

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 108 DB 2018
Petitioner	:	
v.	:	Attorney Registration No. 77698
MICHAEL PATRICK O'DAY	:	
Respondent	:	(Allegheny County)

ORDER


AND NOW, this 20th day of September, 2019, upon consideration of the Report and Recommendation of the Hearing Committee filed on April 11, 2019; it is hereby ORDERED that MICHAEL PATRICK O'DAY, of Allegheny County shall be subjected to **PUBLIC REPRIMAND** by the Disciplinary Board of the Supreme Court of Pennsylvania as provided in Rule 204(a)(5) of the Pennsylvania Rules of Disciplinary Enforcement. Costs shall be paid by the Respondent.

BY THE BOARD:



Board Chair

TRUE COPY FROM RECORD
Attest:



Marcee D. Sloan
Board Prothonotary
The Disciplinary Board of the
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 108 DB 2018
Petitioner	:	
	:	
v.	:	Attorney Registration No. 77698
	:	
MICHAEL PATRICK O'DAY	:	
Respondent	:	(Allegheny County)

OPINION

This matter is before the Board on a Petition for Discipline filed by Petitioner, Office of Disciplinary Counsel, on June 27, 2018, charging Respondent in two client matters with failure to keep entrusted funds and earned funds separate in violation of Rule of Professional Conduct ("RPC") 1.15(b); failure to maintain required records of funds in violation of RPC 1.15(c); failure to deliver \$2,529 to a client for more than six months in violation of RPC 1.15(e); and, engaging in dishonesty, fraud, deceit or misrepresentation in violation of RPC 8.4(c). On August 14, 2018, Respondent filed an Answer to Petition and admitted the factual allegations contained therein.

Following a prehearing conference on September 25, 2018, a District IV Hearing Committee ("Committee") conducted a disciplinary hearing on November 2, 2018. Petitioner introduced fourteen (14) exhibits, which were admitted into evidence. Petitioner presented the testimony of one fact witness. Respondent presented the testimony of three fact witnesses and testified on his own behalf. After the hearing, by agreement of the parties, the deposition of an expert witness, Bruce Wright, M.D., was taken and entered into evidence.

Following the submission of the parties' briefs, the Committee filed a Report

on April 11, 2019, concluding that Respondent violated the rules as charged in the Petition for Discipline and recommending that Respondent receive a Public Reprimand.

On April 30, 2019, Petitioner filed a Brief on Exceptions and requested that the Board reject the Committee's recommendation and instead recommend to the Supreme Court that Respondent be suspended for a period of not less than three years.

On May 29, 2019, Respondent filed a Brief Opposing Exceptions and requested that the Board affirm the Committee's recommendation and impose a Public Reprimand to address Respondent's misconduct.

Petitioner bears the burden of proving, by a preponderance of the evidence that is clear and satisfactory, that Respondent's actions constitute professional misconduct. *Office of Disciplinary Counsel v. John T. Grigsby III*, 425 A.2d 730, 732 (Pa. 1981). Upon the record before us, the Board finds that Petitioner met its burden of proving that Respondent engaged in professional misconduct in violation of RPC 1.15(b), 1.15(c), 1.15(e) and 8.4(c), and we conclude that a public reprimand is the appropriate discipline to address Respondent's misconduct.

Born in 1969, Respondent was admitted to practice law in the Commonwealth in 1996. The conduct at issue relates to Respondent's representation of two separate clients. Regarding the Zoeller matter, in June 2016, Lillian Zoeller suffered injuries when she was a resident of Broadmore Senior Living ("Broadmore") and died intestate. Heather Schmidt Bresnahan, Esquire represented Thomas Zoeller in his capacity as personal representative of Ms. Zoeller's estate, and referred Mr. Zoeller to Respondent to pursue a civil action against Broadmore. The fee for this service was to be one-third of any recovery, with \$10,000 paid to Attorney Bresnahan for the referral. In December 2016, Respondent settled the Zoeller claim against Broadmore for \$90,000.00.

