

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2792 Disciplinary Docket No. 3
	:	
Petitioner	:	No. 15 DB 2020
v.	:	
	:	Attorney Registration No. 26110
JOHN J. O'BRIEN, III,	:	
	:	(Montgomery County)
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 27th day of July, 2021, Respondent's request for oral argument and Petition for Review are DENIED. See Pa.R.D.E. 208(e)(4) (providing that an attorney has no right to oral argument in disciplinary matters unless the recommendation is for disbarment). Upon consideration of the Report and Recommendations of the Disciplinary Board, John J. O'Brien, III, is suspended from the Bar of this Commonwealth for a period of two years. Respondent shall comply with all the provisions of Pa.R.D.E. 217 and pay costs to the Disciplinary Board. See Pa.R.D.E. 208(g).

A True Copy Patricia Nicola
As Of 07/27/2021

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 15 DB 2020
Petitioner	:	
	:	
v.	:	Attorney Registration No. 26110
	:	
JOHN J. O'BRIEN, III,	:	
Respondent	:	(Montgomery County)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

By Petition for Discipline filed on January 16, 2020, Petitioner, Office of Disciplinary Counsel, charged Respondent, John J. O'Brien, III, with violating Rules of Professional Conduct governing recordkeeping and safekeeping of client property. On January 30, 2020, Respondent filed a counseled Answer to the Petition for Discipline, wherein he admitted three of the five charged rule violations.

A prehearing conference was held on February 21, 2020. Due to the COVID-19 pandemic, the disciplinary hearing scheduled for April 21, 2020 was continued

until September 15, 2020. On September 3, 2020, Respondent filed a Motion to Amend Answer with New Matter. On September 8, 2020, Petitioner filed a letter response to Respondent's Motion. By Order dated September 9, 2002, the Committee denied Respondent's Motion to Amend.

On September 15, 2020, a District II Hearing Committee ("Committee") conducted a disciplinary hearing. Petitioner presented one witness and offered exhibits ODC-1 through ODC-18. Respondent's objections to Petitioner's exhibits were addressed in briefs to the Committee prior to the hearing and were overruled. Respondent testified on his own behalf and presented the testimony of six character witnesses. Respondent offered into evidence, without objection, exhibits 1-26 and A-H.

On November 16, 2020, Petitioner filed a Brief to the Committee and requested that the Committee recommend to the Board that Respondent be suspended for a minimum period of one year and one day. Respondent filed a Brief to the Committee on December 2, 2020 and requested that the Committee dismiss the case.

By Report dated February 11, 2021¹, the Committee concluded that Petitioner met its burden to prove that Respondent violated the Rules of Professional Conduct charged in the Petition for Discipline and recommended that Respondent be suspended for a period of one year and one day.

On March 1, 2021, Respondent filed a Brief on Exceptions to the Committee's Report and recommendation and contended that a public reprimand is sufficient to address his misconduct. Respondent requested oral argument before the Board. On March 19, 2021, Petitioner filed a Brief Opposing Respondent's Exceptions

¹ On January 14, 2021, the Committee requested an extension of time to submit its Report and recommendation to the Board. All parties were notified. The request was granted and the date for filing the Report was extended to February 12, 2021.

and requested that the Board recommend to the Court that Respondent be suspended for one year and one day.

On April 8, 2021, a three-member panel of the Board held oral argument.

The Board adjudicated this matter at the meeting on April 14, 2021.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is situated at Pennsylvania Judicial Center, 601 Commonwealth Avenue, Suite 2700, P.O. Box 62485, Harrisburg, Pennsylvania 17106 is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and duty to investigate all matters involving alleged misconduct of any attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said rules.

2. Respondent is John J. O'Brien, III, born in 1950 and admitted to practice law in the Commonwealth of Pennsylvania in 1977. Respondent's address of record is P.O. Box 96, Wynnewood, PA 19096. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent's law practice consists primarily of representing clients who were sued by collection firms, banks and credit card companies. N.T. 71-74.

4. On July 5, 2017, the Pennsylvania Lawyers Fund for Client Security (the "CSF") received notice of an overdraft in Respondent's IOLTA in the amount of \$5,417.21. ODC-6 at Bates 5-6.

