

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 1370 Disciplinary Docket No. 3
Petitioner	:	
	:	No. 48 DB 2008
v.	:	
	:	Attorney Registration No. 50861
JAMES ROBERT MICHAEL,	:	
Respondent	:	(Westmoreland County)

ORDER

PER CURIAM:

AND NOW, this 8th day of April, 2010, upon consideration of the Report and Recommendations of the Disciplinary Board dated December 18, 2009, the Petition for Review and response thereto, the request for oral argument is denied and it is hereby

ORDERED that James Robert Michael is suspended from the Bar of this Commonwealth for a period of three years retroactive to March 31, 2008, and he shall comply with all the provisions of Rule 217, Pa.R.D.E.

It is further **ORDERED** that respondent shall pay costs to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.

Messrs. Justice Saylor and McCaffery dissent, as they would impose the five years recommended by the Disciplinary Board.

A True Copy Patricia Nicola
As of: April 8, 2010
Attest: *Patricia Nicola*
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 1370 Disciplinary Docket No. 3
Petitioner	:	
	:	No. 48 DB 2008
v.	:	
	:	Attorney Registration No. 50861
JAMES ROBERT MICHAEL	:	
Respondent	:	(Westmoreland County)

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

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

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

I. HISTORY OF PROCEEDINGS

By Order of March 31, 2008, the Supreme Court of Pennsylvania entered an Order placing James Robert Michael on temporary suspension and referring the matter to the Disciplinary Board.

On July 24, 2008, Office of Disciplinary Counsel filed a Petition for Discipline against Respondent, charging him with violations of the Rules of Professional Conduct

arising out of allegations that Respondent misused client funds and other dishonest misconduct. Respondent filed an Answer to Petition for Discipline on September 8, 2008.

A disciplinary hearing was held on January 26 and 27, 2009, before a District IV Hearing Committee comprised of Chair James T. Marnen, Esquire, and Members Thelma C. Spells, Esquire, and Richard P. Kidwell, Esquire. Respondent was represented by Richard H. Lindner, Esquire. Petitioner offered exhibits and the testimony of four witnesses. Respondent testified on his own behalf and offered exhibits and the testimony of seven witnesses.

Following the submission of briefs filed by the parties, the Hearing Committee filed a Report on June 26, 2009, concluding that Respondent committed professional misconduct and recommending that he be suspended for three years with two years served and one year on probation, retroactive to April 30, 2008.

Petitioner filed a Brief on Exceptions on July 16, 2009. Respondent filed a Brief Opposing Exceptions on August 4, 2009 and requested accelerated disposition of the matter.

This matter was adjudicated by the Disciplinary Board on September 10, 2009.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, Office of Disciplinary Counsel, whose principal office is

located at Pennsylvania Judicial Center, 601 Commonwealth Ave, Suite 2700, Harrisburg, Pennsylvania 17106, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, 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 and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Petitioner is James Robert Michael. He was born in 1962 and was admitted to practice law in the Commonwealth in 1987. He is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has no prior history of discipline.

4. After having worked as an associate for a law firm in Uniontown, Pennsylvania, during his first five years as a lawyer, Respondent opened a law office in Mt. Pleasant, Pennsylvania, as a sole practitioner in August 1992. Respondent continued his practice until the date of his temporary suspension by Order of the Supreme Court of Pennsylvania dated March 31, 2008.

5. Respondent engaged in the general practice of law, with a focus on real estate matters, administration of estates, and personal injury matters.

6. In 1993, Respondent hired Brenda Gearhart, an experienced legal secretary. She continued to serve as a full time employee until about 2005.

7. From 1996 until about 2003, Ms. Gearhart's employment duties included bookkeeping and record-keeping with respect to the law office bank accounts,

including Respondent's trust accounts. These duties included reconciliation of the accounts.

8. In 2003 and 2004, Respondent maintained a busy real estate practice and relied on Ms. Gearhart to prepare virtually all of the real estate closings and to serve as a closing agent in regard to 30% to 40% of the closings that were held in the office.

9. In mid-2003, Respondent informed Ms. Gearhart that he would be taking over the primary responsibilities for maintaining the office bank accounts.

10. Beginning in 2005, and until her employment with Respondent ended in April 2008, Ms. Gearhart was employed part-time.

11. In December 2006, an NSF check from Citizen's Bank IOLTA Account, No. 610125-963-7, captioned "James R. Michael Attorney at Law IOLTA Account", resulted in a mandatory overdraft notification to the Pennsylvania Lawyers Fund for Security. Based upon Respondent's inadequate responses to its inquiries, the Lawyers Fund determined that there were irregularities in regard to Respondent's handling of his Citizen's Bank IOLTA Account and referred the matter to Office of Disciplinary Counsel for a disciplinary investigation.

12. In his written response of December 5, 2006 to the Lawyers Fund, although his records were in disarray and he was unable to fully and accurately respond, Respondent's explanation for the NSF check was incomplete and not entirely accurate. He stated that the bounced check was related to a certain client real estate transaction and provided incomplete documentation in support of his statement.

13. Upon further inquiry by the Lawyers Fund, although his records remained in disarray and left him unable to fully and accurately respond, Respondent offered an explanation in a letter to the Lawyers Fund dated December 20, 2006 that was incomplete and not entirely accurate, stating the reasons for the NSF check were attributable to the Vivian Estate.

