

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2610 Disciplinary Docket No. 3
: :
Petitioner : No. 236 DB 2018
: :
v. : Attorney Registration No. 68911
: :
BRIAN JOSEPH SMITH, : (Montgomery County)
: :
Respondent :

ORDER

PER CURIAM

AND NOW, this 20th day of June, 2019, 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 Brian Joseph Smith is suspended on consent from the Bar of this Commonwealth for a period of one year and one day. He 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 06/20/2019


Attest:
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 236 DB 2018
Petitioner :
 :
v. : Attorney Reg. No. 68911
 :
BRIAN JOSEPH SMITH, :
Respondent : (Montgomery County)

JOINT PETITION IN SUPPORT
OF DISCIPLINE ON CONSENT
PURSUANT TO Pa.R.D.E. 215(d)

Petitioner, the Office of Disciplinary Counsel (hereinafter, "ODC") by Paul J. Killion, Chief Disciplinary Counsel, and Harold E. Ciampoli, Jr., Disciplinary Counsel and Brian Joseph Smith, Esquire (hereinafter "Respondent") respectfully petition the Disciplinary Board in support of discipline on consent, pursuant to Pennsylvania Rule of Disciplinary Enforcement ("Pa.R.D.E.") 215(d), and in support thereof state:

1. ODC, whose principal office is situated at Office of Chief Disciplinary Counsel, Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, P.O. Box 62485, Harrisburg, Pennsylvania 17106, is invested, pursuant to Pa.R.D.E. 207, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in

FILED
04/29/2019
The Disciplinary Board of the
Supreme Court of Pennsylvania

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

2. Respondent, Brian Joseph Smith, was born on September 1, 1964, was admitted to practice law in the Commonwealth of Pennsylvania on November 22, 1993 and maintains his office at 1458 County Line Road, Suite H, Huntingdon Valley, Pennsylvania 19006. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

SPECIFIC FACTUAL ALLEGATIONS ADMITTED

FILE C2-18-459 (COMPLAINT OF LAWRENCE FOX, ESQUIRE)

3. On October 16, 2017, Respondent filed in the Superior Court of New Jersey a civil action complaint (hereinafter, "Complaint") captioned *Joshua Fenwick, individually and on Behalf of PRO-NRG, LLC, a New Jersey Corporation v. EDDIE DUKHMAN, TANIA PATRUNO, HELEN KHOROSH, JOSEPH RASA, SANTE PUR SOLUTIONS, LLC, BRANDON JACOBS, BRAYDEN ENTERPRISES, LLC, AND JOHN DOE 1-10, ABC PRODUCTION COMPANY AND DAYMOND JOHN*, Superior Court of New Jersey, Law Division, Atlantic County, Docket No. ATL-L-002080-17.

4. The Complaint failed to set forth viable claims against Mr. John.

5. Respondent knew or should have known that the Complaint against Mr. John contained no basis in law and fact that was not

frivolous.

6. In filing the Complaint against Mr. John, Respondent had no substantial purpose other than to embarrass, delay, or burden a third person.

7. After receiving the Complaint, Lawrence Fox, Esquire, New York Counsel for Mr. John, had a telephone conversation with Respondent, wherein:

- a) Mr. Fox explained in detail the lack of any nexus or claim between Respondent's clients and Mr. John; and
- b) Respondent requested Mr. Fox set forth his position in writing.

8. By letter to Respondent dated December 4, 2017, Mr. Fox:

- a) detailed the reasons why the Complaint failed to set forth any semblance of a viable claim of merit against Mr. John; and
- b) advised Respondent of Mr. John's intention to file a motion to dismiss if Respondent did not amend the Complaint by December 8, 2017, to dismiss Mr. John as a defendant.

9. After receiving the December 4, 2017 letter, Respondent advised Mr. Fox he would be meeting with his client on December

13, 2017, and agreed to send a stipulation extending for 45 days the time for Mr. John to respond to the Complaint.

10. By letter dated December 15, 2017, New Jersey attorney Lisa Steirman Harvey advised Respondent that she represented Mr. John and requested Respondent to execute and file an enclosed stipulation to extend the time to answer the Complaint.

