

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2363 Disciplinary Docket No. 3
: :
Petitioner : No. 193 DB 2016
: :
v. : Attorney Registration No. 58234
: :
JOHN CHURCHMAN SMITH, JR. : (Philadelphia)
: :
Respondent :

ORDER

PER CURIAM

AND NOW, this 30th day of March, 2017, upon consideration of the Recommendation of the Three-Member Panel of the Disciplinary Board, the Joint Petition in Support of Discipline on Consent is granted, and John Churchman Smith, Jr., is suspended on consent from the Bar of this Commonwealth for a period of one year. He shall comply with all the provisions of Pa.R.D.E. 217.

A True Copy, Patricia Nicola
As Of 3/30/2017

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, :
Petitioner :
 :
 : No. 193 DB 2016
v. :
 : Atty. Reg. No. 58234
JOHN CHURCHMAN SMITH, JR., :
Respondent : (Philadelphia)

JOINT PETITION IN SUPPORT OF DISCIPLINE
ON CONSENT UNDER RULE 215(d), Pa.R.D.E.

Petitioner, Office of Disciplinary Counsel ("ODC"), by Paul J. Killion, Chief Disciplinary Counsel, and Robert P. Fulton, Esquire, Disciplinary Counsel, and Respondent, John Churchman Smith, Jr., by and through his attorney, John C. Smith, Esquire, file this Joint Petition In Support of Discipline On Consent Under Rule 215(d) of the Pennsylvania Rules of Disciplinary Enforcement ("Pa.R.D.E.") and respectfully represent that:

1. ODC, whose principal office is located at the Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, Harrisburg, Pennsylvania 17106, is vested, pursuant to Pa.R.D.E. 207, with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania

FILED

1/18/2017

**The Disciplinary Board of the
Supreme Court of Pennsylvania**

and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent, John Churchman Smith, Jr., was born in 1961, admitted to practice law in the Commonwealth on June 18, 1990, and assigned attorney identification number 58234. At all times relevant hereto, Respondent had registered office addresses at:

- a. Donald F. Manchel & Associates
Executive Center of Greentree
One Evesham Drive, Suite 111
Marlton, NJ 08053
- b. Lowenthal & Abrams, P.C.
555 City Line Avenue
Bala Cynwyd, PA 19004
- c. 2033 Arch Street, Suite B
Philadelphia, PA 19103

3. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

SPECIFIC FACTUAL ADMISSIONS AND
RULES OF PROFESSIONAL CONDUCT VIOLATED

4. Respondent represented Jennifer S. Harley ("Harley") as a result of a personal injury matter arising from a slip/trip and fall occurring on or about June 9, 2010 ("Harley Matter"), which matter was referred to Respondent by Donald F. Manchel, Esquire ("Manchel").

5. Respondent commenced a legal action on behalf of Harley in the Harley Matter in the New Jersey courts under caption of *Harley v. Payless Shoe Source, Inc. et al.*, docket no. ATL-L-3148-12 ("Harley Action").

6. Respondent entered his appearance for Harley in the Harley Action on behalf of Donald F. Manchel & Associates, Executive Center of Greentree, One Evesham Drive, Suite 111, Marlton, NJ 08053, as Manchel was not admitted to practice law in the State of New Jersey.

7. At the time Respondent entered his appearance, Respondent knew that Manchel was not admitted to practice law in the State of New Jersey.

8. As a result of Respondent's representation of Harley in the Harley Action, Respondent and Manchel were due attorney's fees of 33.3% of the monies collected in the Harley Action plus reimbursement of costs.

9. On or about October 10, 2013, Respondent litigated the Harley Action in an arbitration proceeding and an arbitration award was entered that totaled \$22,500.

10. On or about November 12, 2013, Respondent settled the Harley Action for the stated arbitration award, the payment of which was to be split evenly between the two defendants in the Harley Action.

11. By letter dated November 12, 2013 from Respondent to Harley, Respondent stated, *inter alia*, that "[Respondent] was able to resolve [the Harley Matter] for \$22,500, the amount of the arbitration award," and Respondent enclosed a release for a total of \$22,500, which Harley executed and returned to Respondent.

12. From the gross settlement of \$22,500, Respondent and Manchel were entitled to a total amount of attorney's fees of \$7,500 (33.3%) and costs of \$938 to Manchel and \$176.88 to Respondent, for a total amount of \$8,614.88; Harley was entitled to the balance of \$13,885.12.

13. On or about December 12, 2013, Respondent received settlement funds from The Hartford Insurance Company on behalf of one defendant in the Harley Action, Hong Huynh d/b/a Angel Nails, in the amount of \$11,250 ("Hartford Funds"), which Respondent deposited into Respondent's IOLTA account number xxxxxx-7003 with PNC Bank ("IOLTA").