14. Once the matter was referred to the Office of Disciplinary Counsel by the Lawyers Fund, Respondent then explained that the irregularities were related to a referral fee in the John Hostoffer matter.

15. Respondent, in a verified, written response to the Office of Disciplinary Counsel, characterized his deposit of \$100,000 in June 2005 in the Hostoffer matter as funds which were the subject of a fee in dispute.

16. Said funds were an earned referral fee which Respondent commingled into his Citizens Bank IOLTA Account and against which Respondent took approximately 66 draws of funds payable to himself totaling approximately \$135,700.00

17. Respondent maintained a second trust account, S & T Bank Trust Account No. 30000906085, captioned "James R. Michael Attorney at Law Escrow Account", which account was originally intended to be opened as an IOLTA account and used for funds from real estate closings referred by S & T Bank, but which was actually opened as a non-IOLTA account. Respondent commingled personal funds in this account, and used it as an escrow account for real estate closings, as well as a general account, and sometimes as an account for the deposit of other entrusted funds.

18. Respondent did not identify the S & T Bank Trust account on his 2007-2008 Pennsylvania Attorney's Annual Fee Form as an account in which he placed entrusted funds.

19. In and after 2004, Respondent also maintained another account that was designated as an IOLTA account at National City Bank Account No. 501013008. It was closed on May 26, 2006. Additionally, Respondent maintained a general office account at National City Bank Attorney at Law Account No. 501012999 into which Respondent deposited client funds on one occasion.

20. Respondent habitually deposited entrusted funds that he received with respect to decedents' estates into his pooled trust accounts, i.e. the Citizens Bank IOLTA Account and the S & T Bank Trust Account, rather than establishing separate estate accounts.

21. Since 2004, Respondent has engaged in serial misappropriation of entrusted client funds as specifically set forth herein below.

22. Over the period of four years, Respondent misappropriated estate and other client entrusted funds, and repaid same using funds entrusted to him by other clients and/or his personal funds.

23. On August 12, 2004, Respondent deposited or caused to be deposited the proceeds of two checks totaling \$23,404 into his Citizens Bank IOLTA Account in regard to the Estate of Hilda M. Copeland.

24. Respondent represented William E. Lozier and James C. Lozier, the

executors for the Copeland Estate.

25. By check No. 5030, dated August 13, 2004, in the amount of \$1,388, made payable to the Register of Wills, and drawn on his Citizens Bank IOLTA Account, Respondent disbursed funds in regard to the Copeland Estate.

26. At that time, Respondent was entrusted with \$22,016 in regard to the Copeland Estate.

27. On September 3, 2004, Respondent deposited or caused to be deposited, among other things, the proceeds of a check for his National City Bank Attorney at Law Account in the amount of \$480 into his Citizens Bank IOLTA Account in regard to the Copeland Estate.

28. At that time, Respondent was entrusted with \$22,496 in regard to the Copeland Estate.

29. On October 5, 2004, due to disbursement unrelated to the Copeland Estate, the balance in Respondent's Citizens Bank IOLTA Account was \$638.62, which was \$21,857.38 below Respondent's entrustment in regard to the Copeland Estate.

30. Respondent deposited other funds unrelated to the Copeland Estate into his Citizens Bank IOLTA Account.

31. By check No. 5040, dated August 25, 2004, in the amount of \$10,000, made payable to the Reunion Presbyterian Church, which was negotiated on November 22, 2004, and drawn on Respondent's Citizens Bank IOLTA Account, Respondent made a disbursement in regard to the Copeland Estate.

32. By check No. 5043, dated August 25, 2004, in the amount of \$5,000, made payable to Mr. Pleasant Cemetery Association c/o/ Molly Leonard, which was negotiated on November 17, 2004, and drawn on Respondent's Citizens Bank IOLTA Account, Respondent made another disbursement in regard to the Copeland Estate.

33. At that time, Respondent was entrusted with \$7,469 in regard to the Copeland Estate.

34. By check No. 5042, dated August 25, 2004, in the amount of \$2,500, made payable to Mt. Pleasant Library, which was negotiated on December 30, 2004, and drawn on Respondent's Citizens Bank IOLTA Account, Respondent made another disbursement in regard to the Copeland Estate.

35. Following the negotiation of check no. 5042 on December 30, 2004, Respondent was entrusted with \$4,996 in regard to the Copeland Estate.

36. On January 12, 2005, the balance in Respondent's Citizens Bank IOLTA Account was a negative \$550.01.

37. By check No. 5315, dated June 24, 2005, in the amount of \$5,000, made payable to Gethsemane U.M. Church, and drawn on Respondent's Citizens Bank IOLTA Account, Respondent made a disbursement in regard to the Copeland Estate.

38. At that time Respondent disbursed all funds with which he was entrusted in regard to the Copeland Estate.

39. On August 24, 2004, Respondent deposited or caused to be deposited the proceeds of a check in the amount of \$41,375.11 into his Citizens Bank

IOLTA Account in regard to the Estate of Ethel Zimmerman.