11. Respondent failed to acknowledge receipt of the signed stipulation and thereafter ignored emails and phone calls from Ms. Harvey inquiring of the status of the stipulation.

12. By email to Respondent dated December 22, 2017, Ms. Harvey:

- a) expressed her frustration at Respondent's failure to respond to Mr. John's requests to have Mr. John dismissed from the Complaint, as well as Respondent's failure to confirm the procedural request for an extension of time; and
- b) advised Respondent of her intention to file a motion to dismiss, as well as claims for counsel fees and sanctions for frivolous litigation.

13. Although Respondent received the December 22, 2017 email, he did not respond in any manner.

14. By letter to Respondent dated January 3, 2018, Ms. Harvey notified Respondent that her firm would be seeking all relief

available against Respondent and Plaintiff for frivolous litigation pursuant to New Jersey Court Rule 1:4-8 and N.J.S.A. § 2A:15-59.1.

15. Respondent received the January 3, 2018 letter, but did not respond in any manner.

16. On January 26, 2018, Ms. Harvey filed a motion to dismiss the Complaint against Mr. John for failure to state a claim for which relief could be granted.

17. The response to the motion to dismiss was due on or before February 22, 2018.

18. Respondent did not submit any response to the motion to dismiss.

19. By Order and Memorandum dated March 2, 2018, New Jersey Superior Court Judge Mary C. Siracusa granted Ms. Harvey's January 26, 2018 motion and:

- a) dismissed the Complaint against Mr. John because Plaintiff failed to state a viable claim against Mr. John, there was no basis for any relief by the Plaintiff against Mr. John and that no discovery will provide one; and
- b) permitted Mr. John to file a subsequent application against Respondent and Plaintiff for frivolous

litigation and bad faith dealings pursuant to Rule 1:4-8 and N.J.S.A 2A:15-59.1.

20. On March 22, 2018, Ms. Harvey filed a motion for counsel fees and sanctions against Respondent based upon frivolous litigation and bad faith pursuant to Rule 1:4-8 and N.J.S.A 2A:15-59.1.

21. Any opposition to the motion for sanctions and fees was to be filed on or before April 5, 2018.

22. On April 9, 2018, Respondent filed a late opposition to the motion for sanctions and fees.

23. By Order and Memorandum dated April 13, 2018, Judge Siracusa:

- a) found Respondent in violation of the frivolous litigation statute, N.J.S.A. 2A:15-59.1, and found that Respondent should be sanctioned in accordance with Rule 1:4-8(d);
- b) ordered Respondent to pay Ms. Harvey the sum of \$3,500.00 to cover a portion of the attorney's fees and other expenses incurred as a direct result of the violation of R. 1:4-8 and N.J.S.A. 2:15-59.1; and
- c) explained that she was imposing the sanction to "deter repetition of [Respondent's] conduct."

24. On June 5, 2018, Ms. Harvey filed a motion to enter judgement.

25. Respondent was served with the June 5, 2018 motion, but submitted no response.

26. By Order dated July 6, 2018, Judge Siracusa:

- a) found Respondent in Contempt of Court for Respondent's violation of the April 13, 2018 Order;
- b) enforced the April 13, 2018 Order and required Respondent to pay Mr. John \$3,500.00 within ten days;
- c) reduced to judgement the sanctions of \$3,500.00 against Respondent; and
- d) directed Respondent to pay Mr. John counsel fees and costs in the amount of \$1,332.50 within ten days.

27. Respondent was served with the July 6, 2018 Order.

28. To date, Respondent has failed to pay any amount of sanctions, counsel fees or costs in connection with the July 6, 2018 Order.

29. Respondent was apprised of the foregoing allegations by DB-7 REQUEST FOR STATEMENT OF RESPONDENT'S POSITION dated June 27, 2018 ("the June DB-7").

30. The June DB-7:

- a) advised Respondent that failure to respond without good cause is an independent ground for discipline pursuant to Rule 203(b)(7) of the Pennsylvania Rules of Disciplinary Enforcement; and
- b) warned Respondent that his failure to respond could cause the Office of Disciplinary Counsel to seek to impose discipline for Respondent's violation of Pa.R.D.E. 203(b)(7).