5. On August 3, 2017, the CSF received notice of an overdraft in Respondent's IOLTA in the amount of \$6,017.21. ODC-7.

6. By letter dated August 17, 2017, Petitioner contacted Respondent to regarding the improper use of his IOLTA account as follows:

a. On June 22, 2017, Respondent deposited a \$7,500 client settlement check into his PNC Bank IOLTA. Respondent did not wait for the settlement check to clear his account. On June 23, 2017, Respondent issued four checks drawn on his IOLTA, in the amounts of \$4,700, \$1,000, \$400 and \$500. ODC- 4, ODC-5 ¶¶6a.

b. On June 27, 2017, Respondent's IOLTA was overdrawn in the amount of \$5,417.21. ODC-4, ODC-5, ¶¶6b.

c. On August 1, 2017, Respondent deposited into his IOLTA a replacement settlement check, in the amount of \$7,500. On August 3, 2017, PNC Bank issued a report concerning Respondent's IOLTA, stating that a check in the amount of \$7,500 had been presented on August 1, 2017, creating a \$6,017.21 negative balance in the account. Respondent received a copy of this report. ODC-4, ODC-5, ¶¶6d.

ODC-12.

7. While Petitioner was still investigating Respondent's June and August 2017 overdraft events, on December 8, 2017, PNC Bank reported another negative balance in Respondent's IOLTA, in the amount of \$38.13. ODC-8, ODC-11, Bates 44-47; N.T. 44-45.

8. Respondent's check number 2842 in the amount of \$196.60, representing a filing fee for a client's appeal to the Pennsylvania Superior Court, was returned unpaid. *Id.*

9. On December 22, 2017, PNC Bank reported a negative balance of \$101.53 in Respondent's IOLTA as a result of two checks, identified as check numbers 2845 and 2846, being presented on Respondent's IOLTA account in one day, and one deposit item in the amount of \$990.00 being returned. ODC-9, ODC-11, Bates 44-47; N.T. 46-49.

10. On January 11, 2018, Petitioner requested from Respondent copies of all records required by RPC 1.15(c) from February 1, 2017, including but not limited to periodic statements, cancelled checks, deposited items, individual ledgers for trust clients, monthly reconciliation documentation, copies of writings required by RPC 1.5(b), and copies of records identified in RPC 1.5(c). ODC-10; ODC-5, ¶11.

11. Respondent replied to the records request on January 30, 2018 and produced some of the requested records. ODC-11. Respondent did not produce cancelled checks, deposited items and records of electronic transactions for his IOLTA because he did not maintain them. ODC-11, Bates 2; N.T. 39-40, 42-43; ODC-4, ODC-5 ¶24.

12. Respondent admitted that between February 2017 and January 2018, he did not maintain client ledgers and he did not hold funds in trust for clients. ODC-5, ¶12; ODC-11, Bates 2-3.

13. Between February 2017 and January 30, 2018, Respondent did not properly maintain an IOLTA by keeping client ledgers, deposit slips records and account

information so as to have an accurate balance at all times. ODC-11, Bates 2-3 (“Since I do not accept plaintiff’s cases there are no separate ledgers.”); ODC-5, ¶13; N.T. 50-51.

14. Respondent did not reconcile his IOLTA. ODC-5 at ¶22 (“Respondent did not do reconciliations each month since he did not have the time and had not hired an accountant.”); ODC-11, Bates 2-3.

15. Respondent did not keep a ledger of collected funds. ODC-11, Bates 2-3 (“Trial balances and monthly reconciliation: Since I have not tried a plaintiff’s case in decades I do not have such records.”)

16. After an audit of the records provided by Respondent, on August 2, 2019, Petitioner notified Respondent by letter and alleged that on the following dates in January 2018, Respondent improperly deposited earned fees from clients into his IOLTA:

- a. \$460.00 on January 8, 2018;
- b. \$100.00 on January 5, 2018;
- c. \$500.00 on January 9, 2018;
- d. \$500.00 on January 3, 2018;
- e. \$990.00 on January 10, 2018;
- f. \$500.00 on January 8, 2018;
- g. \$3,205.50 on January 10, 2018;
- h. \$200.00 on January 17, 2018;
- i. \$500.00 on January 15, 2018;
- j. \$50.00 on January 20, 2018;
- k. \$150.00 on January 17, 2018; and
- l. \$1,200.00 on January 22, 2018

ODC-14.

17. Respondent admitted that deposited items referenced in paragraphs (b), (g), (h), (i) and (j) were payment for past legal services and should not have been placed in the IOLTA. ODC-5, ¶15. .

18. At least some of these deposits were neither qualified nor fiduciary funds within the meaning of RPC 1.15(a)(3) or RPC 1.15(a)(9), and should not have been deposited into Respondent's IOLTA account. ODC-5, ¶15.

19. Between February 1, 2017 and January 2018, Respondent deposited checks into his IOLTA, and wrote checks against the funds before determining whether the deposited funds had been credited to the account. N.T. 46-47.

20. Between February 1, 2017 and January 2018, Respondent did not maintain a check register or separately maintained ledger, identifying the purpose of each check, withdrawal and transfer, and the matter involved for each transaction for his trust account, as required under RPC 1.15(c)(2). ODC-5, ¶20.