40. Respondent represented Carl Zimmerman, Executor for the Zimmerman Estate, and Letters of Administration D.B.N. were subsequently issue to Respondent when Carl Zimmerman died.

41. By check No. 5031, dated August 19, 2004, and drawn on Respondent's Citizens Bank IOLTA Account, Respondent disbursed \$1,366 to himself with regard to the Zimmerman Estate.

42. On August 25, 2004, Respondent was entrusted with \$40,009.11 in regard to the Zimmerman Estate.

43. From August 1, 2004, through September 13, 2004, Respondent made various disbursements to the heirs of the Zimmerman Estate and himself totaling \$36,508.80.

44. On September 16, 2004, Respondent was entrusted with:

- a. \$3,500.31 for the Zimmerman Estate;
- b. \$22,496 for the Copeland Estate;
- c. A total of \$25,996.31 for both estates.

45. The balance in Respondent's Citizen's Bank IOLTA Account on September 16, 2004, was \$3,598.60, which was \$22,397.71 below Respondent's entrustment in regard to the Copeland and Zimmerman Estates.

46. On February 7, 2005, Respondent deposited or caused to be deposited the proceeds of a check, in the amount of \$25,973.86, that was drawn on the

Escrow Account of Vision Settlement Services, Inc., and made payable to Respondent and Mary E. Baloh, Esquire, into Respondent's Citizens Bank IOLTA Account.

47. Respondent represented Cheryl Begonia in her divorce action against William Begonia.

48. At that time Respondent was entrusted with \$25,973.86 on behalf of his client, and also William Begonia.

49. Thereafter, Respondent set up an interest bearing escrow account in the parties' counsels' names on behalf of the Begonias in May 2005.

50. An Order of Court dated April 4, 2005, filed in the Court of Common Pleas of Westmoreland County, stated that Cheryl Begonia had filed a Motion seeking the creation of an interest bearing escrow account and the payment of a marital debt.

51. Judge Anthony Marsilli ordered that Respondent was directed to transfer marital funds to an interest-bearing account in the parties' counsels' names; and the Ford Motor Credit Company debt was to be paid off from the proceeds of the sale of the marital residence.

52. On April 27, 2005, due to disbursements unrelated to the Begonias, the balance in Respondent's Citizen's Bank IOLTA Account was \$2,312.83, which was \$23,661.03 below his entrustment on behalf of the Begonias.

53. By facsimile dated May 19, 2005, Attorney Mary Baloh informed Respondent that the attached bill regarding Ford Motor Credit Company was to be paid immediately and requested that Respondent contact her office to set up a time to put

marital funds regarding the Begonias in an interest-bearing account.

54. By letter dated May 20, 2005, Respondent purportedly wrote to Focus Receivables Management, LLC, regarding the funds that were due to Ford and stated that Respondent had enclosed check number 5293 written on Respondent's Citizens Bank IOLTA Account for \$6,757.36 to pay the debt in full.

55. Although Respondent sent a copy of the purported letter addressed to Focus Receivables, LLC, dated May 20, 2005 to Attorney Baloh on July 25, 2005, he did not send said letter or check to Focus Receivables.

56. At the disciplinary hearing, Respondent admitted he did not send the check to Focus Receivables and also admitted that he engaged in an intentional misrepresentation of fact to Attorney Baloh.

57. By facsimile dated May 20, 2005, Respondent informed Attorney Baloh that:

- a. The account for the Begonias was set up with Citizens Bank in New Stanton in his name and tax ID number;
- b. It would require both his signature and Attorney Baloh's signature for withdrawals to be made from that account;
- c. She would need to provide the bank with certain items of personal information;
- d. There was an initial deposit to open the account;
- e. Once the account was opened, the rest of the deposit would be

made;

f. The check for the auto would be going out that day.

58. By facsimile dated May 21, 2005, Respondent informed Attorney Baloh, among other things, that :

a. When she got to the bank she needed to speak to Lisa to establish the account;

b. Respondent was not sure if he could be at the bank at 9:30 Monday morning;

c. Respondent would try his best to be there; and,

d. If Respondent was unable to make it, Attorney Baloh could have all the documents prepared and Respondent would be in the bank later that day to sign the documents and to make the deposit,

59. On May 17, 2005, due to disbursements unrelated to the Begonias, the balance in Respondent's Citizens Bank IOLTA Account was a negative \$1,801.45, which was \$25,973.86 below Respondent's entrustment on behalf of the Begonias.

60. By check number 5306 dated May 20, 2005, in the amount of \$2,500, made payable to Respondent drawn on Respondent's Citizens Bank IOLTA Account and negotiated on June 10, 2005, Respondent disbursed funds in regard to the Begonia matter.

61. On about June 10, 2005, Respondent deposited \$2,500.00 into the joint escrow account that Respondent opened with Attorney Baloh at Citizen's Bank account number 620802-535-8 on behalf of the Begonias.

62. On June 13, 2005, the balance in Respondent's Citizens Bank IOLTA Account was \$4,948.38.

63. On June 22, 2005, Respondent deposited or caused to be deposited \$100,000 into his Citizens Bank IOLTA Account reflecting the referral fee regarding the John Hostoffer matter, and the balance in the IOLTA Account was \$106,569.76.