31. The June DB-7 was sent to Respondent by certified mail, addressed to Respondent's registered address and was received by Respondent on July 2, 2018.

32. Respondent did not respond in any manner to the June DB-7.

33. By letter dated August 3, 2018, ODC advised Respondent it had not received a response to the June DB-7 and reminded Respondent that ODC could seek discipline against him for his violation of Pa.R.D.E. 203(b).

34. Respondent received the August 3, 2018 letter but did not respond in any manner.

SPECIFIC RULES OF PROFESSIONAL CONDUCT AND RULE OF DISCIPLINARY ENFORCEMENT VIOLATED

35. By his conduct alleged in Paragraphs 3 through 34 above, Respondent violated the following Rules of Professional Conduct and Rule of Disciplinary Enforcement:

- A. New Jersey RPC 3.1 (Meritorious Claims and Contentions), which states, a lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law.
- B. New Jersey RPC 4.4(a) (Respect for Rights of Third persons), which states, in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- C. New Jersey RPC 8.4(d) (Misconduct), which states, that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice;
and
- D. Pa.R.D.E. 203(b)(7), which states that failure by a respondent-attorney without good cause to respond

to Disciplinary Counsel's request or supplemental request under Disciplinary Board Rules, §87.7(b) for a statement of the respondent-attorney's position is grounds for discipline.

FILE C2-15-920 (COMPLAINT OF ODC-CSF)

36. On December 18, 2013, Respondent deposited \$372,061.53 belonging to Joseph J. Spinelli, III, (Mr. Spinelli) into his IOLTA at PNC Bank, account number ending in 3278 (hereinafter "PNC IOLTA").

37. From December 2013 through October 2015, Respondent held funds in the PNC IOLTA belonging to Mr. Spinelli and/or Mr. Spinelli's Estate.

38. The funds Respondent held in his PNC IOLTA from December 2013 through October 2015 were subject to Rule 1.15 of the Pennsylvania Rules of Professional Conduct.

39. Respondent was required to identify his PNC IOLTA in his PA Attorney Annual Fee forms filed for the years 2014-2015, 2015-2016, and 2016-2017.

40. Respondent did not list his PNC IOLTA in his PA Attorney Annual Fee forms filed with the Disciplinary Board for the years 2014-2015, 2015-2016, and 2016-2017.

41. On May 9, 2014, Mr. Spinelli passed away in Montgomery County, Pennsylvania.

42. On December 11, 2014, Respondent made an ACH disbursement from the PNC IOLTA in the amount of \$26,367.57.

43. On March 19, 2015, Respondent filed a Petition for Probate and Grant of Letters (Petition) in the Estate of Joseph J.

Spinelli, III, Montgomery County Register of Wills, Case Number 2015-X1014.

44. On April 6, 2015, Respondent deposited an official check from TD Bank in the amount of \$77,000.00 into the PNC IOLTA.

45. On or about September 24, 2015, a check Respondent had provided to the Executor of Mr. Spinelli's Estate in the amount of \$204,484.58, drawn on the PNC IOLTA, was presented to PNC at a time the PNC IOLTA balance was \$6,770.57 less than sufficient to cover the check.

46. By letter dated October 7, 2015, the Pennsylvania Lawyers Fund for Client Security (Client Security) requested Respondent to provide an explanation and certain documentation relating to the shortfall created in the PNC IOLTA.

47. Respondent received the October 7, 2015 letter but did not respond.

48. By letter dated October 23, 2015, Client Security advised Respondent that if he did not respond to the October 7, 2015 inquiry, it would refer the matter to the Office of Disciplinary Counsel.

49. Respondent received the October 23, 2015 letter but did not submit a response to Client Security.

50. By letter dated December 7, 2015, pursuant to the authority conferred by Enforcement Rule 221(g)(1) and D.Bd. Rules

¶91.178(b), ODC requested Respondent to produce copies of all required records for the PNC IOLTA as mandated by Rule 1.15(c).

51. By cover letter to ODC dated December 31, 2015, Respondent enclosed partial and incomplete bank records in connection with his PNC IOLTA.

52. By letter to Respondent dated January 8, 2016, ODC advised Respondent that the documents he provided in response to its December 7, 2015 letter were an inadequate and insufficient response.