21. Between February 1, 2017 and January 2018, Respondent did not maintain an individual ledger for trust clients reflecting the source or nature of all funds received from or on behalf of each client, and did not include a description of the charges or withdrawals from each account, as required under Rule 1.15(c)(2). ODC-5, ¶21.

22. Between February 1, 2017 and January 2018, Respondent did not reconcile each separate client account on a monthly basis. ODC-5, ¶22. ("The Respondent did not do reconciliations each month since he did not have the time and had not hired an accountant.")

23. Between February 1, 2017 and January 2018, Respondent did not balance client accounts and did not diligently account for client funds. ODC-5, ¶23, ODC-11, Bates 2 ("I do not hold any funds in trust for clients"); N.T. 42-56.

24. Between February 1, 2017 and January 2018, Respondent did not retain copies of checks written from his IOLTA account. ODC-5, ¶24.

25. Between February 1, 2017 and January 2018, Respondent did not perform monthly reconciliations of his IOLTA as required by RPC 1.15. ODC-5, ¶25.

26. Respondent knew or should have known his IOLTA is to be used solely for the purpose of holding funds on behalf of clients or third persons. ODC-5, ¶26.

27. Respondent has received previous private and public discipline for recordkeeping deficiencies and comingling funds. ODC-2, ODC-3.

28. Despite having knowledge of his client recordkeeping deficiencies, Respondent continued to commingle funds by depositing earned fees in the IOLTA account. N.T. 52; ODC-5, ¶16, ¶27.

29. Respondent admits violating RPC 1.15(c)(2), RPC 1.15(c)(4) and RPC 1.15(h). ODC-5, ¶28(c), (d) and (e).

History of Prior Discipline

30. On August 26, 2009, Petitioner advised Respondent that it had determined he would to receive an Informal Admonition in matter C2-08-1063, based on violations of RPC 1.15(a) and 1.15 (e)[now Rules 1.15(b) and 1.15(h)]. ODC-3, Bates 1-3.

31. Petitioner advised Respondent that he “failed to keep [his] funds separate from those of [his] client” and “deposited [his] funds to the IOLTA account.” ODC-3, Bates 1.

32. After Petitioner advised Respondent of its findings and determination that an Informal Admonition was to be administered in matter C2-08-1063, but before the informal admonition was actually administered, Respondent again caused his IOLTA to be withdrawn. ODC-3, Bates 85.

33. This prompted Petitioner to open another disciplinary matter, C2-09-900. *Id.*

34. By letter dated September 23, 2009, Respondent was notified of Petitioner's new file and additional concern, and was asked to provide records within 30 days. ODC-3, Bates 85.

35. Respondent did not provide complete records as requested, and on October 23, 2009, Petitioner issued a subpoena for the requested records. ODC-3, Bates 5-7.

36. Petitioner's October 23, 2009 letter to Respondent enclosed materials for Respondent to read and review as a condition to his scheduled October 29, 2009 Informal Admonition. ODC-3, Bates 5-84.

37. These materials included a copy of RPC 1.15, a pamphlet prepared on behalf of the PA IOLTA Board, and three manuals describing proper maintenance of an IOLTA account. ODC-3, Bates 5-88; N.T. 103.

38. Respondent received an Informal Admonition on October 29, 2009. ODC-3, Bates 4, 87-88; ODC-2, Bates 5.

39. Respondent noted that "the meeting of Oct[ober] 29, 2009 was very helpful." ODC-3, Bates 88.

40. Respondent currently does not recall receiving an Informal Admonition. N.T. 101.

41. Respondent does not specifically recall the articles shared with him to correct his recordkeeping deficiencies. N.T. 103.

42. Despite the private discipline and efforts at education, Respondent continued to misuse his IOLTA. ODC-2, ¶19.

43. Between September 2010 and June 2011, Respondent continued to deposit funds into his IOLTA which were not Qualified Funds, as defined by RPC 1.15(a)(9). ODC-2, Bates 5-10.

44. Between September 2010 and June 2011, Respondent incurred six additional overdrafts. ODC-2, Bates 10.

45. The repeated notices of overdraft from the CSF prompted audits, all of which revealed continued misuse of the IOLTA. ODC-2, Bates 12.

46. On August 20, 2012, Petitioner and Respondent agreed to file a Joint Petition in Support of Discipline on Consent, wherein Respondent consented to a one year period of suspension, stayed in its entirety, with one year probation. ODC-2, Bates 3-19.