64. By check number 5336 dated July 18, 2005, in the amount of \$16,716.50, made payable to himself, and drawn on his Citizens Bank IOLTA Account, Respondent deposited \$16,716.50 into the Begonia Account.

65. By check number 5339 dated July 26, 2005, in the amount of \$2,757.36, made payable to Mary Baloh, and drawn on his Citizens Bank IOLTA Account, Respondent disbursed funds in regard to the Begonia matter.

66. By check number 5293, dated July 25, 2005, in the amount of \$4,000.00, made payable to Ford Motor Credit Company, and drawn on Respondent's Citizens Bank IOLTA Account, Respondent disbursed funds on behalf of the Begonias.

67. On July 26, 2005, Attorney Baloh deposited or caused to be deposited the \$2,757.36 into the Begonia account.

68. By check dated August 2, 2006, in the amount of \$25,515.45, and made payable to Respondent, John T. Mitchell remitted funds to Respondent in regard to the Estate of George Nichols.

69. Respondent represented Robert L. Nichols, Executor of the Nichols Estate.

70. On August 2, 2006, Respondent deposited or caused to be deposited the \$35,515.45 into his Citizens Bank IOLTA Account.

71. At that time, Respondent was entrusted with \$35,515.46 in regard to the Nichols Estate.

72. By checks numbered 5606, 5607, 5608, dated August 4, 2006, in the respective amounts of \$37.50, \$350.00. and \$350.00, drawn on Respondent's Citizens Bank IOLTA Account and all made payable to the Recorder of Deeds, Respondent disbursed funds in regard to the Nichols Estate.

73. On August 10, 2006, after Respondent's disbursement to the Recorder of Deeds, Respondent was entrusted with \$34,777.95 on behalf of the Nichols Estate.

74. On August 21, 2006, the balance in Respondent's IOLTA Account was \$16,212.01, which was \$18,565.94 below Respondent's entrustment in regard to the Nichols Estate.

75. By check number 5625, dated August 25, 2006, in the amount of \$914.72, drawn on Respondent's Citizens Bank IOLTA Account, and made payable to the Register of Wills of Westmoreland County, Respondent disbursed funds in regard to the Nichols Estate.

76. On August 31, 2006, after the negotiation of the \$914.72 check, Respondent was entrusted with \$33,863.23 on behalf of the Nichols Estate.

77. On September 25, 2006, the balance in Respondent's IOLTA Account

was \$4,579.87, which was \$29,283.36 below his entrustment on behalf of the Nichols Estate.

78. On October 20, 2006, Respondent had a negative balance of \$1,928.83 in his Citizens Bank IOLTA Account.

79. By check dated November 27, 2006, in the amount of \$16,843.11, and made payable to Respondent, funds were remitted to Respondent by Brett Mailloux in regard to Mr. Mailloux's purchase of property from Robert and Susan Ellenberger.

80. On November 28, 2006, Respondent deposited or caused to be deposited \$16,843.11 from Mr. Mailloux into Respondent's S & T Bank Trust Account.

81. From those funds, Respondent was entrusted with at least \$12,043.19 on behalf of the Ellenbergers.

82. Respondent made various disbursements in regard to the sale of the property, as reflected on Respondent's client ledger sheet for Mr. Mailloux, which included entries for purported payments of \$471.50 by check number 1343 to Seabol & Co., Inc. and \$450 to Eugene Heald, PLS by check number 1350.

83. However, these checks did not clear Respondent's S & T Bank Trust Account and Respondent was entrusted with the \$921.50 for the checks that did not clear his S & T Bank Trust Account.

84. Eugene Heald was subsequently paid \$450 by Resident from an unknown source.

85. On December 18, 2006, the balance in Respondent's S & T Bank

Trust Account was \$9,533.11, which was at least \$2,510.08 below Respondent's entrustment on behalf of the Ellenbergers.

86. By check number 1355, dated December 5, 2006, in the amount of \$12,043.19, drawn on Respondent's S & T Bank Trust Account, and made payable to Robert Ellenberger and Susan Ellenberger, Respondent purported to disburse funds with which Respondent was entrusted on behalf of the Ellenbergers.

87. On December 21, 2006, Respondent's check number 1355, in the amount of \$12,043.19 was returned by the bank as "NSF" because Respondent did not have sufficient funds in his account to cover said funds.

88. On January 12, 2007, the balance in Respondent's S & T Bank Trust Account was \$4,437.45, which was \$7,605.74 below Respondent's entrustment on behalf of the Ellenbergers.

89. By check dated January 11, 2007, in the amount of \$34,185.83 and made payable to the Estate of James V. Smith, Metro Settlement Services, Inc. submitted funds to Respondent in regard to the Estate of James V. Smith.

90. Respondent represented Melissa Coffman, Executrix for the Smith Estate.

91. On January 16, 2007, Respondent deposited or caused to be deposited the \$34,185.83 into his S & T Bank Trust Account.

92. At that time Respondent was entrusted with approximately \$34,185.83 in regard to the Smith Estate.

93. Due to the deposit of the Smith Estate funds, Respondent had sufficient funds in this S. & T Bank Trust Account to cover the \$12,043.19 proceeds of the check that Respondent owed to the Ellenbergers.