53. By letter to ODC dated January 8, 2016, Respondent enclosed partial and incomplete bank records and documents in connection with his PNC IOLTA.

54. By letter dated February 17, 2016, ODC advised Respondent that his previous submission was incomplete and again requested, pursuant to the authority conferred by Enforcement Rule 221(g)(1) and D.Bd. Rules ¶91.178(b), that he produce copies of all required records for the PNC IOLTA as mandated by Rule 1.15(c), that he had not previously provided.

55. By cover letters dated March 4, 2016 and March 17, 2016, addressed to ODC Auditor Daniel Richer, Respondent provided additional documentation.

56. On April 13, 2016, Auditor Richer contacted Respondent by telephone and specifically identified the required records in

connection with the PNC IOLTA that Respondent had not provided, including 9 of the 18 payments Respondent issued; 3 deposited items and records of 3 withdrawals.

57. On May 4, 2016, Auditor Richer contacted Respondent by telephone and inquired about the status of the documents Mr. Richer had requested on April 13, 2016. Respondent represented he would deliver the requested documents to ODC by May 9, 2016.

58. After Respondent did not deliver the requested documents to ODC, subpoenas were issued to PNC Bank and Respondent.

59. Respondent was commanded to appear at ODC's office in Trooper, PA on August 18, 2016, with the required records for his PNC IOLTA, including records of the ACH transfer from the PNC IOLTA on December 11, 2014, and deposit slips and records of the source for the deposits negotiated on the PNC IOLTA on April 6, 2015 and October 7, 2015.

60. On August 18, 2016, Respondent appeared at the subpoena return in the ODC Trooper office at which time he failed to provide any documentation in connection with the \$26,367.57 December 11, 2014 ACH transaction and the April 6, 2015 and October 7, 2015 deposits of \$77,000.00 and \$6,800.00, respectively, and failed to provide any bank reconciliations and a check register in connection with his PNC IOLTA.

61. Respondent was apprised of the foregoing allegations in

connection with File C2-15-920 by DB-7 REQUEST FOR STATEMENT OF RESPONDENT'S POSITION dated October 12, 2018 ("The October DB-7").

62. The October DB-7:

- a) advised Respondent that failure to respond without good cause is an independent ground for discipline pursuant to Rule 203(b)(7) of the Pennsylvania Rules of Disciplinary Enforcement;
- b) warned Respondent that the Office of Disciplinary Counsel may seek to impose discipline for Respondent's violation of Pa.R.D.E. 203(b)(7).

63. The October DB-7 was sent to Respondent by certified mail, addressed to Respondent's registered address and was received by Respondent on October 15, 2018.

64. To date, Respondent has not submitted a response nor contacted ODC in any manner in connection with the October DB-7.

SPECIFIC RULES OF PROFESSIONAL CONDUCT AND RULES OF
DISCIPLINARY ENFORCEMENT VIOLATED

65. By his conduct as alleged in Paragraphs 36 through 64 above, Respondent violated the following Rules of Professional Conduct and Rules of Disciplinary Enforcement:

- A. RPC 1.15(c)** (effective 9-20-2008) (For conduct prior to March 9, 2015):

Complete records of the receipt, maintenance and disposition of Rule 1.15 Funds and Property shall be preserved for a period of five years after termination of the client-lawyer or Fiduciary relationship or after distribution or disposition of the property, whichever is later. 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(1): (1) all transaction records provided to the lawyer by the Financial Institution or other investment entity, such as periodic statements, cancelled checks, deposited items and records of electronic transactions; and (2) check register or separately maintained ledger, which shall include the payee, date and amount of each check,

withdrawal and transfer, the payor, date, and amount of each deposit, and the matter involved for each transaction. (3) The records required by this rule may be maintained in electronic or hard copy form. If records are kept only in electronic form, then such records shall be backed up at least monthly on a separate electronic storage device.