47. On March 28, 2013, the Court approved the Joint Petition, with conditions that on a quarterly basis Respondent provide Petitioner with bank statements, including monthly statements of account, deposit slips and client ledgers demonstrating the proper maintenance of his IOLTA account. ODC-2, Bates 1.

48. On April 13, 2016, Respondent received a Public Reprimand for his conduct while representing an estate. ODC-1, Bates 1.

49. Respondent sought to open an estate in Pennsylvania, using a Pennsylvania address for the decedent which he knew was invalid, and where the decedent had never resided. ODC-1, Bates 1-5.

50. The Board determined Respondent made false statements to the Court, violating RPC 3.1 (a lawyer shall not bring or defend a proceeding or assert or controvert an issue therein unless there is a basis in law and fact for so doing that is not frivolous...); RPC 3.3(a)(1)(a lawyer shall not knowingly make a false statement of

material fact or law to a tribunal); RPC 4.1 (“in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person”); and RPC 8.4(d) (prohibiting conduct prejudicial to the administration of justice.”) ODC-1, Bates 5-7.

51. Respondent’s Public Reprimand specifically put him on notice that “any future dereliction will subject you to disciplinary action.” ODC-1, Bates 2.

Respondent’s Testimony

52. Respondent testified at the hearing on September 15, 2020.

53. Respondent failed to exhibit any remorse for his misconduct. N.T. 69-103.

54. Respondent did not appreciate the nature of his past or current misconduct. N.T. 69-103.

55. Respondent did not submit evidence to establish that he has changed his practice to conform to the rules governing safekeeping of client property.

Witness Testimony

56. At the hearing, Respondent offered the testimony of six individuals as mitigating character evidence.

57. Michael Gallagher, Esquire has a law office in East Norriton, Montgomery County, Pennsylvania and has known Respondent for a number of years. Mr. Gallagher described Respondent as an experienced, aggressive litigator who has a reputation in the legal community as being able and honest. N.T. 105 – 106.

58. Mr. Gallagher was not aware of the details of Respondent's misconduct nor was he aware that Respondent had a previous history of misconduct. N.T. 108-109.

59. Robert Walton, Esquire is a Pennsylvania lawyer who knows Respondent through the many cases where they have been on opposing sides. Mr. Walton testified that Respondent is a fine, reputable attorney to deal with and is an active defense attorney. N.T. 111-112.

60. Mr. Walton had no knowledge of the nature and purpose of the disciplinary proceedings against Respondent. N.T. 113.

61. Mr. Walton was not aware of whether Respondent had any prior discipline. N.T. 114.

62. John Rollins, Esquire is a Pennsylvania lawyer who practices law mainly in federal court and has known Respondent for a number of years both personally and professionally. Mr. Rollins acted as co-counsel to Respondent in the instant matter. N.T. 116, 119.

63. Mr. Rollins testified that among the people he knows who also know Respondent, Respondent's reputation is that he is an efficient attorney and an honest person. N.T. 117.

64. Mr. Rollins was aware of the charged rule violations. N.T. 118.

65. Timothy Gorbey, Esquire is a Pennsylvania lawyer who practices primarily in Delaware County. Mr. Gorbey has known Respondent for approximately 45 years. N.T. 121.

66. Mr. Gorbey testified that among the lawyers he knows who know Respondent, Respondent has an excellent reputation for truth and honesty. N.T. 121, 122.

67. Mr. Gorbey was aware of some details of the rules violations and reviewed some paperwork that Respondent showed him. N.T. 123 – 125.

68. Mr. Gorbey was uncertain whether he knew Respondent had been the subject of prior discipline. N.T. 125.

69. Michael D. Parrish is a retired colonel in the Army Reserves who has known Respondent for at least ten years and is a former client of Respondent. N.T. 128-130.

70. Mr. Parrish testified that in his experience, Respondent's integrity is beyond reproach and his moral and ethical values are among the best. Mr. Parrish did not know any other individuals who know Respondent except for the people that were on the other side of the legal matter in which Respondent represented Mr. Parrish. N.T. 130.

71. Mr. Parrish testified that he had a vague understanding of why Respondent was at a disciplinary hearing, and believed it involved an issue about checks that were not properly cashed. N.T. 131.

72. Mr. Parrish was not aware of whether Respondent had been previously disciplined. N.T. 132.

73. Patricia O'Neill, Esquire is a retired Pennsylvania attorney who has known Respondent for some time. Ms. O'Neill testified that Respondent is a very experienced and knowledgeable attorney and an honest person. N.T. 137 - 140.

74. Ms. O'Neill was aware of the misconduct charges against Respondent as she was active for a time in his defense. N.T. 145-156.

75. Ms. O'Neill previously represented Respondent and assisted him in negotiating the one year stayed suspension on consent in 2013, as described above. ODC-2.