94. By check number 1399, dated January 22, 2007, the amount of \$12,043.19, and made payable to Robert Ellenberger and Susan Ellenberger, Respondent disbursed the funds with which Respondent had been entrusted on behalf of the Ellenbergers.

95. On January 22, 2007, Respondent was still entrusted with \$34,185.83 in regard to the Smith Estate.

96. Respondent's fees for his representation with regard to the Smith Estate were \$2,789.00.

97. Respondent incurred administrative costs regarding the Smith Estate that totaled \$1,705.74.

98. Pursuant to Respondent's client ledger sheet for the Smith Estate, Respondent also disbursed \$562.36.

99. After deduction of Respondent's fees, administrative costs, and the disbursements that Respondent made on behalf of the Smith Estate, Respondent was entrusted with \$29,128.73 in regard to the Smith Estate.

100. On February 20, 2007, due to disbursements unrelated to the Smith Estate, the balance in Respondent's S & T Bank Trust Account was \$8,422.42, which was \$20,706.31 below Respondent's entrustment in regard to the Smith Estate.

101. On March 3, 2007, Respondent deposited a check in the amount of \$339.00 into his S & T Bank Trust Account in behalf of the Smith Estate.

102. On March 3, 2007, Respondent was entrusted with \$29,467.73 in regard to the Smith Estate.

103. On March 30, 2007, due to disbursements unrelated to the Smith Estate, the balance in Respondent's S & T Bank Trust Account was \$2,073.84, which was \$27,393.89 below Respondent's entrustment in regard to the Smith Estate.

104. On April 10, 2007, due to disbursement unrelated to the Smith Estate, the balance in Respondent's S & T Bank Trust Account was a negative \$230.92, which was \$29,467.73 below Respondent's entrustment in regard to the Smith Estate.

105. By check dated May 2, 2007, in the amount of \$15,296.33, and made payable to Respondent, Jennifer and Carlo Pernelli submitted funds to Respondent on behalf of the Estate of Frances M. Bailey.

106. In and after December 2006, Respondent represented Regina Clausner and Kathleen Potocki, Executrixes for the Bailey Estate.

107. On May 9, 2007, Respondent deposited or caused to be deposited the sum of \$15,296.33 into Respondent's S & T Bank Trust Account.

108. According to Respondent's client ledger sheet for the Bailey Estate, on about April 13, 2007, Respondent was also previously entrusted with \$1,500 in cash on behalf of the Bailey Estate.

109. At that time, Respondent was entrusted with \$16,796.33 in regard to

the Bailey Estate.

110. Respondent's fees in regard to representing the Bailey Estate were \$1,042.70.

111. Respondent incurred administrative costs related to the Bailey Estate that totaled \$470.00.

112. According to Respondent's client ledger sheet for the Bailey Estate, Respondent also disbursed \$1,319.56.

113. After deduction of Respondent's fees, administrative costs and other disbursements made on behalf of the estate, Respondent was entrusted with \$13,964.07 on behalf of the Bailey Estate.

114. On May 29, 2007, due to disbursements unrelated to the Bailey Estate, the balance in Respondent's S & T Bank Trust Account was a negative \$83.07, which was \$13,964.07 below Respondent's entrustment in regard to the Bailey Estate.

115. By check dated April 2007, in the amount of \$30,403.38, and made payable to the Estate of Geraldine Kerlin, Matrix Property Settlement, LLC remitted funds to Respondent in regard to the Estate of Geraldine Kerlin.

116. Respondent represented Sherry Elcock, Executrix for the Kerlin Estate.

117. On April 16, 2007, Respondent deposited or caused to be deposited the amount of \$30,403.38 and an additional \$212.26 related to the Kerlin Estate in cash into Respondent's Citizens Bank IOLTA Account.

118. At that time, Respondent was entrusted with \$30,615.64 in regard to the Kerlin Estate.

119. Respondent's fees in regard to his representation of the Kerlin Estate were \$3,762.47.

120. Respondent incurred administrative costs regarding the Kerlin Estate that totaled \$981.89.

121. According to Respondent's client ledger sheet regarding the Kerlin Estate, Respondent also disbursed \$6,914.91.

122. After deduction of Respondent's fees, administrative costs and other disbursements that Respondent made on behalf of the Kerlin Estate, Respondent was entrusted with \$18,956.37 in regard to the Kerlin Estate.

123. On June 15, 2007, due to disbursements unrelated to the Kerlin Estate, the balance in Respondent's Citizens Bank IOLTA Account was \$15,733.23, which was \$3,223.14 below Respondent's entrustment in regard to the Kerlin Estate.

124. On July 24, 2007, due to disbursements unrelated to the Kerlin Estate, the balance in Respondent's Citizens Bank IOLTA Account was \$10,914.45, which was \$8,041.92 below Respondent's entrustment in regard to the Kerlin Estate.

125. On August 20, 2007, due to disbursement unrelated to the Kerlin Estate, the balance in Respondent's Citizens Bank IOLTA Account was \$6,330.64, which was \$12,625.73 below Respondent's entrustment in regard to the Kerlin Estate.

126. On September 21, 2007, due to disbursements unrelated to the Kerlin

Estate, the balance in Respondent's Citizens IOLTA Account was \$1,386.12, which was \$17,570.23 below Respondent's entrustment in regard to the Kerlin Estate.

