

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2247 Disciplinary Docket No. 3
	:	
Petitioner	:	No. 28 DB 2016
	:	
v.	:	Attorney Registration No. 83891
	:	
KEITH MICHAEL McWHIRK,	:	(Montgomery County)
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 31st day of July, 2020, 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 Keith Michael McWhirk is suspended on consent from the Bar of this Commonwealth for a period of four years, retroactive to February 25, 2016. 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 07/31/2020

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

**BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA**

OFFICE OF DISCIPLINARY COUNSEL, : No. 2247 Disciplinary Docket No. 3

Petitioner :

: No. 28 DB 2016

v. :

: Attorney Registration No. 83891

:

KEITH MICHAEL MCWHIRK

: (Montgomery County)

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

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

Petitioner, Office of Disciplinary Counsel ("ODC"), by Thomas J. Farrell, Esquire, Chief Disciplinary Counsel, and by Harold E. Ciampoli, Jr., Esquire, Disciplinary Counsel, and Respondent, Keith Michael McWhirk, through his counsel, Amy Stovall Kline, Esquire, of the law firm of Saul Ewing Arnstein & Lehr, LLP, 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, PO Box 62485, Harrisburg, Pennsylvania 17106, is

FILED

06/30/2020

The Disciplinary Board of the
Supreme Court of Pennsylvania

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

2. Respondent, Keith Michael McWhirk, was born on May 2, 1974 and was admitted to practice in the Commonwealth on October 25, 1999.

3. By Order dated February 25, 2016, the Supreme Court of Pennsylvania granted the parties' Joint Petition to Temporarily Suspend an Attorney and placed Respondent on temporary suspension.

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

BACKGROUND

5. From April 2007 through December 2015, Respondent was a named partner and associate at the law firm of Mandracchia & McWhirk, LLC (the "Firm").

6. On December 3, 2015, Respondent lost consciousness and collapsed while at a work-related event.

7. The cause of Respondent's loss of consciousness was believed to be a vasovagal syncope.

8. Respondent was hospitalized for five days and required surgery for his serious injuries that included a LaFort Type 2 fracture to his face, a left orbital fracture, and damage to his teeth.

9. In attempting to cover Respondent's files during his absence from the Firm, his associates began to discover mounting evidence of serious ethical misconduct by Respondent.

10. Respondent did not return to work at the Firm following his accident.

11. Effective December 2015, Respondent was removed as a named partner, terminated as an employee of the Firm and the Firm name was changed to Mandracchia Law, LLC.

12. On February 2, 2016, Respondent's former associates, Charles Mandracchia, Jeffrey Soderberg and Christopher Mandracchia faxed a Complaint to ODC.

13. Complainants advised *inter alia*, they had uncovered evidence of misconduct by Respondent that triggered their duty to report; certain clients did not wish their names to be used; the full depth of the situation was still not known and "within the confines of [their] duty to [their] clients" they were disclosing "what [they knew] at this point."

14. By letter dated February 4, 2016, Respondent self-reported his misconduct.

15. Respondent's February 4, 2016 letter identified and provided detail regarding eleven client matters wherein Respondent had committed misconduct.

16. In four of those cases Respondent admitted he had intentionally misrepresented the status of matters to clients, purporting to have filed complaints, petitions and other filings, when in fact he had not.

17. In these four cases, Respondent claimed he used his personal funds to pay the clients, whom he had misled into believing that the funds were settlement funds, awards, or proceeds due to them from their various legal claims.

18. Respondent stated that he distributed his personal funds to these four clients in the following amounts: \$31,000.00; \$69,500.00; \$10,000.00 and \$424,000.00.

19. Respondent identified seven additional client matters wherein he made intentional misrepresentations to clients, including but not limited to, advising clients that he had filed complaints, motions and/or responsive pleadings when in fact he had not.

20. Respondent advised he had retained the law firm of Saul Ewing to assist him.

21. On February 12, 2016, Respondent, his counsel and ODC filed a Joint Petition to Temporarily Suspend.

22. By Order dated February 25, 2016, the Supreme Court placed Respondent on temporary suspension.

SPECIFIC FACTUAL ALLEGATIONS ADMITTED

I. INTENTIONAL FALSE REPRESENTATIONS TO CLIENT AND CLIENT NEGLECT INVOLVING TRANSFERS OF RESPONDENT'S PERSONAL FUNDS.

A. Client 1

23. Respondent represented Client 1, a commercial bank, in a mortgage foreclosure action in which the Sheriff's Sale was completed and the funds to cover the judgment disbursed.

