naught.


Luis Fernando Hess

Sworn to and subscribed before me by the said Luis Fernando Hess on this the 30th day of September 2013, to certify which witness my hand and official seal.



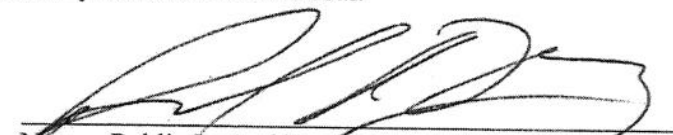

Notary Public In And For The State Of Texas

EXHIBIT 2

11-07-2011

Office of the Chief Disciplinary Counsel
3335 American Avenue,
Jefferson City, MO 65109

Dear Office of the Chief Disciplinary Counsel,

My name is Luis Hess and I am a licensed attorney in State of Missouri, MBE 62945. I graduated from St. Louis University Law School in 2010. I passed the bar immediately after law school and I then started a solo practice in St. Louis.

I have retained Bevis Schock as my lawyer regarding the subject of this letter. He has directed me to write this letter to you. I am aware that he is enclosing this letter with his own letter.

The reason I am writing to you today is that over the last two months on several occasions I used my IOLTA account as my business account.

Let me start by saying that my IOLTA account had a zero balance for the first few months of my practice. In January of this year, to pay for check printing and to have a buffer, I deposited \$500.00 to that account. I then improperly started using both my business and IOLTA checkbooks to make payments for rent, court fees, etc. In order to avoid any overdrafts in the IOLTA account, I transferred funds from the business account to the IOLTA account.

Let me review client funds. Earlier in 2011 I obtained a small judgment in a collection case and initiated garnishments. On August 31, 2011 I received the first of several small garnishment checks from St. Louis County.

The sum of all the garnishment checks is \$394.16. I initially deposited each check to my general account, but in each case within a few days transferred the funds to the IOLTA account. My client and I discussed these checks early on and we agreed that I would pay her when the amount built up to a reasonable amount. I have today with a check from the IOLTA account paid to her all \$394.16. I thus am holding no client funds as of this time (subject to clearing). Those garnishment checks are the only third party funds I have ever held in my IOLTA account.

Math tells us that of the \$5,038.96 that passed through the IOLTA accounts since September 1, 2011, \$4,644.80 was my own funds.

Last week I attempted to pay my office rent from my IOLTA account. The check bounced, but if it had not bounced it would have overdrawn my IOLTA account by \$63.97, plus a \$25.00 overdraft charge.

I have contacted my office Landlord about the situation, and am delivering a replacement check to him today to cover the bounced check. I will cover any bank fee he incurs.

I have attached my office and IOLTA bank statements for September and October, plus print outs for the first few days of November. At all times the balance in my office account has been greater than \$394.16, the sum of all the garnishment checks.

I sincerely apologize for using my accounts improperly. I have no explanation or excuse.

I have discussed this situation with my attorney, and I understand my obligations under Rule 4-1.15(c).

Going forward I will exclusively use Quickbooks to keep track of my funds, and as needed I will use a bookkeeper as needed to bring my records up to date and to keep them straight in the future.

In the future I will use my office general account exclusively for my own business account, and I will use my IOLTA account only to hold 3rd party funds.

Sincerely,



Luis F. Hess, Missouri Bar #62945

EXHIBIT

2