76. Ms. O'Neill could not accurately recall the circumstances of that previous discipline for Rule 1.15 violations. N.T. 158 ("It was a case of his handling his IOLTA account in regard to payment of his bills, and not as to overdrafts, in my opinion."); see ODC-2 at Bates 1-19 (Joint Petition), ¶10 (conceding six overdrafts in Respondent's IOLTA between September 28, 2010 and June 20, 2011).

77. None of the witnesses exhibited a clear understanding of the nature of Respondent's misconduct.

78. Witnesses Gallagher, Walton, Gorbey and Parrish were not aware that Respondent had any previous disciplinary history. *Id.*

79. Respondent offered no other mitigation evidence.

III. CONCLUSIONS OF LAW

By his conduct as set forth above, Respondent violated the following Rules of Professional Conduct:

1. RPC 1.15(b) – A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded;
2. RPC 1.15(c)(1) – A lawyer shall maintain the following books and records for each Trust Account and for any other account in which Fiduciary Funds are held pursuant to Rule 1.15(l): (1) all

transaction records provided to the lawyer by the Financial Institution or other investment entity, such as periodic statements, cancelled checks in whatever form, deposited items and records of electronic transactions;

3. RPC 1.15(c)(2) – A lawyer shall maintain a check register to include the payee, date, purpose and amount of each check, withdrawal and transfer, the payor, date and amount of each deposit and the matter involved for each transaction; provided however, that where an account is used to hold funds of more than one client, a lawyer shall also maintain an individual ledger for each trust client, showing the source, amount and nature of all funds received from or on behalf of the client, the description and amounts of charges or withdrawals, the names of all persons or entities to whom such funds were disbursed, and the dates of all deposits, transfers, withdrawals and disbursements;

4. RPC 1.15(c)(4) – A regular trial balance of the individual client trust ledgers shall be maintained....On a monthly basis, a lawyer shall conduct a reconciliation for each fiduciary account; and

5. RPC 1.15(h) – A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying service charges on that account, and only in an amount necessary for that purpose.

IV. DISCUSSION

This matter is before the Board for consideration of the allegations against Respondent that he ignored his fiduciary obligations and failed to comply with rules governing safekeeping of client property. Our review follows the Committee's Report concluding that Respondent violated RPCs 1.15(b), 1.15(c)(1), 1.15(c)(2), 1.15(c)(4) and 1.15(h) and unanimously recommending that Respondent be suspended for a period of one year and one day; Respondent exceptions thereto; Petitioner's opposition to Respondent's exceptions; and oral argument before a Board panel. Petitioner bears the burden of proving ethical misconduct by a preponderance of clear and satisfactory evidence. *Office of Disciplinary Counsel v. John Grigsby*, 425 A.2d 730, 732 (Pa. 1981). We conclude that Petitioner satisfied its burden by way of the documentary evidence and witness testimony, which demonstrated Respondent's violations of the rules charged in the Petition for Discipline. Based on the evidentiary record and for the reasons stated herein, we find no basis to support Respondent's challenges to the Committee's Report and we recommend that Respondent be suspended for a period of two years.

The record established that Respondent failed to adhere to his fiduciary obligations under the Rules of Professional Conduct by misusing his IOLTA, failing to maintain Rule 1.15 Funds in a trust account or IOLTA and failing to maintain required records. Respondent, on various occasions between February 1, 2017 and January 2018, deposited client settlement checks into his IOLTA and did not wait for the checks to clear the IOLTA before issuing checks drawn on that account, causing PNC Bank to report overdrafts on the IOLTA to the Pennsylvania Lawyers Fund for Client Security. Petitioner's investigation revealed that Respondent commingled funds by improperly depositing earned fees from clients into his IOLTA. Further investigation uncovered

multiple recordkeeping deficiencies in violation of RPC 1.15. Between February 1, 2017 and January 2018, Respondent failed to keep client ledgers, deposit slips records and account information, and did not reconcile his IOLTA or each client account on a monthly basis. In short, Respondent shirked his duty to account for the funds in his IOLTA and safeguard them by ensuring that he did not commingle client funds with his own funds.

Respondent is a thrice-disciplined attorney who despite previous discipline for identical misconduct and previous educational efforts aimed at correcting his lack of comprehension of his fiduciary obligations, continues to reject the ethical rules that ensure safekeeping of client funds. It is unclear whether Respondent's actions are due to unwillingness or inability to comply; whatever the basis for Respondent's repeated, persistent rule violations, the record strongly supports the conclusion that Respondent's unchecked noncompliance cannot be allowed to continue.