24. In or around July 2013, Respondent misrepresented to Client 1 that Respondent filed a petition to pursue additional recovery from excess sale funds being held by the Sheriff.

25. In fact, no such petition was filed.

26. Respondent also misrepresented to Client 1 that the petition was granted and that the client was awarded funds.

27. On or about September 11, 2013, in furtherance of these misrepresentations, Respondent paid \$31,000.00 of Respondent's personal funds to Client 1.

28. The funds were misrepresented to Client 1 as being distributed from the excess Sheriff Sale funds as a result of the petition that was never filed.

29. Respondent made misrepresentations to representatives of Client 1 through phone calls, emails and in-person conversations.

30. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

B. Client 2

31. Respondent represented Client 2, the plaintiff in a mortgage foreclosure action in which the borrower/underlying defendant filed for protection under chapter 13 of the Bankruptcy Code.

32. On or about February 2014, Respondent misrepresented to Client 2 that a motion for relief from the automatic stay provisions of the Bankruptcy Code was filed and had been granted.

33. Respondent further misrepresented to Client 2 that the mortgage foreclosure action that was filed prior to the bankruptcy in Montgomery County was proceeding to a Sheriff's Sale.

34. The petition for relief from stay was not filed and the underlying mortgage foreclosure action did not proceed to a Sheriff's Sale.

35. Instead, on or about May 20, 2014, Respondent caused \$69,500.00 from Respondent's personal funds to be paid to Client 2, which Respondent misrepresented as being distributed from funds from a Sheriff's Sale.

36. Although the mortgage was not satisfied, starting on or about July 24, 2014, monthly distributions in the amount of \$23,901.47 were made through the borrower's Chapter 13 bankruptcy plan to Mandracchia & McWhirk, LLC, in satisfaction of Client 2's claim filed in the Bankruptcy Court.

37. Following the accident on December 3, 2015, Respondent misrepresented to the Firm the nature of the funds received from the Bankruptcy Court.

38. Instead of advising the Firm that Respondent had previously paid \$69,500.00 of Respondent's personal funds to Client 2, Respondent via a fabricated letter and fabricated deposit slip dated December 14, 2015 told

the Firm that Client 2 received the amount of \$20,330.67 of which the Firm was retaining \$3,570.80 as fees.

39. As set forth in ¶66, *infra*, Respondent caused approximately \$20,000.00 of the funds received on behalf of Client 2 through the Bankruptcy Court to be distributed to another client.

40. Respondent made misrepresentations to representatives of Client 2 through telephone calls and emails.

41. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

C. **Client 3**

42. Client 3 requested Respondent file a breach of contract and unfair trade practices and consumer protection law claim against an auto restoration company to recover \$25,000.00 that Client 3 had paid to have a vehicle restored.

43. A demand letter was sent out, but a complaint was not filed.

44. On or about September 2013, Respondent misrepresented to Client 3 that a complaint was filed and that a motion for summary judgment was filed and granted.

45. In furtherance of these misrepresentations, Respondent created a document that purported to be a court order stating that summary judgment in the amount of \$25,000.00 was entered in favor of Client 3.

46. The fictitious order was dated April 17, 2015, bore a fictional docket number and caption and purported to have the signature of the Honorable Bernard A. Moore, Judge of the Montgomery County Court of Common Pleas.

47. Respondent copied Judge Moore's signature from an order in Respondent's possession from another matter pending before his Honor.

48. Respondent provided the fictitious order to Client 3 and did not tell the client that the order was fictitious.

49. Respondent also placed a hard copy of the order in the Firm's file.

50. Respondent did not cause the order to be disseminated to any other persons or entities.

51. Respondent further misrepresented to Client 3 that the Defendant had initiated an appeal and subsequently obtained the client's consent to "settle" the matter for total payments of \$40,000.00.

52. This “settlement” amount included purported attorney fees, costs and penalties that the client believed he was entitled to under the fictitious order.

53. Respondent drafted an agreement documenting the fictitious settlement.

54. In furtherance of the terms of the settlement agreement, on December 3, 2015, prior to the accident, the Respondent caused \$10,000.00 of Respondent’s personal funds to be paid to Client 3.

55. Respondent misrepresented to Client 3 that the \$10,000.00 was the initial payment under the fictitious Settlement Agreement.