14. On Respondent's 2014-2015, Pennsylvania Attorney's Annual Fee Form ("Fee Form"), Respondent failed to identify PNC Account Number xxxxxx-7003 as an account in which Respondent held client or fiduciary funds; rather, Respondent identified Manchel's IOLTA account as an account in which Respondent held client or fiduciary funds.

15. On December 18, 2013, Respondent issued to himself check number 1222 from IOLTA in the amount of \$3,166.88 and issued check number 1223 from IOLTA in the amount of \$4,938 payable to Manchel.

16. After issuing check numbers 1222 and 1223, which totaled \$8,104.88, Respondent was entitled to no more than \$510 from the balance of settlement funds not yet received.

17. On January 15, 2014, Respondent issued check number 1224 from IOLTA in the amount of \$2,500 to Harley.

18. Following Respondent's issuance of check 1224, Harley remained entitled to receive \$11,385.12.

19. On April 2, 2014, Respondent deposited a check in the amount of \$11,250 from Cedar Trust Realty ("Realty Funds"), the co-defendant in the Harley Action, into IOLTA.

- a. On March 31, 2014, and at the time of this deposit, the existing balance in IOLTA was \$756.42, which when combined with the \$11,250 deposit, was sufficient to cover the \$11,385.12 owed to Harley and the balance of Respondent's fee of \$510.

Consequently, Respondent was required either to maintain in IOLTA or to distribute to Harley the sum of \$11,385.12.

20. On June 13, 2014, Respondent issued to himself check number 1225 from IOLTA in the amount of \$2,000, of which Respondent was only entitled to \$510, which resulted in an end-of-the-day balance in the IOLTA of \$10,006.42; Respondent's IOLTA was out-of-trust by \$1,490.

21. On July 2, 2014, Respondent issued check number 1226 from IOLTA in the amount of \$4,200 payable to Respondent, which resulted in an end-of-the-day balance in the IOLTA of \$5,806.42; Respondent's IOLTA was out-of-trust by \$5,690.

22. Respondent misappropriated \$5,690 $[(\$2,000 - \$510) + \$4,200]$ to Respondent's own use.

23. At the time that Respondent issued check numbers 1225 and 1226, Respondent knew that he was not entitled to the additional \$5,690; Respondent's misappropriation was knowing and intentional.

24. On October 6, 2014, Respondent deposited \$4,200 of his personal funds from Respondent's PNC Bank personal account number xxxx-xxx-1346 into IOLTA.

25. On November 7, 2014, Respondent deposited \$1,500 of his personal funds from Respondent's PNC Bank personal account number xxxx-xxx-1346 into IOLTA.

26. As a result of Respondent's depositing personal funds from his own bank account to IOLTA, Respondent commingled personal funds with fiduciary funds in IOLTA.

27. In connection with the Harley Action, Respondent's IOLTA account was out-of-trust from June 13, 2014 to November 7, 2014, a period of nearly five months.

28. Respondent failed to promptly distribute from the Realty Funds, which Respondent deposited on April 2, 2014 (¶ 19, *supra*), the fiduciary funds owed to Harley.

29. From January 2014 to at least April 2015, Harley has made numerous and various attempts to contact Respondent by telephone without success to determine the status of the Harley Matter and, in particular, the distribution of the settlement funds from the Harley Action.

30. Harley spoke with Respondent on one occasion in "fall 2014" and Respondent gave the explanations that Respondent had been hospitalized and would "straighten out" Harley's file as the file could not be found.

31. Thereafter, Respondent failed to contact Harley.

32. Despite repeated requests from Harley, Respondent failed to disburse the settlement funds to Harley and failed to provide a prompt accounting to Harley of the Hartford Funds and the Realty Funds.

33. On or about May 5, 2015, Respondent executed check number 1227 in the amount of \$11,385.12 payable to Harley from IOLTA, by which time thirteen months had elapsed from the time of Respondent's receipt of the Realty Funds.

34. In response to an inquiry by then-District I Disciplinary Counsel Donna M. Snyder, Respondent, via fax dated May 5, 2015, to the District I (Philadelphia) Office of Disciplinary Counsel, forwarded a copy of: 1) check 1227; 2) a "Statement of Distribution" for Harley; and 3) page one of Respondent's monthly statement for Respondent's IOLTA account (for the period 4/1/2015 to 4/30/2015) ("April Statement").

- a. The fax was on the letterhead of Lowenthal & Abrams, P.C., 555 City Line Avenue, Suite 500, Bala Cynwyd, PA 19004.