By his words and actions, Respondent has refused to acknowledge the essential obligation of members of the legal profession to account for and safeguard funds of clients and third parties. We highlight examples of record from the current proceeding to demonstrate Respondent's distorted views of his responsibilities:

Since I do not accept plaintiff's cases and there are no settlement funds in the IOLTA account there is no commingling. ODC-15, ¶¶8-9.

It is true I do not keep clients ledgers because I do not accept plaintiff's cases. ODC- 15, ¶¶11-12.

Since I do not accept plaintiff's cases I do not keep client ledgers. It is true that I keep a balance in the IOLTA account which confers an interest benefit on the Court. I make no withdraws [sic] unless the bank balance slip shows a current balance. The bank record [sic] are the most accurate. If you want me to close the IOLTA account pleas [sic] advise because I do not accept plaintiff's cases. ODC-15, ¶¶13

It is true that I deposit defense fees in the IOLTA account but because there are no settlement funds in the IOLTA account there is no commingling. I do

confer a benefit on the Supreme Court with interest unless you want me to close the account. ODC-15, ¶15.

As the Committee aptly points out, Respondent's erroneous views on the propriety of his actions have not changed since his previous instances of private and public discipline and demonstrate that he has never acknowledged that his advance retainers are fiduciary funds that require individual ledgers and safekeeping.

A review of Respondent's disciplinary record reveals that on October 29, 2009, Chief Disciplinary Counsel administered an Informal Admonition to Respondent for violation of RPC 1.15. In that matter, similar to the instant proceeding, Respondent failed to keep his own funds separate from those of his clients and deposited his own funds into the IOLTA. As a condition to the admonition, Respondent was provided educational materials regarding RPC 1.15 and maintaining an IOLTA account. However, subsequent to the admonition Respondent continued to misuse his IOLTA by depositing funds into that account that were not Qualified Funds under the rule and incurring overdrafts. This sparked further investigation by Petitioner, which demonstrated that Respondent, despite the administration of an informal admonition for similar misconduct in 2009, had not changed his practice habits and still did not comprehend how to account for and safeguard entrusted funds. For example:

On August 4, 2010, Respondent replied to Petitioner's inquiries regarding his continued overdrafts, stating:

. . . I handle one hundred (100%) percent defense cases and there are no settlement funds in the IOLTA account, however to reassure the Board I opened a client escrow account. This became fortunate because a subrogation defendant called after thirty (30) years to settle a case. Those funds were put into the escrow account so there was no commingling of clients' funds. (ODC-2, Bates 99.) There will not be any more overdrafts because I will transfer all fees to my other account. *Id.*

On October 27, 2010, Respondent replied to the Client Security Fund inquiry regarding continued overdrafts stating:

. . . one hundred (100%) percent of my work is defense cases and there are no settlement funds in the IOLTA account.
ODC-2, Bates 97.

In a September 12, 2011 letter to Petitioner, Respondent again stated:

As I told you before one hundred (100%) percent of my work is defense... .
Yes there were overdrafts because clients did not pay their bills and as you can see the problem was corrected. ODC-2, Bates 57.

To address the continuing misconduct, Petitioner and Respondent agreed to file a Joint Petition in Support of Discipline on Consent, wherein Respondent consented to a one year suspension, stayed in its entirety and one year probation with conditions. The Court approved the Joint Petition on March 28, 2013.

The instant record established that over the course of many years and multiple interactions with disciplinary authorities which resulted in private discipline and a stayed suspension with probation, Respondent has yet to grasp the importance of proper account handling and has not implemented the procedures necessary to fulfill his professional responsibilities. The misconduct at hand is merely the continuation of a long pattern of unprofessional conduct in the practice of law. Respondent's testimony at the instant hearing underscores his ongoing miscomprehension of the details of his previous discipline and prior rule violations as well as a lack of understanding regarding the current matter:

The first one I remember occurred in 2009. And I admit, since I don't handle plaintiff cases, when a client would pay me, I would place it in the IOLTA account. And at that time, I learned, unfortunately, you don't pay bills directly out of the IOLTA account. **They told me to stop it, and I said fine.** N.T. 76. (emphasis added)

Anyway, yes, I tried to correct the situation about addressing that. In fact, back in 2013, I got an admonition about keep your records straight. **I don't remember being instructed to keep everyday ledgers for clients.**

N.T. 78. (emphasis added)

I always thought the 2013 matter, the public – the suspended suspension or probation was all a part of the original transaction in 2019 (sic), and that there were efforts to make sure I complied with their warnings in 2009.

Q: (by Mr. Rollins) Why do you believe that you were brought before the disciplinary board today then?