56. Respondent made misrepresentations to Client 3 through telephone calls, emails and in-person conversations.

57. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

D. Client 4

58. Respondent represented Client 4, a commercial bank, in a mortgage collection action that began with the filing of a confession of judgment action.

59. The Court granted a motion to open/strike judgment filed on behalf of the debtor-defendants.

60. Thereafter, Client 4 requested that a mortgage foreclosure action be filed against the properties.

61. The subject property consisted of 11 lots, ten of which were vacant, and one which had a model home occupied by an unknown tenant.

62. On various dates between September 2009 and December 2015, Respondent misrepresented that he had filed the mortgage foreclosure action. In fact, no such action was filed.

63. In October 2015, Respondent misrepresented to Client 4 that a Sheriff's Sale had taken place in the matter. In fact no such sale took place because no foreclosure action had been filed.

64. Just prior to Respondent's December 3, 2015 accident, and immediately thereafter, Client 4 requested payment of the funds from the Sheriff Sale that the client had been misled to believe had occurred.

65. Subsequently, between December 10, 2015 and December 14, 2015, Respondent closed and transferred various personal banking accounts in an aggregate amount of \$424,000.00, and caused those funds to be deposited with the Firm.

66. Respondent then caused these personal funds, together with an additional \$20,000.00 of funds from the Client 2 matter, for a total of approximately \$444,000.00, to be transferred to Client 4.

67. After the funds were transferred to Client 4, the client questioned the amount of the payment because it was less than what it understood were the proceeds of the Sheriff's Sale.

68. On or about December 17, 2015, in response to a request made to Respondent by the Firm and by Client 4, Respondent created a fictitious Sheriff's Distribution Sheet and provided it to the Firm and Client 4.

69. The fictitious Sheriff's Distribution Sheet:

- a) included letterhead at the top indicating it was from the Berks County Sheriff's Department;
- b) listed the Sheriff's name, mailing address, phone and fax number; and
- c) set forth a fictitious sale number, identified the 11 properties, and had a breakdown of the sale amounts resulting in a net payment of \$444,445.35 to Client 4.

70. Client 4 was aware within days of the transfer that the funds were not from a Sheriff's Sale but were Respondent's personal funds.

71. During a meeting that took place on December 28, 2015 between Respondent, Respondent's wife and representatives of the Firm, Respondent advised the Firm that the funds were Respondent's personal funds.

72. Respondent made misrepresentations to Client 4 representatives through phone calls and emails.

73. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

II. INTENTIONAL FALSE REPRESENTATIONS TO CLIENTS AND CLIENT NEGLIGENCE.

74. Respondent admits that in seven additional matters, he made intentional misrepresentations to clients including, but not limited to, advising clients that he had filed complaints, motions, and/or responsive pleadings when in fact, he had not.

A. Client 5

75. Respondent represented Client 5 (three brothers) in regard to their rights to a property located in Wildwood, New Jersey that had been left to them by their aunt in her Last Will and Testament.

76. Clients 5 requested that Respondent file a lawsuit to recover for the loss of the property.

77. Between late 2010/early 2011 to the Fall of 2015, Respondent misrepresented to Client 5 that the action was filed and misled the clients about the progress and status of the matter.

78. Respondent made misrepresentations to Client 5 through phone calls, emails and in-person conversations.

79. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

B. Client 6

80. Respondent represented Client 6, a commercial bank.

81. On or about October 2011, Respondent drafted a complaint on behalf of Client 6 in connection with potential commercial litigation.

82. On or about June 2012, Respondent misrepresented to Client 6 that the complaint was filed when in fact it was not.

83. Respondent made misrepresentations to representatives of Client 6 through phone calls and emails.

84. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

C. Client 7

85. Respondent represented Client 7, the plaintiffs in a breach of contract matter.

86. Respondent failed to file a timely response to defendant's summary judgment motion and failed to file a motion to reinstate the action following entry of summary judgment against Client 7.

87. The defendant's motion for summary judgment was granted on January 8, 2015 without opposition.

88. Respondent misled Client 7 and attorneys at the Firm regarding the status of the motion and the litigation.

89. When asked by the Firm during the Summer of 2015 about the status of this matter, Respondent indicated that it was pending and that opposition to the defendant's summary judgment motion had been filed.

90. Respondent made misrepresentations through phone calls with Client 7 and in-person conversations with an attorney in the Firm.

91. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

D. Client 8

92. Respondent represented Client 8, the plaintiff in a failure to diagnose case, where Client 8 was treated by her dentist for an issue that ended up being oral cancer.

93. Client 8 was subsequently diagnosed and treated.

94. The case was commenced on September 25, 2014 with the filing of a Writ of Summons.

95. Respondent failed to file a complaint in response to the rule to file a complaint filed on behalf of the defendant.

96. The matter was subsequently dismissed for failure to file a complaint.

97. On or about the Spring of 2015, Respondent misrepresented to Client 8 during a phone call that the case was proceeding through discovery, that there was no settlement offer on the table and that cases in the Montgomery County Court of Common Pleas were known for taking a long a time to move forward and resolve.

E. Client 9

98. Client 9 requested Respondent to file a complaint on their behalf in the U.S. District Court for the Eastern District of Pennsylvania.

99. Respondent failed to file the complaint.

100. In or about the Summer of 2015, Respondent misrepresented to Client 9 that the complaint had been filed and that the case was moving forward through litigation.

101. In fact, there was no such case filed or pending.

102. Respondent made misrepresentations to representatives of Client 9 through emails and weekly meetings.

103. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

F. Client 10

104. Respondent represented Client 10, a commercial bank, in a matter that arose out of two commercial loans.

105. One loan was secured by a Philadelphia property in which the property was sold and that loan was closed. The second loan involved property located in New Jersey.

106. Client 10 instructed Respondent to file a foreclosure action against the New Jersey property.

107. On or about the Spring of 2012, Respondent misrepresented to Client 10 that the complaint had been filed and that the matter was moving forward through litigation.

108. In fact, there was no such case file or pending.

109. Respondent made these misrepresentations to Client 10's representatives through emails and telephone calls.

110. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

G. Client 11

111. Respondent represented Client 11, the Executor in an Estate that was administered to completion in Middlesex County, New Jersey.

112. Subsequently, the State of New Jersey Department of Taxation filed a judgment for additional inheritance/estate taxes.

113. Respondent failed to respond or provide information requested by the New Jersey Department of Taxation and a lien was subsequently filed against the Estate and the Executor.

114. On or about November 2012, Respondent misrepresented to Client 11 that a timely response had been provided to the New Jersey Department of Taxation. In fact, no response had been provided.

115. Respondent made these misrepresentations to the Executor through emails, telephone calls and in-person meetings.

116. The records of these interactions are in the exclusive possession of the Firm and have not been available to the Respondent since his accident on December 3, 2015.

SPECIFIC RULES OF PROFESSIONAL CONDUCT VIOLATED

117. Respondent violated the following Rules of Professional Conduct:

- A. R.P.C. 1.1 which states that a lawyer shall provide competent representation to a client. Confidential representation requires the legal knowledge skill thoroughness and preparation reasonably necessary for the representation;
- B. R.P.C. 1.2(a) which states that a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c),(d) and (e) and shall consult with the client as to the means by which they are to be pursued;
- C. R.P.C. 1.3 which states that a lawyer shall act with reasonable diligence and promptness in representing a client;
- D. R.P.C. 1.4(a)(2), (3), and (4) which state that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information;

- E. R.P.C. 1.4(b) which states that a lawyer shall explain a matter to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;
- F. R.P.C. 1.15(h) which states that a lawyer shall not deposit the lawyers 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. R.P.C. 4.1(a) which states that 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
- H. R.P.C. 8.4(c) which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

SPECIFIC RECOMMENDATION FOR DISCIPLINE

118. Petitioner and Respondent jointly recommend that the appropriate discipline for Respondent's admitted misconduct is a four-year suspension, retroactive to the effective date of Respondent's temporary suspension.

119. 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 Pa.R.D.E. 215(d), stating that he consents to the recommended discipline and including the mandatory acknowledgments contained in Pa.R.D.E. 215(d)(a)1 through (4).

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

- A. Prior to ODC commencing its investigation, Respondent self-reported his misconduct and was forthright and specific as to the scope and nature of his misconduct. Very shortly after self-reporting, Respondent agreed to be put on interim suspension, which was ordered by the Supreme Court of Pennsylvania by Order dated February 25, 2016;
- B. Respondent has admitted engaging in misconduct and violating the charged rules of professional conduct;
- C. Subsequent to agreeing to a temporary suspension, Respondent has completely cooperated with Petitioner as is evidenced by Respondent's admissions herein. In fact numerous admissions contained in this Petition were supplied by Respondent, not corroborated by records and

would not have been discovered by ODC without Respondent's assistance and cooperation.

