

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2798 Disciplinary Docket No. 3
: :
Petitioner : No. 68 DB 2020
: :
v. : Attorney Registration No. 79582
: :
DAVID CHARLES AGRESTI , : (Erie County)
: :
Respondent :

ORDER

PER CURIAM

AND NOW, this this 21st day of July, 2021, upon consideration of the Report and Recommendations of the Disciplinary Board, David Charles Agresti is suspended from the Bar of this Commonwealth for a period of three years. 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 07/21/2021


Attest:
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 68 DB 2020
Petitioner	:	
	:	
v.	:	Attorney Registration No. 79582
	:	
DAVID CHARLES AGRESTI,	:	
Respondent	:	(Erie 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 Petition for Discipline filed on May 8, 2020, Petitioner, Office of Disciplinary Counsel, charged Respondent, David Charles Agresti, with violation of the Pennsylvania Rules of Professional Conduct and Pennsylvania Rules of Disciplinary Enforcement in connection with his representation of three separate clients. On June 22, 2020, Respondent filed a counseled Answer to Petition for Discipline. On July 20, 2020, Respondent filed a Supplemental Answer to Petition.

Following a prehearing conference on July 30, 2020, a District IV Hearing Committee ("Committee") conducted a disciplinary hearing on September 10, 2020. Petitioner presented Administrative Exhibits I, II and III and Petitioner's Exhibits 1 through 39, which were admitted into evidence. Petitioner presented the testimony of four witnesses. Respondent introduced Respondent's Exhibit A, which was admitted into evidence. Respondent testified on his own behalf and presented the testimony of five witnesses.

On October 28, 2020, Petitioner filed a Brief to the Committee and requested that the Committee recommend to the Board that Respondent be suspended for no less than one year and one day. Respondent filed a Brief to the Committee on December 10, 2020, and requested that the Committee recommend to the Board that a public reprimand be imposed.

By Report filed on February 9, 2021, the Committee concluded that Respondent violated the rules as charged in the Petition for Discipline and recommended that he be suspended for a period of three years. The Committee further recommended that upon conclusion of Respondent's suspension and assuming successful reinstatement to the practice of law, Respondent be placed on probation for one year with a practice monitor to review the maintenance of his financial accounts.

On March 11, 2021, Respondent filed a Brief on Exceptions and requested oral argument before the Board. Respondent contended that a public reprimand is the appropriate sanction in this matter. On March 23, 2021, Petitioner filed a Brief Opposing Exceptions and requested that the Board dismiss Respondent's exceptions and recommend a three year suspension to the Court.

On April 12, 2021, a three-member panel of the Board held oral argument.

The Board adjudicated this matter at the meeting on April 14, 2021.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, P.O. Box 62485, Harrisburg, PA 17106-2485, 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. Respondent is David Charles Agresti, born in 1969 and admitted to practice law in the Commonwealth in 1997. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has no history of attorney discipline.

4. Following his admission to the practice of law, Respondent worked in his family's law firm. He then worked as an assistant district attorney in Erie County from 2000 to 2005 and later as a part-time public defender in Erie County and as an assistant solicitor for the Erie International Airport. N.T. 209, 210.

5. Since 2010, Respondent has engaged in the private practice of law. N.T. 210.

6. At all material times, Respondent did not maintain a trust account in which he could deposit Rule 1.15 Funds and hold them separately from his own property. Administrative Exhibit ("AE") I; AE III; Petitioner's Exhibit ("PE") 8; N.T. 137-139.

7. Respondent did not report a trust account on his 2018-2019 and 2019-2020 attorney registration forms and indicated that he did not have any accounts that required mandatory reporting pursuant to Rule 219(d)(1)(iii)-(v). PE 8; N.T. 138-139.

The Parth S. Bhatia Matter

8. On May 14, 2019, Parth S. Bhatia ("Parth") and his girlfriend, Cheyanne Davis, were arrested and charged in Erie County for various felony and misdemeanor drug related offenses. AE I; AE II; N.T. 13.

9. Respondent received a phone call from Nathaniel Pellegrino, the brother of Ms. Davis, requesting that Respondent assist in getting Ms. Davis released, which he did. AE I; AE II; N.T. 13-18.