B. RPC 1.15(c) (Required records) (For conduct after March 9, 2015):

Complete records of the receipt, maintenance and disposition of Rule 1.15 Funds and property shall be preserved for a period of five years after termination of the client-lawyer or Fiduciary relationship or after distribution or disposition of the property, whichever is later. A lawyer shall maintain the writing required by Rule 1.5(b) (relating to the requirement of a writing communicating the basis or rate of the fee) and the records identified in Rule 1.5(c) (relating to the requirement of a written fee agreement and distribution statement in a contingent fee matter). A lawyer shall also 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(1):

(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; and

(2) check register or separately maintained ledger, which shall 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.

(3) photographic, or other media provided that the records otherwise comply with this Rule and that printed copies can be produced. Whatever method is used to maintain required records must have a backup so that the records are secure and always available. If records are kept only in electronic form, then such records shall be backed up on a separate electronic storage device at least at the end of any day on which entries have been entered into the records. These records shall be readily accessible to the lawyer and available for production to the Pennsylvania Lawyers Fund for Client Security or the Office of Disciplinary Counsel in a timely manner upon a request or demand by either agency made pursuant to the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board Rules, the Pennsylvania Lawyers Fund for Client Security Board Rules and Regulations, agency practice, or subpoena.

(4) A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning

balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed. On a monthly basis, a lawyer shall conduct a reconciliation for each fiduciary account. The reconciliation is not complete if the reconciled total cash balance does not agree with the total of the client balance listing. A lawyer shall preserve for a period of five years copies of all records and computations sufficient to prove compliance with this requirement.

- C. **Pa.R.D.E. 219(d)(iii)** (For conduct prior to April 12, 2016): On or before July 1 of each year all attorneys required by this rule to pay an annual fee shall file with the Attorney Registration Office a signed or electronically endorsed form prescribed by the Attorney Registration Office that shall set forth, *inter alia*, the name of each Financial Institution, as defined in Pa.R.P.C. 1.15(a)(4), within or outside 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 attorney held such funds, and each IOLTA Account shall be identified as such.

- D. Pa.R.D.E. 219(d)(1)(iii)** (For conduct after April 12, 2016): On or before July 1 of each year, all attorneys required by this rule to pay an annual fee shall electronically file with the Attorney Registration Office an electronically endorsed form prescribed by the Attorney Registration Office that shall set forth, *inter alia*, the name of each Financial Institution, as defined in Pa.R.P.C. 1.15(a)(4), within or outside this Commonwealth in which the attorney, from May 1 of the previous year to the date of the filing of the annual fee form, 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 attorney held such funds, and each IOLTA Account shall be identified as such.
- E. Pa.R.D.E. 203(b)(7)**, which states that failure by a respondent-attorney without good cause to respond

to Disciplinary Counsel's request or supplemental request under Disciplinary Board Rules, §87.7(b) for a statement of the respondent-attorney's position shall be grounds for discipline.

SPECIFIC RECOMMENDATION FOR DISCIPLINE

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

67. Respondent hereby consents to that discipline being imposed upon him by the Supreme Court of Pennsylvania. Attached to this Petition is Respondent's executed Affidavit required by Rule Pa.R.D.E. 215(d), stating that he consents to the recommended discipline and including the mandatory acknowledgements contained in Rule 215(d)(1) through (4) Pa.R.D.E.

68. In support of Petitioner and Respondent's joint recommendation, it is respectfully submitted that the following mitigating circumstances are present:

- a) Respondent has admitted engaging in misconduct and violating the charged Rules of Professional Conduct;
- b) Respondent has cooperated with Petitioner in connection with this Petition, as evidenced by

Respondent's admissions herein and his consent to receiving a one-year and one-day suspension;

- c) Respondent is remorseful for his misconduct and understands he should be disciplined, as evidenced by his consent to receiving a one-year and one-day suspension; and
- d) Respondent has practiced law for over twenty-five years and has no record of discipline.