Rule Violations

35. By his conduct as alleged in Paragraphs 4 through 34 above, Respondent violated the following Rules of Professional Conduct:

- a. RPC 1.3, which states that a lawyer shall act with reasonable diligence and promptness in representing a client;
- b. RPC 1.4(a)(3), which states that a lawyer shall keep the client reasonably informed about the status of the matter;
- c. RPC 1.4(a)(4), which states that a lawyer shall promptly comply with reasonable requests for information;

- d. RPC 1.15(b), which states that 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;
- e. RPC 1.15(e), which states that except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property; Provided, however, that the delivery, accounting and disclosure of Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of Fiduciary administration, confidentiality, notice and accounting applicable to the Fiduciary entrustment;

- f. RPC 1.15(h), which states that 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;
- g. RPC 8.4(b), which states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- h. RPC 8.4(c), which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and
- i. Pa.R.D.E. 203(b)(3), which states that a wilful violation of any other provision of the Enforcement Rules shall be grounds for discipline, via Pa.R.D.E. 219(d)(1)(iii) [superseded effective 2-28-2015], which states that on or before July 1 of each year all persons required by this rule to pay an annual fee shall file with the Attorney Registration Office a signed form prescribed by the Attorney Registration Office

in accordance with the following procedures:

(1) The form shall set forth: (iii) The name of each financial institution in this Commonwealth in which the attorney on May 1 of the current year or at any time during the preceding 12 months held funds of a client or a third person subject to Rule 1.15 of the Pennsylvania Rules of Professional Conduct. The form shall include the name and account number for each account in which the lawyer holds such funds, and each IOLTA Account shall be identified as such. The form provided to a person holding a Limited In-House Corporate Counsel License or a Foreign Legal Consultant License need not request the information required by this subparagraph.

SPECIFIC JOINT RECOMMENDATION FOR DISCIPLINE

Petitioner and Respondent jointly recommend that the appropriate discipline for Respondent's admitted misconduct is a one-year suspension.

Respondent hereby consents to the discipline being imposed upon him. Attached to this Petition is Respondent's executed Affidavit required by Pa.R.D.E. 215(d), stating that he consents to the recommended discipline and including the

mandatory acknowledgements contained in Pa.R.D.E. 215(d)(1) through (4).

In support of Petitioner and Respondent's joint recommendation, it is respectfully submitted that there are several mitigating circumstances:

- a. Respondent has expressed remorse;
- b. Respondent has accepted responsibility for his misconduct;
- c. Respondent rectified his misappropriation by making full restitution prior to any involvement by ODC;
- d. By way of explanation, and not as an excuse, Respondent believed that he had a life-threatening physical condition that required immediate attention for which he did not have readily available funds, which led to his use of client funds from his IOLTA account. Respondent was suffering from significant respiratory issues, which were exacerbated by extreme heat and humidity. Respondent used a portion of Harley's funds to replace the heat pump in his residence, which was not working. Respondent was ultimately diagnosed as suffering from Chronic Obstructive Pulmonary Disease and Congestive Heart Failure.

- e. Respondent has cooperated with ODC in its investigation of this matter;
- f. Respondent has proffered letters from various character witnesses, all attesting to his integrity;
- g. Respondent has given credible assurances that he will not succumb to temptation again; and
- h. Respondent has no record of discipline.

Respondent has been a member of the bar of the Commonwealth for over twenty-six years and has no history of contact with the disciplinary system. Although Respondent does not proffer his ongoing physical medical problems as an excuse, he does offer them as an explanation. As his physical health declined, Respondent experienced a concomitant decline in his mental health. The physical maladies resulted in his misappropriating client funds for what he believed was a necessary investment to alleviate his breathing difficulties. The mental decline resulted in his neglect of the client's matter. Following the improvement of his physical health, his mental health improved as well.

In *Office of Disciplinary Counsel v. Staropoli*, 97 DB 2002 (D.Bd. Rpt. 4/1/2004) (S.Ct. Order 7/8/2004), the respondent misappropriated law firm funds (\$2,000) which he subsequently reimbursed plus interest. The respondent

engaged in a series of misrepresentations in accounting to his former firm regarding the fees. In reviewing the circumstances of the matter involving misappropriation of law firm funds, the Board cited to *In re Anonymous No. 115 DB 2000* (S.Ct. Order 1/31/2002). The Board wrote "that the fact that [the respondent in No. 115 DB 2000] converted money [\$5,895.32] from his law firm, rather than from his client, was of no moment because the conversion of law firm funds was no less egregious than the conversion of client funds.... The Board determined that the attorney's prior unblemished record, his strong character testimony, including testimony from partners at his former law firm, and his cooperation with Office of Disciplinary Counsel weighed favorably for a one year suspension." *Staropoli, supra*, at p. 12. The Board recommended that Staropoli receive a six-month suspension. The Court imposed a one-year suspension.

Although the instant matter involves the misappropriation of client funds, Respondent replenished the funds prior to any contact from ODC. Respondent also met with ODC and impressed upon ODC the nature and extent of his remorse and acceptance of responsibility. Under the facts and mitigating factors of the instant matter, a suspension of one year is appropriate.