127. By check dated December 12, 2007, in the amount of \$20,040.68 and made payable to "James Michael, Esquire for the Estate of Raymond Govern," Patricia D. Majercak remitted funds to Respondent in regard to the Estate of Raymond Govern.

128. Respondent represented Cheryl Polakovsky, Executrix for the Govern Estate.

129. On December 13, 2007, Respondent deposited or caused to be deposited the amount of \$20,040.68 into his Citizens Bank IOLTA Account.

130. At that time, Respondent was entrusted with \$20,040.68 in regard to the Govern Estate.

131. From December 21, 2007 through December 28, 2007, Respondent disbursed \$8,782.27 regarding the Govern Estate.

132. On December 28, 2007, after deduction of the above disbursements on behalf of the Govern Estate, Respondent was still entrusted with \$11,258.41 in regard to the Govern Estate.

133. On December 31, 2007, Respondent was entrusted with \$18,956.37 in regard to the Kerlin Estate, and \$11,258.41 in regard to the Govern Estate for a total entrustment of \$30,214.78.

134. Additionally, Respondent was entrusted with \$5,884.70 in regard to the check that Respondent had issued to Dianne Van Keuren in regard to the Nichols

Estate.

135. On December 31, 2007, Respondent's total entrustment for the Kerlin, Govern, and Nichols Estates was \$36,099.48.

136. On December 31, 2007, the balance in Respondent's Citizens Bank IOLTA Account was \$12,722.44, which was \$23,377.04 below Respondent's entrustment for the Kerlin, Govern, and Nichols Estates.

137. On December 1, 2007, the balance in Respondent's National City Bank Attorney at Law Account was a negative \$13.64.

138. By check dated December 6, 2007, in the amount of \$55,482.56, made payable to "James R. Michael, Attorney for the Estate of Jimmie N. Santore," drawn on the account of McCue and Husband Law Firm, and annotated "Net Proceeds of Sale to Moore (Kreinbrook Hill Road, Mt. Pleasant)", Attorney Richard A. Husband remitted funds to Respondent in regard to the Santore Estate.

139. Respondent represented Shawn Santore, Executor for the Santore Estate.

140. On December 6, 2007, Respondent deposited or caused to be deposited the proceeds of the \$55,482.56 check related to the Santore Estate into Respondent's National City Attorney at Law Account.

141. At that time, Respondent was entrusted with \$55,482.56 for the Santore Estate.

142. By check number 9360, dated December 18, 2007, in the amount of

\$1,260.05, drawn on his National City Attorney at Law Account, and made payable to Citizens Bank, Respondent disbursed funds that were unrelated to the Santore Estate.

143. By check number 9363, dated December 1, 2007, in the amount of \$2,226.32, drawn on his National City Attorney at Law Account, and made payable to First Commonwealth, Respondent disbursed funds that were unrelated to the Santore Estate.

144. By check number 9378, dated December 10, 2007, in the amount of \$9,000, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds that were unrelated to the Santore Estate.

145. By check number 9379, dated December 11, 2007, in the amount of \$3000.00, made payable to Respondent, and drawn on Respondent's National City Account, Respondent disbursed funds unrelated to the Santore Estate.

146. By check number 9380, dated December 18, 2007, in the amount of \$600.00, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

147. By check number 9381, dated December 21, 2007, in the amount of \$5,000.00, made payable to Respondent, and drawn on Respondent's National City Account, Respondent disbursed funds unrelated to the Santore Estate.

148. By check number 9382, dated December 21, 2007, in the amount of \$1,000.00, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

149. By check number 9383, dated December 27, 2007, in the amount of

\$1,500.00, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

150. By check number 9384, dated December 24, 2007, in the amount of \$3,500, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

151. On about December 17, 2007, Respondent authorized an electronic transfer of funds in the amount of \$2,000.00 that was made payable to "Chase" from his National City Attorney at Law Account that was unrelated to the Santore Estate.

152. On about December 18, 2007, Respondent authorized an electronic transfer in the amount of \$1,010.00 to "Payment to Ben," from his National City Attorney at Law Account that was unrelated to the Santore Estate.

153. By check number 5885, dated December 19, 2007, in the amount of \$4,000.00, drawn on Respondent's Citizens Bank IOLTA Account, and made payable to Shawn Santore, Respondent disbursed funds related to the entrustment for the Santore Estate.

154. On December 31, 2007, Respondent was entrusted with \$51,482.56 for the Santore Estate.

155. On December 31, 2007, the balance in Respondent's National City Attorney at Law Account was \$25,372.55, which was \$26,110.01 below Respondent's entrustment for the Santore Estate.

156. By check number 9385, dated January 2, 2008, in the amount of

\$1,500.00, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

157. By check number 9386, dated January 4, 2008, in the amount of \$500.00, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

158. By check number 9387, dated January 9, 2007 [sic], in the amount of \$600.00, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

159. By check number 9389, dated January 16, 2008, in the amount of \$2,000.00, made payable to Respondent, and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

160. By check number 9393, dated January 18, 2007 [sic] in the amount of \$600.00, made payable to Respondent and drawn on his National City Attorney at Law Account, Respondent disbursed funds unrelated to the Santore Estate.

