

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2001 Disciplinary Docket No. 3
Petitioner	:	
	:	
v.	:	No. 97 DB 2013
	:	
KEVIN JOSEPH FITZGERALD,	:	Attorney Registration No. 64407
Respondent	:	(Lackawanna County)

ORDER

PER CURIAM:

AND NOW, this 3rd day of December, 2013, there having been filed with this Court by Kevin Joseph Fitzgerald his verified Statement of Resignation dated October 10, 2013, stating that he desires to resign from the Bar of the Commonwealth of Pennsylvania in accordance with the provisions of Rule 215, Pa.R.D.E., it is

ORDERED that the resignation of Kevin Joseph Fitzgerald is accepted; he is disbarred on consent from the Bar of the Commonwealth of Pennsylvania; and he shall comply with the provisions of Rule 217, Pa.R.D.E. Respondent shall pay costs, if any, to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.

A True Copy Patricia Nicola
As Of 12/3/2013

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

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

OFFICE OF DISCIPLINARY COUNSEL	:	No. 97 DB 2013
Petitioner	:	
	:	
v.	:	Attorney Registration No. 64407
	:	
KEVIN JOSEPH FITZGERALD	:	
Respondent	:	(Lackawanna County)

RESIGNATION BY RESPONDENT

Pursuant to Rule 215
of the Pennsylvania Rules of Disciplinary Enforcement

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL : No. ____ Disciplinary Docket No. __
Petitioner :
: No. 97 DB 2013
:
: Attorney Registration No. 64407
KEVIN JOSEPH FITZGERALD :
Respondent : (Lackawanna County)

RESIGNATION STATEMENT UNDER RULE 215, PA. R.D.E.

I, Kevin Joseph Fitzgerald, hereby resign from the practice of law in the Commonwealth of Pennsylvania in conformity with Rule 215 of the Pennsylvania Rules of Disciplinary Enforcement, and further state as follows:

1. I desire to resign from the Bar of the Commonwealth of Pennsylvania.
2. This resignation is freely and voluntarily rendered.
3. I am not being subjected to coercion or duress.
4. I am fully aware of the implications of submitting this resignation, including the fact that it is irrevocable, and that I can only apply for reinstatement to the practice of law pursuant to the provisions of Pa.R.D.E. 218(b).
5. I am currently being represented by Kevin F. Guyette, Esquire, 136 Court Street, Binghamton, NY 13901.
6. I am aware of a pending investigation and prosecution of me for acts constituting professional misconduct.

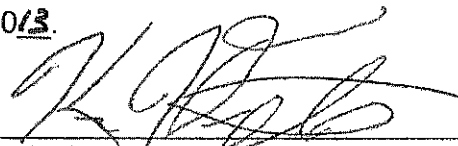
7. The material facts are more fully set forth in Exhibit A, which is attached hereto and incorporated herein.

8. I acknowledge that the material facts in Exhibit A are true.

9. I am submitting my resignation because I cannot successfully defend against the charges of professional misconduct as set forth in attached Exhibit A.

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 10th day of OCTOBER, 2013.


Kevin Joseph Fitzgerald, Respondent


Kevin F. Guyette
Counsel for Respondent

EXHIBIT A

1. Respondent, Kevin Joseph Fitzgerald, was born in 1957, was admitted to practice law in the Commonwealth in 1992, and maintains his office at 108 N. Washington Avenue, Scranton, Lackawanna County, Pennsylvania 18503. He is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

2. In or about June 2000, Respondent was retained by George and Arlene Mennig to collect the balance owed on a \$45,000 mortgage held by the Mennigs on property in Clarks Summit, Lackawanna County, PA, which they had sold to Thomas and Mary O'Dea in 1993.

3. George and Arlene Mennig both died in 2002. Respondent continued in his collection efforts on behalf of their sons/heirs, Paul and John Mennig.

4. By letter dated October 23, 2003, William Zacharelis, Esquire, counsel for Mary O'Dea, advised Respondent that she was willing to pay \$30,000 to fully satisfy the \$41,909.75 which Respondent had asserted was due on the mortgage. By letter dated November 7, 2003, Respondent advised Attorney Zacharelis that the Mennigs accepted the offer of \$30,000.

5. By letter dated November 24, 2003, Attorney Zacharelis sent Respondent a check for \$30,000 drawn on Attorney Zacharelis' escrow account and payable to Respondent, which funds had been provided to Attorney Zacharelis by Ms. O'Dea. Respondent was to maintain the \$30,000 in trust and make no disbursements until the mortgage was satisfied of record.

6. On November 25, 2003, Respondent deposited the \$30,000 to his IOLTA checking account No. 800224477 at what is now the Community Bank and Trust Company ("Account").

7. Attorney Zacharelis subsequently corresponded with Respondent about the need to have the mortgage satisfied of record. On April 1, 2004, Respondent sent Attorney Zacharelis a copy of a mortgage satisfaction and advised Attorney Zacharelis it had been filed on March 22, 2004, and Respondent was waiting for the return of a time-stamped copy.

8. By letter to Respondent dated July 30, 2004, Attorney Zacharelis noted that he had not received a copy of the recorded satisfaction piece.

9. On September 30, 2004, Respondent faxed Attorney Zacharelis another copy of a Satisfaction of Mortgage, which had no filing stamp and which was not signed by the mortgagees or their successors in interest.