- D. Respondent is remorseful for his misconduct and understands he should be disciplined as is evidenced by his consent to receiving a four-year suspension;
- E. Prior to his temporary suspension, Respondent had practiced law for over 16 years and had no record of discipline;
- F. It is Respondent's position that if this matter were to proceed to a disciplinary hearing, he would be able to establish that he is entitled to *Braun* mitigation. Respondent underwent a psychiatric evaluation by Dr. John S. O'Brien II, MD, JD, who concluded that Respondent suffered from anxiety and depressed mood, consistent with Dysthymic Disorder or Major Affective Disorder. Dr. O'Brien's report is discussed in more detail, *infra*; and
- G. Since February 2016, Respondent has been, and continues to be, in a course of therapy with Dr. Joshua Friedman. Respondent obtains treatment in weekly

individual therapy sessions to address the psychological issues outlined above.

121. Analogous fact patterns have resulted in suspensions ranging from one-year and one-day to four-years.

In *Office of Disciplinary Counsel v. Thomas William Smith*, 21 DB 2000(Bd.Rpt. 9/8/2003)(S.Ct. Order 12/9/2003) the Supreme Court imposed a one-year and one-day suspension. Smith neglected eleven client matters during a three year time period. His neglect resulted in the complete dismissal of the clients' claims in ten matters and partial dismissal of the client's claims in one matter. In four of these matters, Smith engaged in misrepresentation to the client or a third person to conceal his neglect from the client. In seven matters he engaged in active misrepresentation and deception toward his employer to conceal his neglect from his employer. The Board found that Smith had satisfied the *Braun* standard for consideration of his alcoholism as a mitigating factor. An aggravating factor was that Smith had received a public censure fourteen years previously as a result of a criminal conviction for failing timely file tax returns,

In *Office of Disciplinary Counsel v. Donna Marie Albright-Smith*, 225 DB 2010(Bd.Rpt. 12/30/2011)(S.Ct. Order 5/30/2012) the Court imposed a two-year suspension. Albright-Smith neglected eight client matters over four

years. The pattern of misconduct was similar in each case in that she accepted a retainer fee, did not appropriately deposit the retainer into an IOLTA and thereafter did little to pursue the case. She also engaged in misrepresentation, including knowingly making a false statement of material fact to a Bankruptcy Court and Trustee to deceive that she had complied with an Order of Court, when she had not. Her numerous personal and health problems did not meet the *Braun* threshold.

In *Office of Disciplinary Counsel v. Susan Bell Bolno*, 162 DB 2000 (Bd.Rpt. 12/16/2002)(S.Ct. Order 3/7/2003) the Court imposed a two-year suspension. Bolno engaged in serial neglect of four client matters over seven years. She made misrepresentations and fabricated letters to perpetuate the misrepresentations and cover her neglect. Her personal difficulties didn't meet the *Braun* standard.

In *Office of Disciplinary Counsel v. Daniel Houlihan*, 208 DB 2003 & 110 DB 2004 (Bd.Rpt. 1/4/2006)(S.Ct. Order 3/28/2006) the Court imposed a four-year suspension. Houlihan committed misconduct in four client matters. In one, he failed to pursue his clients' adoption with reasonable promptness. In another, he failed to communicate, and in a third he failed to follow through on an appeal. In that matter, he not only failed to inform the clients the appeal was dismissed, but falsely told them that he didn't know

the outcome. In the fourth and most serious matter, he presented evidence to the Court of an Acceptance of Service which was purportedly signed by a Mr. Pearce. In fact, the evidence established it wasn't Pearce's signature and Respondent knew it when he presented it to the Court. Houlihan also made a knowing misrepresentation to the court on the record that he had located Mr. Pearce and obtained his signature on the Acceptance of Service. The Board found that the evidence submitted by Houlihan did not meet the *Braun* standard because it did not establish a causal nexus between his alcoholism and his misconduct.