Respondent deposited the proceeds of this settlement into his PNC escrow account, captioned "Michael P. O'Day, Esquire, General Escrow Account" ("Escrow Account"). On February 1, 2017, Respondent withdrew from the Escrow Account \$20,000.00 of the \$30,000.00 agreed-upon fee. On February 27, 2017, \$30,000.00 was made payable from the Escrow Account to Mr. Zoeller as a portion of the settlement of the Zoeller claim. On March 2, 2017, \$10,000.00 was made payable from the Escrow Account to Mr. Zoeller, which was the \$10,000.00 referral fee to be paid to Attorney Bresnahan, which she declined for the benefit of Ms. Zoeller's estate. On April 10, 2017, \$1,742.25 was made payable from the Escrow Account to The Rawlings Co., LLC for payment of liens asserted against the Zoeller settlement. On September 29, 2017, \$34,569.90 was made payable from the Escrow Account to Medicare for payment of a Medicare lien asserted against the Zoeller settlement.

Regarding the Thomas matter, on July 1, 2016, Benjamin Thomas sustained personal injuries in a motor vehicle accident. On November 16, 2016, Mr. Thomas entered into a contingency fee agreement with Respondent, which provided for a one-third fee of any recovery on Mr. Thomas' personal injury claim. In May 2017, Mr. Thomas' claim was settled by Respondent. The proceeds of this settlement in the amount of \$11,266.00 was paid into the Escrow Account. Pursuant to the settlement, Respondent's fee was \$3,717.00, a reduced medical lien from McCaslin Chiropractic Center was \$3,717.00, and Mr. Thomas was due the remainder of the settlement in the amount of \$3,717.00. On May 30, 2017, \$1,188.50 was paid to McCaslin Chiropractic Center in payment of its lien and \$3,717.00 was paid to Mr. Thomas as his portion of the settlement. At that time, Respondent was still entrusted with \$2,529 of funds on behalf of Mr. Thomas. It was not until December 8, 2017, some six months later, that

Respondent disbursed the remaining funds to Mr. Thomas.

During the time frame of the Zoeller and Thomas representations, on multiple occasions from approximately March 8, 2017 through September 29, 2017, Respondent's Escrow Account balance was less than the total amount entrusted on behalf of his clients in the two matters. On four occasions during that six-month time frame, Respondent withdrew funds from the Escrow Account without having enough remaining funds in that account to cover payments with which he was entrusted. One such occasion resulted in the escrow account being overdrawn by \$4,283.55, which triggered PNC's notification to the Pennsylvania Lawyers Fund for Client Security. Respondent was only able to bring his escrow account out of arrears once additional funds were placed in the account from other sources. The full disbursement of funds due in relation to the Zoeller and Thomas matters occurred by December 8, 2017.

For approximately six months, Respondent failed to hold all RPC 1.15 Funds and property separate from his own property when he disbursed entrusted funds from his Escrow Account for purposes unrelated to his representation in the Zoeller and Thomas matters. In violation of RPC 1.15(c), Respondent failed to create and preserve complete records of his receipt, maintenance, and disposition of RPC 1.15 Funds. Respondent's failure to promptly deliver to Mr. Thomas \$2,529 between May 30, 2017 and December 8, 2017 violated RPC 1.15(e). Respondent's actions constituted dishonest conduct, in violation of RPC 8.4(c).

At the disciplinary hearing, Respondent testified on his own behalf and offered significant mitigating factors that weigh in favor of a public reprimand.

Respondent established that he suffered from a psychiatric disorder that caused his misconduct. The Supreme Court has held that, where evidence of record

supports the finding that a psychiatric disorder was a causal factor in professional misconduct, such evidence may be considered in mitigation of discipline. ***Office of Disciplinary Counsel v. Seymour Braun***, 553 A.2d 894 (Pa. 1989). Respondent met his burden of proving, through the expert testimony of Dr. Wright, that his diagnosed adjustment disorder was a substantial factor in causing his misconduct.