10. Neither this document, nor any other satisfaction piece, was ever recorded by Respondent.

11. Between November 12, 2004 and August 3, 2005, Respondent wrote and negotiated 34 checks on his IOLTA Account, payable to himself, in even dollar amounts ranging from \$100 to \$2,500. By August 3, 2005 he had utilized, for his personal benefit, all \$30,000 of the O'Dea funds.

12. He did so without any personal or professional right or claim to the \$30,000, nor any actual or implied authority to use any portion of those funds.

13. From late 2003 through approximately November 2010, John Mennig, a son and heir of the deceased Mennigs, periodically would contact Respondent

regarding the distribution of the \$30,000, as would Paul Mennig, another son/heir (until his death in July 2005).

14. Respondent assured the Mennigs he held the \$30,000 in trust. Respondent never disclosed to either John or Paul Mennig that he had converted the entire \$30,000.

15. On January 19, 2010, Respondent deposited \$44,444.44 to his IOLTA Account. This was a referral fee Respondent received from Barry Dyler, Esquire. The \$44,444.44 represented Respondent's personal funds and depositing the check in his Account constituted the commingling of personal funds with trust funds.

16. The \$44,444.44 Respondent received in January 2010 gave him the means by which he could have paid the \$30,000 due the Mennigs. He failed to do so, and instead spent all these funds by May 18, 2012.

17. In 2010, John Mennig retained Raymond Rinaldi, Esquire to recover the \$30,000.

18. On December 9, 2010, Attorney Rinaldi contacted Respondent and requested information about his handling of the \$30,000 and the related mortgage satisfaction. Respondent advised Attorney Rinaldi that he would review his records and then contact Attorney Rinaldi.

19. By letter dated January 3, 2010, Attorney Rinaldi requested that Respondent provide him with Respondent's files relating to John Mennig and his wife Catherine, and Beverly Mennig, the surviving spouse of Paul Mennig.

20. By letter dated January 11, 2011, Respondent wrote to Attorney Rinaldi stating that he had been in trial, but would have time that week to review his files and find any information regarding the Mennigs.

21. On March 17, 2011, Attorney Rinaldi spoke to Respondent by phone and Respondent told him that he had yet to locate the file.

22. By letter dated March 18, 2011, Attorney Rinaldi asked Respondent to provide him with whatever documentation Respondent had on the Mennig mortgage transaction in 2003 and provide him with a written synopsis of the matter so he could update his clients. Respondent did not respond.

23. By letter dated August 5, 2011, Attorney Rinaldi demanded that Respondent pay the \$30,000, plus interest in the amount of \$13,857.53, within 10 days.

24. On August 15, 2011 Respondent spoke with Attorney Rinaldi by phone. Respondent acknowledged he had spent the \$30,000 and stated that he could only return the funds by making installment payments.

25. By email dated August 16, 2011 to Attorney Rinaldi, Respondent offered to pay \$5,000 a month, beginning August 26, 2011, and continuing through and including December 31, 2011, with the remaining balance of \$18,857.53 due on December 31, 2011. The Mennigs rejected this proposal.

26. By email dated August 30, 2011 to Attorney Rinaldi, Respondent offered to pay the Mennigs a lump sum of \$43,857.53, plus attorney's fees, on or before October 5, 2011. Attorney Rinaldi accepted this offer on behalf of his clients on condition that the payment be made by October 5, 2011.

27. By email dated October 5, 2011 to Attorney Rinaldi, Respondent indicated he needed additional time to pay back the money. By letter dated October 13, 2011, Attorney Rinaldi requested a written response from Respondent as to when he would be able to make payments.

28. Respondent did not respond to this letter, and has not communicated with Attorney Rinaldi since.

29. Respondent has failed to repay any funds to the Mennigs despite his conversion of these funds more than 8 years ago, which has caused the Mennigs exceptional financial hardship.

30. At the time Respondent was converting these funds (November 2004 – August 2005), and subsequent thereto, Respondent was under substantial financial pressure due to the serious illness of his father, and then his son.

31. On May 1, 2013 the Pennsylvania Lawyers Fund for Client Security (“LFCS”) paid the Estate of George Mennig \$30,000 pursuant to a claim filed by John Mennig. Respondent acknowledges he will be barred from seeking reinstatement, if ever, until this amount, plus interest, is paid by him to the LFCS. (See Pa. R.D.E. 531)

SPECIFIC RULES OF PROFESSIONAL CONDUCT
VIOLATED

32. Respondent admits to violations of the following Rules of Professional Conduct : Rules effective April 23, 2005 to present:

- a. RPC 1.3, which provides that a lawyer shall act with reasonable diligence and promptness in representing a client.

- b. RPC 1.4(a)(3), which provides that a lawyer shall keep the client reasonably informed about the status of the matter.
- c. RPC 1.4(a)(4), which provides that a lawyer shall promptly comply with reasonable requests for information
- d. RPC 8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Rules effective April 1, 1988 to April 23, 2005:

- a. RPC 1.4(a), which provides that a lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.
- b. RPC 1.15(a), which provides that a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be preserved for a period of five years after termination of the representation.
- c. RPC 1.15(b), which provides that upon receiving funds or other property in which a client or third person has an interest, 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, a lawyer shall promptly deliver to the client or third person any funds or other 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.