In *In re Anonymous No. 126 DB 90*, 22 Pa. D. & C. 4th 163 (1994) (William D. Anthony) the Court imposed a two- year suspension. Anthony created fictitious legal documents (a court subpoena, two court orders, a deed, a letter, a check and a release) which he presented to two clients as official documents. He also neglected their cases and made misrepresentations to the clients concerning their cases. In one matter he paid the client \$7,500.00 out of his own pocket. The Board distinguished *ODC v. Holston*, 619 A.2d 1054 (Pa. 1993) by emphasizing that Anthony did not lie to the court or any tribunal.

In *In re Anonymous Nos. 52, 79 & 116 DB 92 and 30 DB 93*, 24 Pa. D. & C. 4th 447 (1994) (Bernard Turner) the Court imposed a two-year

suspension. Turner engaged in serial neglect of eleven client matters for over five and a half years. The misconduct included failure to communicate with clients, failure to return files and failure to return unearned fees upon termination.

122. The parties agree that a four-year suspension is a fair resolution based upon the above cited precedent and the balancing of the severity of the misconduct with the substantial mitigating factors in this matter.

A four-year suspension is lengthy and adequately addresses that Respondent's transgressions in this matter were continuous, pervasive and extensive over the course of several years and involved eleven client matters. Respondent intentionally and repeatedly misrepresented facts and the status of matters to multiple clients resulting in extensive client neglect. Respondent utilized his own personal funds which were misrepresented as settlement funds, awards or proceeds due to clients from various legal claims. In one case, Respondent created a fictitious court order that he provided to the client and placed a copy in the Firm's file. In another matter Respondent created a fictitious Sheriff's Distribution Sheet, which he provided to the Firm and Client. In a third matter, he provided the Firm a fabricated letter and deposit slip to obfuscate the fact that he had previously provided the client his personal funds.

However, Respondent's substantial mitigation militates against a sanction greater than a four-year suspension. Prior to his temporary suspension, Respondent had no history of discipline in over sixteen years of practice.

Respondent has exhibited deep remorse for his misconduct and completely cooperated with ODC. Prior to ODC even commencing its investigation, and at a very early stage of the disciplinary process, Respondent voluntarily self-reported, was quite candid about his misconduct, and agreed to a temporary suspension. He has described in detail the extent and scope of his transgressions. In fact, a number of Respondent's admissions could not be corroborated by records and would not have been discovered by ODC without Respondent's assistance and cooperation.

Respondent did not mishandle or misuse funds entrusted to him by any client or from the Firm, but instead utilized his own funds for the ultimate benefit of clients. Importantly, no misrepresentations were made to any tribunal and, although Respondent admits to fabricating a court order and a sheriff's distribution sheet, those were provided only to the respective clients and were not used to any advantage of the Respondent. *Cf. Office of Disciplinary Counsel v. Holston*, 619 A.2d 1054(Pa. 1993)(disbarment for

attorney who forged a court order and then lied to the Court when asked as to who signed the order; *Office of Disciplinary Counsel v. Barry Franklin Levine*, 35 DB 2002 (Bd.Rpt. 3/18/2004) (S.Ct. Order 4/27/2005) (five-year suspension for attorney who forged a judge's name on a settlement order and then falsely represented to the Court that the Court had signed the Order).

It is Respondent's position that were this matter to proceed to a hearing, Respondent could demonstrate by clear and convincing evidence that his psychiatric disorder was a causal factor in producing several elements of his misconduct and is therefore an appropriate consideration as a mitigating factor in this proceeding. See, *Office of Disciplinary Counsel v. Braun*, 553 A.2d 894 (Pa. 1989).

Respondent contends that, as set forth in the Report of Dr. O'Brien, Respondent's conduct is directly traceable to his psychological diagnosis of Dysthymic Disorder or Major Affective Disorder and his learned response to conflict. As explained by Dr. O'Brien, Respondent "developed a pattern of avoidance in response to negativity and confrontation during childhood which he observed in his father and demonstrated himself throughout his childhood with him assiduously working to avoid provocation . . . even to his

own personal detriment in terms of providing alternative versions of situations that were later discovered, triggering the very response . . . that he sought to avoid. [Respondent's] reported work environment prior to his injury in December 2015 strikingly mirrors his childhood experiences and the characterologic avoidance behavior which he developed in response to it." Dr. O'Brien found that Respondent's interaction with his boss at the Firm, coupled with Respondent's psychological issues dating from his childhood, gave rise to an environment that triggered the conduct in question in this matter. According to Dr. O'Brien, the stress in Respondent's work environment also manifested itself in his physical health thereby exacerbating the situation and clearly contributed to Respondent's misconduct. Dr. O'Brien further opined that Respondent "has demonstrated an ability not only to take responsibility for his prior behavior but also to work actively at improving his insight into himself and his characterologically based behavior patterns in order to address them and bring them under control."