WHEREFORE, Petitioner and Respondent respectfully request that:

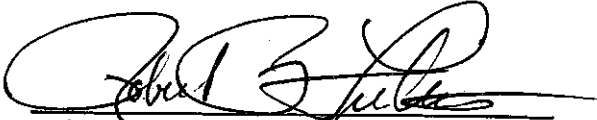
- a. Pursuant to Rule 215(e) and 215(g), Pa.R.D.E., a three-member panel of the Disciplinary Board review and approve the above Joint Petition In Support of Discipline On Consent for the imposition of a one-year suspension.
- b. Pursuant to Rule 215(i), the three-member panel of the Disciplinary Board order Respondent to pay the necessary expenses incurred in the investigation of this matter as a condition to the grant of the Petition and that all expenses

be paid by Respondent before the imposition of discipline under Rule 215(g), Pa.R.D.E.

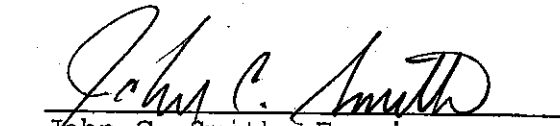
Respectfully submitted,
OFFICE OF DISCIPLINARY COUNSEL

PAUL J. KILLION
CHIEF DISCIPLINARY COUNSEL


18 JAN 2017
Date

By: 
Robert P. Fulton, Esquire
Disciplinary Counsel
Attorney Regis. No. 37935
1601 Market Street, Ste. 3320
Philadelphia, PA 19103
(215) 560-6296

1/13/17
Date

By: 
John C. Smith, Esquire
Attorney Regis. No. 9012
Counsel for Respondent

1/13/17
Date

By: 
John Churchman Smith, Jr.
Attorney Regis. No. 58234
Respondent


BEFORE THE DISCIPLINARY BOARD OF THE
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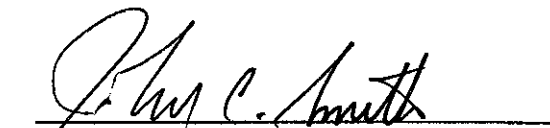
VERIFICATION

The statements contained in the foregoing Joint Petition In Support of Discipline on Consent Under Rule 215(d), Pa.R.D.E., are true and correct to the best of our knowledge or information and belief and are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

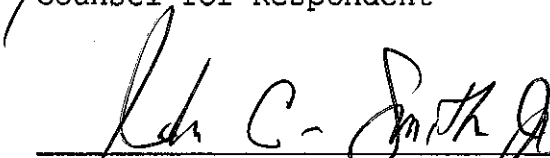
18 JAN 2017
Date

By: 
Robert P. Fulton, Esquire
Disciplinary Counsel

1/13/17
Date

By: 
John C. Smith, Esquire
Counsel for Respondent

1/13/17
Date

By: 
John Churchman Smith, Jr.
Respondent

BEFORE THE DISCIPLINARY BOARD OF THE
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OFFICE OF DISCIPLINARY COUNSEL, :
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JOHN CHURCHMAN SMITH, JR., :
Respondent : (Philadelphia)

AFFIDAVIT UNDER RULE 215(d), Pa.R.D.E.

Respondent, John Churchman Smith, Jr., hereby states that he consents to the imposition of a one-year suspension, as jointly recommended by Petitioner, Office of Disciplinary Counsel, and Respondent in the Joint Petition In Support Of Discipline On Consent and further states that:

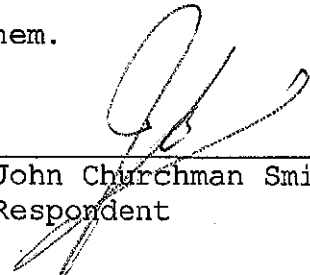
1. His consent is freely and voluntarily rendered; he is not being subjected to coercion or duress; and he is fully aware of the implications of submitting the consent;

2. He acknowledges that he is fully aware of his right to consult and employ counsel to represent him in the instant proceeding. He has consulted with John C. Smith, Esquire, in connection with his decision to consent to discipline;

3. He is aware that there is presently pending a proceeding at No. 193 DB 2016 involving allegations that he has been guilty of misconduct as set forth in the Joint Petition;

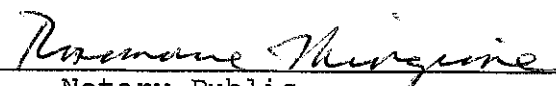
4. He acknowledges that the material facts set forth in the Joint Petition are true; and

5. He consents because he knows that if charges predicated upon the matter under investigation continued to be prosecuted in the pending proceeding, he could not successfully defend against them.



John Churchman Smith, Jr.
Respondent

Sworn to and subscribed
before me this 13th day
of JANUARY, 2016.



Notary Public