161. On January 31, 2008, the balance in Respondent's National City Attorney at Law Account was \$20,183.67, which was \$31,298.89 below Respondent's entrustment for the Santore Estate.

162. By letter dated June 26, 2007, Respondent's counsel, Robert H. Davis, Jr., Esquire, advised the Office of Disciplinary Counsel, among other things, that:

- a. On June 20, he received from Respondent the original deposit ticket evidencing Respondent's initial restoration of fees mistakenly

overdrawn on Respondent's Citizens Bank IOLTA Account in the amount of \$10,000.00.

b. Respondent had liquidated personal assets to make the replacement deposit and was working to obtain other personal funds to replace the balance of funds, now that Respondent knew with confidence the correct amount needing replacement.

163. Respondent represented to Office of Disciplinary Counsel through his counsel that he had liquidated personal assets to make the replacement deposit.

164. Respondent, in fact, deposited the proceeds of a check dated June 14, 2007, in the amount of \$10,000.00, that was made payable to Respondent, and was drawn on the account of Health First Medical Center, P.C. to replenish Respondent's Citizens Bank IOLTA Account.

165. The \$10,000 from Health First Medical Center, P.C., a client of Respondent, was a retainer that was to be drawn on for services rendered.

166. Respondent, by verified letter dated on or about February 20, 2008, directed to the Office of Disciplinary Counsel, admitted that he represented to the Office of Disciplinary Counsel that he had liquidated personal assets to replace funds but did not do so. Respondent admitted that he used the Health First retainer to do so.

167. Respondent lied to the Pennsylvania Lawyers Fund for Client Security regarding irregularities in his Citizens Bank IOLTA Account.

168. Respondent lied to Attorney Mary Baloh in the Begonia matter.

169. Respondent's failure to identify his S & T Bank Account on his 2007-2008 Pennsylvania Attorney's Annual Fee Form as an account in which he placed entrusted funds was a misrepresentation.

170. In January 2008, on the advice of a friend, Respondent contacted Lawyers Concerned for Lawyers, where he was referred to Patrick Condo, a psychotherapist and licensed clinical social worker.

171. Respondent first met with Mr. Condo on January 10, 2008. Subsequent to his evaluation of Respondent, Mr. Condo diagnosed Respondent with major depressive disorder. The hallmarks of this disorder are depressed mood, low energy, fatigue, crying, and lack of interest in activities.

172. Mr. Condo provided credible testimony within a reasonable degree of professional certainty that Respondent's misconduct was caused by his psychiatric disorder. Mr. Condo opined that Respondent's disorder led him to lose track of what he was doing, and to become confused and disoriented in his every day dealings of his law practice. Respondent's thought process for problem solving became impaired. Respondent knew right from wrong but was incapable of taking the proper actions to remedy situations.

173. As of the date of the disciplinary hearing, Mr. Condo had met with Respondent on 33 occasions at the rate of every few weeks.

174. Respondent began a course of ongoing treatment which includes psychotherapy and medication. Respondent is compliant with taking his medication and

attending therapy sessions.

175. Mr. Condo opined that Respondent's prognosis is good and he will not experience a recurrence of his misconduct if he remains compliant with his therapy.

176. Alexandre Dombrovski, M.D., testified as an expert in this matter. He is board certified in psychiatry and neurology, but is not board certified in forensic psychiatry. His practice focuses on patients with depression.

177. Dr. Dombrovski met with Respondent for a two hour session on December 20, 2008, at the request of Respondent's counsel.

178. Based on this meeting, and his review of records and telephone conversations with Respondent's other doctors and legal secretary, Dr. Dombrovski opined that Respondent suffered from major depressive disorder and that the disorder caused the professional misconduct.

179. Respondent testified on his own behalf.

180. Respondent admitted that he misappropriated a substantial amount of client funds and made misrepresentations to Office of Disciplinary Counsel and others.

181. Respondent expressed shame and remorse for his dishonest and reckless actions.

182. Respondent disputes the exact amount of funds misappropriated, but does not dispute that the sum was at least \$100,000.

183. Petitioner and Respondent agreed on the record that Respondent had corrected all trust account deficiencies and satisfied all of the financial obligations relating

to his representation of the clients referenced in the Petition for Discipline.

184. Respondent offered the testimony of three witnesses who credibly testified that Respondent's misconduct was not consistent with his usual character.

III. CONCLUSIONS OF LAW

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

1. RPC 1.15(a) – A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a client-lawyer relationship separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded. Complete records of the receipt, maintenance and disposition of such property shall be preserved for a period of five years after termination of the client-lawyer relationship or after distribution or disposition of the property, whichever is later.

2. RPC 1.15(b) – Upon receiving property of a client or third person in connection with a client-lawyer relationship, a lawyer shall promptly notify the client or third person. 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 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 such property.

3. RPC 8.1(a) – An applicant for admission to the bar, or a lawyer in

connection with a bar admission application or in connection with a disciplinary matter, shall not knowingly make a false statement of material fact.

4. RPC 8.4(c) - It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In addition, Respondent proved by clear and convincing evidence that his professional misconduct was caused by his psychiatric disorder. Office of Disciplinary Counsel v. Braun, 533 A.2d 894 (Pa. 1989).