A: Well, when two checks bounced, I immediately got a phone call from – I believe it's the client fund. The exact name, I don't know. I explained what happened, and they seemed satisfied. I sent them my father's ledger for expenses in that case and the entire circumstances. And I thought, well, since I got two bad checks from an entity of the state, that would be sufficient.

But then someone started looking into my entire practice. And suddenly, I'm told that I must provide every month to every client – every defense client a ledger of what I do for them and a bill every month. I'll do that, but it creates a problem for people who live from check to check.

So, that's what brought this on, the two bounced checks from the insurance fund.

N.T. 89-90.

Respondent's claims that he corrected specific practice problems are not borne out by the record. He put forth no evidence to show that he has taken measures to address his longstanding noncompliance with fiduciary responsibilities and that he has applied a newfound understanding of the rules to his practice. In fact, the record supports the exact opposite of Respondent's claims, in that he ignored the educational efforts afforded him through private discipline and probation and continued engaging in the same wrongful actions. When confronted with his latest deficiencies, Respondent exhibited little

understanding of the violations and put forth the same preposterous excuses to justify his actions in this matter as he put forth to explain away his prior recordkeeping deficiencies.

Rounding out Respondent's record of discipline is a public reprimand administered by the Board in 2016 for his violation of RPC 3.1, 3.3(a)(1), 4.1, and 8.4(d) relating to his representation of an estate. Therein, Respondent sought to open an estate in Pennsylvania using a Pennsylvania address for the decedent, which he knew was invalid and where the decedent never resided. The Board determined that Respondent intentionally made a false statement to the court. Although the misconduct in the estate matter is not similar to the instant misconduct and the misconduct in the admonition and probation matters, it constitutes an aggravating factor to be considered in the assessment of the appropriate disciplinary sanction herein.

In addition to Respondent's significant history of prior discipline, he exhibited no remorse for his wrongdoing, both present and past, and has exhibited a stubborn unwillingness to learn the rules that govern the profession and apply them to his everyday practice of law.

In mitigation, Respondent called six witnesses to testify as to his character. These witnesses were sincere and credible, but conceded their lack of awareness of some or most of Respondent's misconduct and his previous disciplinary history. This lack of knowledge undermines the weight of the character testimony. Respondent presented no other mitigating factors.

Disciplinary sanctions serve to protect the interests of the public while maintaining the integrity of the bar. *Office of Disciplinary Counsel v. John Keller*, 506 A.2d 872, 875 (Pa. 1986). Sanctions also serve as a deterrent. *In re Dennis J. Iulo*, 766 A.2d 335, 338-39 (Pa. 2001). While it is well-established that each matter is reviewed on the totality

of its facts and circumstances, the Board is mindful of precedent and the need for consistency when recommending disciplinary sanctions. **Office of Disciplinary Counsel v. Robert Lucarini**, 472 A.2d 186, 189-91 (Pa. 1983); **Office of Disciplinary Counsel v. Brian Preski**, 134 A.3d 1027, 1031 (Pa. 2016).

Recent disciplinary matters reflect that repeat disciplinary offenders have received progressively more severe sanctions as a way to maintain the public's confidence in the legal profession. Numerous of these matters have resulted in a one year and one day suspension.

In the recent matter of **Office of Disciplinary Counsel v. Frank C. Arcuri**, 147 DB 2019 (D. Bd. Rpt. 8/20/2020) (S. Ct. Order 10/6/2020), the Board recommended a one year and one day suspension to address Arcuri's repeated incidents of incompetence and neglect. In making this recommendation, the Board weighed in aggravation Arcuri's three private reprimands between the late 1990s and mid-2000s and his one year suspension in 2006. The instances of prior discipline involved misconduct similar to Arcuri's most recent matter. The Board stated:

While the instant misconduct . . . is troubling in its repetitive nature of incompetence and neglect, the Board is equally concerned with the significance of Respondent's prior history of discipline. This prior discipline has afforded Respondent multiple opportunities to remediate his practice habits and conform his conduct to the ethical standards required of the legal profession in this commonwealth. Notwithstanding these opportunities, Respondent is before this Board once again, the prior discipline having had no appreciable beneficial impact on his conduct. While we acknowledge that Respondent's health problems posed an obstacle to his sound execution of responsibilities in some of the current client matters, the similarities in Respondent's misconduct over the breadth of his various disciplinary matters cannot be ignored and expose his tenuous grasp on the rules of conduct.

Arcuri, D.Bd.Rpt. at p. 27-28.