10. On that same day, Respondent spoke with Parth, still in custody, regarding the charges against him. Parth declined to hire Respondent at that time but eventually requested that Respondent contact Parth's parents to advise them of the arrest. N.T. 218-221.

11. The next day, May 15, 2020, Respondent called Parth's father, Sanjay Bhatia ("Mr. Bhatia"), to inform him of Parth's arrest and pending charges. Respondent advised Mr. and Mrs. Bhatia that they should travel to Erie to visit Parth in custody. AE 1, AE 11; N.T. 43.

12. Upon Respondent's advice, the Bhatias traveled to Erie. When they arrived, they met with Respondent, who discussed with them the seriousness of the charges against Parth. AE 1; AE 11; N.T. 45.

13. Respondent informed the Bhatias that he typically charged \$125,000 for cases similar to Parth's, but he was willing to represent Parth for \$100,000.

Respondent represented to the Bhatias that Parth assured him that they could pay up to \$100,000 for Parth's representation. AE 1; AE 11.

14. Respondent and the Bhatias eventually agreed that Mr. Bhatia would pay Respondent \$50,000 to commence representation. PE 1; N.T. 43-46.

15. Respondent presented a "Fee Agreement for Legal Representation Regarding a Criminal Matter" ("Fee Agreement") to the Bhatias. The Fee Agreement stated that "this agreement will be deemed a retainer agreement" for the representation of Parth and that the retainer was \$50,000. N.T. PE 1; 16-19, 34, 44-45.

16. The Fee Agreement noted that Respondent's hourly rate was \$250.00, and that Respondent would keep, maintain, and prepare written statements for the services rendered. PE 1.

17. Respondent's Fee Agreement did not include any language that would put a client on notice that his fee was nonrefundable. PE 1; N.T. 91.

18. Respondent requested immediate payment of the \$50,000 retainer so that he could prepare a motion for bond reduction on behalf of Parth. N.T. 77-83.

19. Respondent then accompanied Mr. Bhatia to a local branch of Citizens Bank so that Mr. Bhatia could issue Respondent \$50,000 via check. AE 1; AE 11; N.T. 45-46, 78-80.

20. While at Citizen's Bank, Respondent instructed Mr. Bhatia to purchase two cashier's checks each in the amount of \$5,000 made payable to the Erie County Clerk of Courts. Respondent told Mr. Bhatia to bring them to the bond hearing. AE I; AE II; N.T. 46, 80-81.

21. On May 16, 2019, \$50,000 was drawn from the Bhatias' joint checking account and paid to Respondent. PE 9; PE 28; N.T. 45-46, 139-140.

22. As recently as May 14, 2019, just two days prior to Respondent's receipt of the Bhatias' funds, the balance of Respondent's personal checking account was negative \$61.27. AE I; AE II; AE III; PE 28; N.T. 141.

23. Respondent deposited the Bhatias' \$50,000 check in his Marquette Savings Bank personal checking account. AE I; AE II; AE III; PE 9; PE 28; N.T. 139-140, 238.

24. Respondent did not deposit the check from the Bhatias in a trust account that was to be drawn upon as earned. AE I; AE II; AE III; PE 1; PE 9; PE 28.

25. In addition to the Bhatias' check, Respondent also deposited other clients' funds in his personal checking account, which increased his balance to \$50,688.73. AE I; AE II; AE III; PE 9; PE 28.

26. On May 16, 2019, prior to the scheduled bond reduction hearing, the Bhatias spoke with Parth, who informed them that he was reaching out to additional lawyers to review his case. Parth requested that his parents assist him in finding additional counsel. AE 1; AE II; N.T. 20, 34, 47.

27. Respondent argued Parth's motion for bond reduction, which was denied. AE I; AE II; AE III, N.T. 46-47.

28. On or about May 16, 2019, Mr. Bhatia realized that the copy of the Fee Agreement that Respondent provide to him was missing some pages. Mr. Bhatia sent a text message to Respondent requesting the missing pages. Respondent gave the Bhatias a copy of the Fee Agreement on May 19, 2020. PE 2; N.T. 22-23.

29. That same day, Respondent asked a jail guard to request that Parth call him from the Erie County Prison. Respondent wanted Parth to tell his parents to "back

off” because Parth instructed them to seek out second opinions from other attorneys. N.T. 18-19.