IV. DISCUSSION

This matter is before the Board for consideration of Respondent's misappropriation of client funds and other dishonest conduct.

By a preponderance of the clear and convincing evidence, Petitioner has met its burden of proof that Respondent violated Rules of Professional Conduct 1.15(a) and (b), 8.1(a), and 8.4(c). Office of Disciplinary Counsel v. Keller, 506 A.2d 872 (Pa. 1986), Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186 (Pa. 1994).

Respondent admitted that he commingled and misappropriated approximately \$100,000 in client funds over the course of approximately four years. Petitioner maintains that \$200,000 is the more accurate amount of the misappropriation. Although the record supports Petitioner's assessment, even viewing the amount of funds misappropriated in the light most favorable to Respondent, the amount is significant and

the conduct egregious. In addition to misappropriation of funds, Respondent engaged in repeated misrepresentations to Disciplinary Counsel. During the investigation, Respondent lied about the initial irregularity in his Citizens Bank IOLTA Account, he made misrepresentations regarding the nature of the Hostoffer fee, he did not reveal that he had a trust account at S & T Bank where he was holding entrusted funds, and he lied about a \$10,000 deposit he made into his IOLTA Account to replenish money that he had misappropriated. Also, Respondent made misrepresentations to the Pennsylvania Lawyers Fund for Client Security and during the course of the Begonia representation to another attorney, Mary Baloh.

Respondent contends that he suffered from a psychiatric disorder which caused his misconduct. To that end he offered testimony from two mental health professionals which met the threshold to establish mitigation in accordance with the Supreme Court's decision in Office of Disciplinary Counsel v. Braun, 533 A.2d 894 (Pa. 1989). Both experts established a familiarity with Respondent's medical history and psychiatric condition, as well as the specifics of the misconduct. Both experts testified as to the nature and effectiveness of his treatment and gave Respondent a positive prognosis.

Patrick Condo is Respondent's treating psychotherapist. He gave credible testimony that Respondent suffered from a major depressive disorder which began in 2002 and was a causal factor in Respondent's misconduct.

Alexandre Dombrovski, M.D., is a psychiatrist who met with Respondent on one occasion for two hours for forensic evaluation. Dr. Dombrovski reviewed medical

records and spoke by telephone with Respondent's healthcare providers and his former legal secretary. Based on this information, Dr. Dombrovski confirmed Mr. Condo's conclusion that Respondent suffered from a major depressive disorder during the relevant time frame and there was a causal connection between Respondent's depression and his misconduct.

Although the Hearing Committee found that Respondent met his burden pursuant to Braun, Petitioner disputes any finding of Braun mitigation and contends that the expert testimony was not sufficient. Specifically, Petitioner emphasizes that Dr. Dombrovski only met with Respondent for two hours on one occasion and never talked to Respondent's wife or family. After careful review of the record, the Board concludes that Dr. Dombrovski's testimony, while perhaps not the strongest ever rendered in a Braun case, is sufficient to meet the Braun standard. As well, the testimony of Mr. Condo was persuasive that Respondent suffered from depression which caused his misconduct, and equally persuasive that he has responded to treatment. In light of the totality of the expert testimony, the Board finds that Respondent met his burden of proving that he suffered from a psychiatric disorder which caused his misconduct. Respondent is entitled to mitigation.

In addressing the question of discipline in a misappropriation of funds case, the Board recognizes the Supreme Court's holding that misappropriation of client funds is a serious offense that may warrant disbarment. Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186 (Pa. 1983), Office of Disciplinary Counsel v. Knepp, 441 A.2d 1197 (Pa. 1982). Furthermore, "A client must rest assured that any financial transactions carried out

on the client's behalf will be scrupulously honest. The public trust that an attorney owes his client is in the nature of a fiduciary relationship involving the highest standards of professional conduct." Office of Disciplinary Counsel v. Lewis, 426 A.2d 1138 (Pa. 1981).

Respondent's serious breaches of trust cannot be ignored because of mitigating circumstances offered by Respondent in his defense. While it is creditable that Respondent received help for his depression, he bore responsibility to protect his clients' interests. If conduct of the nature engaged in by Respondent is not adequately responded to by the disciplinary system, the public's confidence in the legal system will be damaged.

The recommendations before the Board are a three year suspension, retroactive to April 30, 2008, with two years served and one year stayed with probation, as put forth by the Respondent and adopted by the Hearing Committee, and disbarment, as put forth by Petitioner. In light of the Board's conclusion that Respondent met the Braun standard to be afforded mitigation, disbarment is too severe. Conversely, due to the egregious nature of Respondent's misappropriation and multiple misrepresentations, a three year suspension is simply an inadequate response. The particular facts of this matter suggest a lengthy suspension. It is the Board's recommendation that Respondent be suspended for a period of five years, retroactive to March 31, 2008, the date of Respondent's temporary suspension.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, James Robert Michael, be Suspended from the practice of law for a period of five years retroactive to March 31, 2008.

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

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: 

Gerald Lawrence, Board Member

Date: December 18, 2009

Board Members Jefferies and Cohen did not participate in the special Meeting held September 10, 2009.