In weighing the appropriate discipline in *Arcuri*, the Board also considered in mitigation Arcuri's credible expressions of remorse, his full acceptance of responsibility for his misconduct, the credible testimony of four character witnesses, and evidence that Arcuri engaged in community service. The Court ordered the recommended one year and one day suspension. Similar to the facts of *Arcuri*, the instant Respondent has an extensive history of discipline for similar misconduct over the course of twelve years. However, unlike the respondent-attorney in *Arcuri*, Respondent has not accepted responsibility for his actions, has shown no remorse, and failed to demonstrate other mitigation.

The attorneys in the following cases received a suspension for one year and one day because their prior discipline was an aggravating circumstance. *Office of Disciplinary Counsel v. John A. Gallagher*, No. 65 DB 2019 (D. Bd. Rpt. 9/29/2020) (S. Ct. Order 1/22/2021) (misconduct aggravated by two prior informal admonitions for similar misconduct); *Office of Disciplinary Counsel v. William James Helzlsouer*, 197 DB 2018 (D. Bd. Rpt. 11/18/2019) (S. Ct. Order 1/23/2020) (misconduct aggravated by a private reprimand, a three month stayed suspension with probation and a three month suspension); *Office of Disciplinary Counsel v. Mark David Johns*, 95 DB 2013 (D. Bd. Rpt. 12/2/2014) (S. Ct. Order 12/30/2014) (misconduct aggravated by an informal admonition and a private reprimand); *Office of Disciplinary Counsel v. Richard Patrick Reynolds*, 179 DB 2011 (D. Bd. Rpt. 11/19/2013) (S. Ct. Order 3/31/2014) (misconduct aggravated by two informal admonitions).

Some matters involving recidivist offenders have resulted in suspensions longer than one year and one day. Recently, the Court adopted the Board's recommendation and imposed a two year period of suspension on an attorney whose prior public discipline

aggravated the matter. **Office of Disciplinary Counsel v. Matthew Gerald Porsch**, 248 DB 2018 (D. Bd. Rpt. 2/20/2020) (S. Ct. Order 5/29/2020). Porsch neglected three client matters, failed to refund monies to two of the clients and failed to return original documents to the third. He ignored Office of Disciplinary Counsel's request for a statement of position and never filed a response to the Petition for Discipline. Porsch had a prior public reprimand for failing to appear at an informal admonition. The acts of misconduct resulting in the admonition were similar to his later misconduct. The Board noted that Porsch had the opportunity to make changes to his law practice to avoid unethical behavior but failed to do so. Additionally, the Board noted that Porsch failed to apologize to his clients and failed to express sympathy for their circumstances that resulted from his misconduct.

In **Office of Disciplinary Counsel v. Craig B. Sokolow**, No. 83 2018 (D. Bd. Rpt. 9/4/2019) (S. Ct. Order 12/11/2019), the Board recommended a suspension for two years to address Sokolow's false statements to a tribunal and to Office of Disciplinary Counsel. In making its recommendation, the Board considered Sokolow's prior record of discipline consisting of a disbarment on consent (20 years prior) for a criminal conviction and a more recent informal admonition for making a false statement in a pleading, misconduct similar to his subsequent infractions. The Board also noted Sokolow's lack of remorse. The Court imposed a two year suspension, with Justices Baer and Todd dissenting for the issuance of a rule to show cause why Sokolow should not be disbarred for repeated dishonest conduct. Similarly, in **Office of Disciplinary Counsel v. Nicholas E. Fick**, 132 DB 2012 (D. Bd. Rpt. 11/4/2013) (S. Ct. Order 3/31/2014), the respondent-attorney's prior history of an informal admonition, a private reprimand, and a one year stayed suspension with probation was a weighty factor in the Board's recommendation of an 18 month

period of suspension. The Board also considered Fick's lack of remorse. The Court adopted the Board's recommendation, with Justices Baer and Stevens dissenting for a three year period of suspension due to Fick's prior disciplinary record.

The disciplinary precedent supports the imposition of a two year period of suspension in this matter to impress upon Respondent that this Board and the Court will not countenance his continued wrongful conduct. Respondent is an unrepentant recidivist whose attitude throughout these proceedings has been one of condescension and indignation. His demeanor and testimony reflected no contrition or regret for his misconduct, either now or in the past. Respondent's checkered history shows that he is unwilling to conform his practice to the standards expected of all Pennsylvania attorneys. Despite Respondent's attempts to persuade the Board otherwise, his repeated transgressions are not meaningless or insignificant. Given Respondent's extensive history of discipline for similar infractions and because we find no evidence of record to demonstrate that Respondent's misconduct will cease, a lengthy suspension is warranted to protect the public and preserve the reputation of the legal profession.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, John J. O'Brien, III, be Suspended for two years from the practice of law in this Commonwealth.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: 
Jerry M. Lenocky, Vice-Chair

Date: May 7, 2021