69. In support of Petitioner and Respondent's joint recommendation, it is respectfully submitted that the following aggravating circumstances are present:

- a) Respondent's cooperation as acknowledged above, was extremely belated.¹ Prior to the eve of the scheduled disciplinary hearing, Respondent had no contact with ODC and had exhibited complete disdain for this disciplinary proceeding by failing to respond to two DB-7 Letters of Inquiries; failing to respond to the Petition for Discipline and failing to attend the Pre-Hearing Conference; and

¹ A Petition for Discipline was filed on December 12, 2018. Respondent failed to file an Answer. A Prehearing Conference and Disciplinary Hearing were scheduled for Tuesday, March 5, 2019 and Monday, April 8, 2019, respectively. Respondent failed to attend the Prehearing Conference and failed to comply with the March 5, 2019 Prehearing Order issued by the Designated Chair of the Hearing Committee. On the afternoon of Thursday, April 4, 2019, Respondent contacted Petitioner and requested to resolve the matter via consent discipline.

b) Respondent has not paid any of the sanctions, counsel fees or costs imposed by the New Jersey Superior Court.

70. Respondent's misconduct involved two separate matters. Respondent filed a frivolous pleading and was ultimately held in contempt for violating a court order. The other matter was a referral to ODC from Client Security relating to a shortfall created in Respondent's PNC IOLTA. Respondent utilized this IOLTA for a single client and the client's estate after the client passed away. Respondent failed to keep required records for these fiduciary funds and his indifferent and casual responses to Petitioner's numerous requests for these records unnecessarily delayed the investigation and ultimately effectively prevented ODC from performing a comprehensive audit of Respondent's IOLTA. Specifically, *inter alia*, Respondent failed to provide supporting documentation in connection with a \$26,367.57 ACH transfer and deposits of \$77,000.00 and \$6,800.00. Respondent also failed to produce bank reconciliations and a check register in connection with the PNC IOLTA. Additionally, Respondent did not list, as he was required to do, his PNC IOLTA in his PA attorney Annual Fee forms filed with the Disciplinary Board for the years 2014-2015, 2015-2016; and 2016-2017.

71. The parties agree that in totality, Respondent's misconduct was serious, warranting a suspension of one year and one day. Respondent's previous failure to participate is an aggravating factor demonstrating Respondent's lack of interest in his professional license and a level of unfitness necessitating a sanction that requires Respondent to petition for reinstatement prior to resuming practice.

Public discipline has been imposed when an attorney files one or two frivolous lawsuits to further the interests of a client. *See, Office of Disciplinary Counsel v. Margaret M. Stuski*, 94 DB 2013 (2015) (public reprimand on consent for attorney who filed two frivolous suits in bankruptcy court and engaged in misconduct prejudicial to the administration of justice); *In re Anonymous*, 95 DB 1997, 44 D.&C. 4th 299 (1999) (public censure for attorney who filed a single frivolous lawsuit to further the interest of a client).

As stated previously, Respondent's misconduct in this matter inhibited ODC's investigation and ability to conduct a complete audit. The majority of cases that discuss failure to maintain proper financial records also involved misappropriation or mishandling of client funds, which has not been proven here. However, in imposing a public reprimand for a respondent who mishandled his law firm's IOLTA account by failing to maintain

proper records which caused the balance to go below the aggregate entrustment, the Disciplinary Board emphasized that "serious ethical violations occur when an attorney fails to keep the required records necessary for account maintenance...". *Office of Disciplinary Counsel v. Michael Paul Petro*, 195 DB 2014 (2016), 2/2/16 D.Bd.Rpt. at 9. In *Office of Disciplinary Counsel v. John Kelvin Conner*, 165 DB 2004 (2006), the Disciplinary Board recommended a nine-month suspension for a respondent who "engaged in an inexcusable failure to maintain records of his client's funds" when he commingled in his business account and otherwise mishandled funds of two clients. D.Bd.Rpt. at 12. Although the Board concluded that respondent's violations were "unintentional and due solely to poor recordkeeping in his law practice", it recommended a suspension to "emphasize to Respondent the importance of following the professional rules pertaining to safeguarding client monies and instituting office procedures designed to facilitate the correct handling of funds." *Id.* at 12-14.