Finally, Respondent immediately sought, and continues to receive psychological treatment, further evidencing his intent to address his misconduct and address the underlying issues which contributed to it. This is also appropriately considered as a mitigating factor.

WHEREFORE, Petitioner and Respondent respectfully request that, pursuant to Pennsylvania Rules of Disciplinary Enforcement 215(e) and 215(g), 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 receive a four-year suspension retroactive to the effective date of the interim suspension which was ordered on February 25, 2016 by the Supreme Court.

Respectfully Submitted,

OFFICE OF DISCIPLINARY COUNSEL

Thomas J. Farrell
Chief Disciplinary Counsel

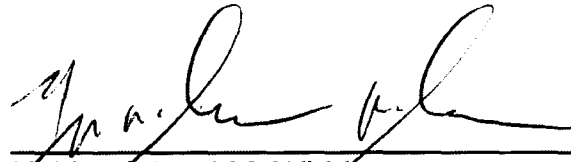


June 29, 2020

Date

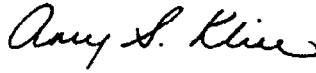
Harold E. Ciampoli, Jr., Esquire
Disciplinary Counsel, District II
Attorney Registration No. 51159
820 Adams Avenue, Suite 170
Trooper, PA 19403
610-650-8210

6/19/2020
Date



Keith Michael McWhirk
Respondent
Atty. Registration No. 83891

June 22, 2020
Date



Amy Stovall Kline, Esquire
Counsel for Respondent
Attorney Registration No. 84690

VERIFICATION

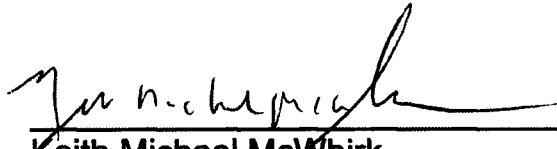
The statements contained in the foregoing *Joint Petition In Support of Discipline on Consent Discipline* are true and correct to the best of my knowledge or information and belief and are made subject to the penalties of 18 Pa.C.S.A. §4904, relating to unsworn falsification to authorities.

June 29, 2020
DATE



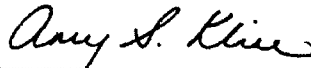
Harold E. Ciampoli, Jr., Esquire
Disciplinary Counsel

6/19/2020
DATE



Keith Michael McWhirk
Respondent

June 22, 2020
DATE



Amy Stovall Kline, Esquire
Counsel for Respondent

Harold E. Ciampoli, Jr., Esquire
Disciplinary Counsel
Attorney Registration No. 51159
Office of Disciplinary Counsel
820 Adams Avenue, Suite 170
Trooper, PA 19403
(610) 650- 8210

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

In the Matter of : No. 2247 Disciplinary Docket No. 3
KEITH MICHAEL MCWHIRK :
: No. 28 DB 2016
: :
: Attorney Registration 83891
: :
: (Montgomery County)

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

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF MONTGOMERY:

Keith Michael McWhirk, being duly sworn according to law, deposes and hereby submits this affidavit consenting to the recommendation of a four-year suspension, retroactive to the effective date of Respondent's temporary 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 October 25, 1999.
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.

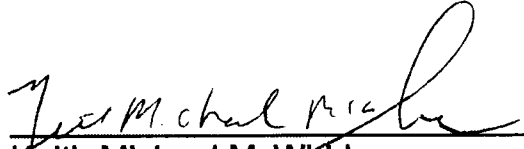
5. He acknowledges that the material facts set forth in the Joint Petition are true.

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 retained, consulted and acted upon the advice of counsel, in connection with his decision to execute the within Joint Petition.

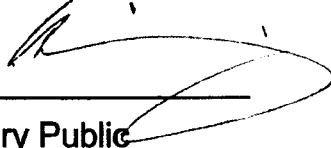
It is understood that the statements made herein are subject to the penalties of 18 Pa.C.S.A. §4904 (relating to unsworn falsification to authorities).

Signed this 19th day of June, 2020.



Keith Michael McWhirk

Sworn to and subscribed
before me this 19th day
of JUNE, 2020.



Notary Public

MARK J. RASIMOWICZ
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/27/2021