The evidence demonstrates that in 2016, Respondent was a defendant in a lawsuit and his father was ill and died, which events caused him to become anxious and depressed. Dr. Wright, a psychiatrist, diagnosed Respondent with adjustment disorder with mixed anxiety and depressed mood. Dr. Wight credibly testified that Respondent's adjustment disorder had a causative effect on Respondent's handling of the Escrow Account, and that the disorder led to mismanagement of the Escrow Account, due to Respondent's inattentiveness, inability to focus, and feelings of being overwhelmed. Dr. Wright testified that Respondent's adjustment disorder has improved and that no further psychiatric treatment is required.

Respondent credibly testified that the events in questions made him realize that he had not properly handled his accounts to the level required by the rules, and in order to remediate the issues underlying his misconduct, he hired a bookkeeper. Respondent and his bookkeeper meet once a month to go over the account management. Respondent expressed genuine remorse for his failings that led to his misconduct and testified that his account improprieties were unintentional.

Numerous other mitigating factors are present in this matter that alleviate the need for harsh discipline. Respondent has practiced law since 1996 without any disciplinary history; he has an excellent reputation in the legal community, as attested to by his character witnesses; he was extremely remorseful and apologetic for his conduct,

and sincere and truthful in his hearing testimony; and, Respondent took accountability for his misconduct by admitting the same in his Answer to Petition for Discipline and repeatedly testifying that the violations were his fault.

The purpose of the disciplinary system is “to protect the public from unfit attorneys and to maintain the integrity of the legal system.” **Office of Disciplinary Counsel v. Robert Costigan**, 584 A.2d 296, 300 (Pa. 1990). Each disciplinary matter must be decided on a case-by-case basis, considering the totality of the facts and circumstances, with precedent considered due to “the need for consistency in the results reached in disciplinary cases.” **Office of Disciplinary Counsel v. Robert Lucarini**, 472 A.2d 186, 190 (Pa. 1983).

A wide range of discipline has been imposed in matters involving mishandling of entrusted funds and mishandling of trust accounts, including suspension. Upon review, we conclude that cases with similar misconduct and similar mitigating facts support the imposition of a public reprimand in the instant matter. See, **Office of Disciplinary Counsel v. Clair Michelle Stewart**, No. 228 DB 2018 (D. Bd. Order 12/21/2018) (public reprimand imposed for mishandling estate funds and mishandling IOLTA account; failed to comply with RPC 1.15; cooperated with Office of Disciplinary Counsel; no prior discipline); **Office of Disciplinary Counsel v. Elliott Tolan**, No. 200 DB 2015 (D. Bd. Order 12/30/2015) (public reprimand imposed for commingling client funds and engaging in dishonest conduct; no prior discipline);

We also note matters of a similar factual nature that resulted in public reprimand despite the fact that the respondent-attorney had a history of discipline and did not have weighty mitigating factors. See, **Office of Disciplinary Counsel v. James T. Marsh**, No. 247 DB 2018 (D. Bd. Order 1/18/2019) (public reprimand imposed for

mishandling IOLTA account and failing to maintain client ledgers; prior discipline); **Office of Disciplinary Counsel v. Gordon D. Fisher**, No. 21 DB 2016 (D. Bd. Order 1/19/2017) (public reprimand imposed for failing to hold entrusted funds in a separate account and allowing the account to be deficient for a period of time; prior discipline); **Office of Disciplinary Counsel v. Manrico Troncelliti, Jr.**, No. 196 DB 2016 (D. Bd. Order 12/12/2016) (public reprimand imposed for taking unearned fees and failing to maintain and account for fiduciary funds in an estate matter, neglect and failure to communicate; prior discipline).

Under these circumstances, a public reprimand is appropriate discipline and is consistent with discipline imposed in prior similar matters.

DETERMINATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously determines that the Respondent, Michael Patrick O'Day, shall receive a Public Reprimand.

The expenses incurred in the investigation and prosecution of this matter shall be paid by Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: S/John C. Rafferty, Jr.
John C. Rafferty, Jr., Member

Date: September 20, 2019