Failure to fully participate in the disciplinary proceedings is a significant aggravating factor. *See, Office of Disciplinary Counsel v. Keith Hall Barkley*, 144 DB 2016 (2017) (respondent appeared at the pre-hearing conference but failed to answer the petition for discipline, failed to appear at the disciplinary

hearing and failed to submit a brief to the hearing committee); *Office of Disciplinary Counsel v. Joseph P. Maher*, 4 DB 2018 (2019) (respondent attended the disciplinary hearing but failed to answer the initial DB-7 and petition for discipline and failed to file a brief to the hearing committee, thus demonstrating lack of remorse and failure to appreciate the seriousness of his conduct). As stated previously, up until days before the scheduled disciplinary hearing in this matter, Respondent exacerbated his misconduct by demonstrating a complete disregard for the disciplinary process and refusing to participate in any manner. Such indifference demonstrates his unfitness and in totality with the underlying misconduct, justifies a one-year and one-day suspension. Respondent's belated cooperation and no record of discipline is mitigation and militates against a more severe sanction.

WHEREFORE, Petitioner and Respondent respectfully request that, pursuant to Pennsylvania Rules of Disciplinary Enforcement 215(e), 215(g) and 215(i), a three-member panel of the Disciplinary Board review and approve the Joint Petition in Support of Discipline on Consent and file a recommendation with the Supreme Court of Pennsylvania that Respondent be suspended from the Bar of the Commonwealth for a period of one year and one day.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL
PAUL J. KILLION,

Attorney Registration No. 20955,
Chief Disciplinary Counsel

4/29/19

DATE



Harold E. Ciampoli, Jr.
Disciplinary Counsel
Attorney Registration Number 51159
Office of Disciplinary Counsel
Suite 170, 820 Adams Avenue
Trooper, PA 19403
(610) 650-8210

4/24/19

DATE



Brian Joseph Smith
Attorney Registration Number 68911
Respondent

VERIFICATION

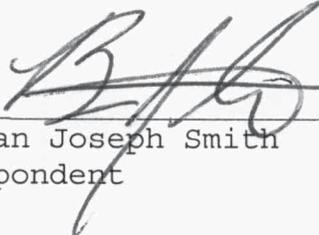
The statements contained in the foregoing *Joint Petition In Support of Discipline on Consent Discipline* are true and correct to the best of my knowledge or information and belief and are made subject to the penalties of 18 Pa.C.S.A. §4904, relating to unsworn falsification to authorities.

4/29/19
DATE



Harold E. Ciampoli, Jr.
Disciplinary Counsel

4/24/19
DATE



Brian Joseph Smith
Respondent

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 236 DB 2018
Petitioner :
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v. : Attorney Reg. No. 68911
 :
BRIAN JOSEPH SMITH, :
Respondent : (Montgomery County)

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

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF MONTGOMERY:

Brian Joseph Smith, being duly sworn according to law, deposes and hereby submits this affidavit consenting to the recommendation of a one-year and one-day suspension in conformity with Pa.R.D.E. 215(d) and further states as follows:

1. He is an attorney admitted in the Commonwealth of Pennsylvania, having been admitted to the bar on or about November 22, 1993.

2. He desires to submit a Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d).

3. 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 this affidavit.

4. He is aware that there is presently pending a proceeding

into allegations that he has been guilty of misconduct as set forth in the Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d) to which this affidavit is attached.

5. He acknowledges that the material facts set forth in the Joint Petition are true.

6. He submits the within affidavit because he knows that if charges predicated upon the matter under investigation were filed, or continued to be prosecuted in the pending proceeding, he could not successfully defend against them.

7. He acknowledges that he is fully aware of his right to consult and employ counsel to represent him in the instant proceeding. He has/has not retained, consulted and acted upon the advice of counsel, in connection with his decision to execute the within Joint Petition.

It is understood that the statements made herein are subject to the penalties of 18 Pa.C.S.A. §4904 (relating to unsworn falsification to authorities).

Signed this 15th day of April, 2019.



Brian Joseph Smith

Sworn to and subscribed
before me this 15th day
of April, 2019.


Notary Public

Commonwealth of Pennsylvania - Notary Seal
DALE G. NICKLAS JR, Notary Public
Bucks County
My Commission Expires December 30, 2022
Commission Number 1120602

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 236 DB 2018
Petitioner :
v. : Attorney Reg. No. 68911
BRIAN JOSEPH SMITH, :
Respondent : (Montgomery County)

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 204 Pa. Code §89.22 (relating to service by a participant).

By First Class Mail and Overnight Delivery as follows:

Brian Joseph Smith
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Dated:

4/29/19



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