30. During this conversation, Respondent inquired about the names of the attorneys that Parth and his parents had contacted and stated that the other lawyers would want the retainer that the Bhatias paid Respondent. N.T. 23-24.

31. The Bhatias paid the straight bond of \$100,000 for Parth’s release on or about May 17, 2019. AE I; AE II; AE III; N.T. 19-20, 46-47.

32. After Parth’s release, Respondent met with him on May 20, 2019. During this meeting, Parth told Respondent that Parth had retained other counsel to represent him and therefore, was terminating Respondent’s representation. AE I; AE III; PE 2; N.T. 23.

33. On May 20, 2019, Parth sent an email to Respondent confirming his termination. *Id.*

34. In response to Parth’s email, Respondent misrepresented to Parth that “[he] just received notice from [his] bank that the [payment of the] retainer that [Parth is] contractually bound by had been stopped.” Respondent also threatened that “I will be filing a lawsuit against you and your family members, based on the contract, prior to your next court appearance.” *Id.*

35. Neither Mr. and Mrs. Bhatia, nor Parth, requested a stop-payment on the \$50,000 check. AE I; AE II; AE III; PE 28; N.T. 25, 47.

36. Eight days after receiving notice that Parth had terminated Respondent’s representation, on May 28, 2019, Respondent wrote a check for \$4,000 made payable to Cathedral Preparatory School, bringing his checking account balance to \$43,317.54. AE III; PE 2; PE 9; PE 10; PE 28; N.T. 141-142.

37. On May 30, 2019, Mr. Bhatia emailed Respondent requesting an itemized invoice for the services that Respondent provided to date, that Respondent return the remainder of the unearned balance of the retainer to Mr. Bhatia immediately, and that Respondent return Parth's passport. AE I; AE III; PE 3.

38. Respondent replied to Mr. Bhatia's email on May 31, 2019, alerting him that he would be out of town for the weekend but upon his return he would address the remaining retainer and the lawsuit that he was preparing to file against the Bhatias. AE I; AE III; PE 4.

39. On June 3, 2019, Respondent followed up on his May 31, 2019 email to Mr. Bhatia stating: "It is well established, in Pennsylvania, that retainers for criminal matters are deemed to be earned at the time of their execution." The email also noted that "[Respondent] contacted the Pennsylvania Bar Association regarding the Rules of Professional Conduct and Ethics and spoke with fellow criminal defense attorneys since [his] representation of Parth. [He was] confident in [his] position, legally, that the retainer should not be returned." He went on to state that "[nevertheless], [he was] willing to discuss settling this matter with [Mr. Bhatia] or [his] attorney." AE I; AE III; PE 5.

40. Between May 28, 2019 and June 10, 2019, Respondent made several personal disbursements from his personal checking account totaling \$1,474.26. AE III; PE 28.

41. On or about June 10, 2019, Respondent's personal checking account balance was only \$41,843.28, which was \$2,344.22 below the remaining \$44,187.50 of the Bhatias' retainer. *Id.*

42. As of June 10, 2019, Respondent had returned Parth's passport but had still not provided the Bhatias' an itemized statement or the remainder of the retainer. AE I; AE II; PE 6; PE 14; PE 29; PE 30; PE 31; N.T. 59, 61-62, 67.

43. On June 14, 2019, Respondent withdrew \$23,500 to purchase a boat. This transaction brought his personal checking account balance to \$20,478.28, which was \$23,709.22 below the remaining \$44,187.50 of the Bhatias' retainer. AE I; AE II; AE III; PE 11; PE 28; N.T. 142-144.

44. Between June 11 and June 19, 2019, Respondent made several additional withdrawals from his personal checking account for personal expenses, bringing the balance of his account to \$16,193.13, which was \$27,994.37 below the Bhatias' retainer amount of \$44,187.50. AE III; PE 1; PE 7; PE 28.

45. On July 9, 2019, Respondent withdrew an additional \$3,005 from his personal checking account for personal expenses and brought his personal checking account balance to \$7,470.61, which was \$36,716.89 below the Bhatias' remaining \$44,187.50 retainer amount. *Id.*

46. Respondent made an additional withdrawal on July 23, 2019 for his personal benefit and brought his personal checking account balance down to \$4,130.93, which was \$40,056.56 below the Bhatia's remaining retainer amount of \$44,187.50. *Id.*

47. As of August 23, 2019, Respondent's checking account was negative \$40.40. AE I; AE II; AE III; PE 28; N.T. 146-147.

48. In a letter dated September 6, 2019, Respondent proposed to reimburse Mr. Bhatia the unearned portion of the retainer in the amount of \$4,187.50 by October 31, 2019. AE I; AE II; PE 7; PE 14; PE 31; N.T. 62-63.

49. On September 17, 2019, Respondent provided Mr. Bhatia an invoice entitled "Statement of Services Rendered," which was dated August 10, 2019, where Respondent calculated that he had earned a total fee of \$5,812.50 based on his \$250 hourly rate for his initial consultations with Parth and the Bhatias, inquiries made to the police regarding the charges against Parth, his preparation of a motion for bond reduction, and his appearance at the bond reduction hearing. AE I; AE II; PE 1; PE 7; PE 31.

50. Respondent sold his boat for \$18,000 and deposited the proceeds of the sale to his personal checking account. AE III; PE 11; PE 16; PE 28; N.T. 146-149, 151-152.

51. By September 23, 2019, Respondent's personal checking account balance was negative \$400.40. AE I; AE II; AE III; PE 28; N.T. 146-147.

52. Respondent wrote a check dated November 1, 2019 to Mr. Bhatia for \$5,000 to return a portion of the remaining retainer using the proceeds from the boat sale. AE I; AE II; PE 15; PE 28; N.T. 67.

53. Respondent did not use any of the remaining proceeds from the sale of the boat to return any of the outstanding \$39,187.50 of the Bhatias' retainer. PE 11; PE 16; PE 28; N.T. 146-149.

54. Respondent did not provide the Bhatias any additional reimbursements for the outstanding balance of their retainer. This caused the Bhatias to file a claim with the Pennsylvania Lawyers Fund for Client Security, which awarded them \$39,188.50 in August 2020. AE I; AE II; AE III; PE 36; N.T. 67-69.

55. On August 28, 2020, Respondent made full restitution to the Pennsylvania Lawyers Fund for Client Security. Respondent's Exhibit A; N.T. 243-244.

56. On March 25, 2019, Respondent's personal checking account was negative \$1,045.53. AE I; AE II; AE III; PE 28.

57. J. David Eubank engaged Respondent to represent him in connection with his employment dispute with the Erie County School District.

58. On April 9, 2019, Respondent and Mr. Eubank entered into a fee agreement entitled "Fee Agreement for Legal Representation Regarding Employment at Erie School District," which stated Respondent would charge Mr. Eubank \$275 per hour. AE I; AE II; AE III; PE 17; N.T. 150-151.

59. On April 9, 2019, Respondent deposited into his personal checking account at PNC Bank a retainer check from Mr. Eubank for \$10,000 for legal fees associated with Mr. Eubank's matter. AE I; AE III; PE 18; PE 28; N.T. 150-152.

60. Respondent did not deposit the check from Mr. Eubank in a trust account that was to be drawn upon as earned. AE I; AE II; AE III; PE 17; PE 18; PE 19; PE 28; N.T. 152-155.

61. Between April 9, 2019 and May 7, 2019, Respondent's personal PNC checking account balance constantly ran a deficiency and was below the amount of entrusted funds for Mr. Eubank. *Id.*

62. By May 9, 2019, Respondent concluded his representation of Mr. Eubank, at which point Respondent had billed 32.75 hours and had earned \$9,006.25 of the \$10,000 retainer provided by Mr. Eubank. Respondent retained the remaining \$993.75 in his checking account. AE I; AE II; AE III; PE 17; PE 19; PE 28.

63. Respondent did not refund Mr. Eubank the remaining portion of the \$10,000 retainer paid by Mr. Eubank until October 2, 2019. AE I; AE II; AE III; PE 17; PE 19; PE 28; N.T. 153-155.

64. Respondent was able to refund Mr. Eubank \$1,000 with the proceeds he received from the sale of the boat that he purchased with the Bhatias' retainer funds. AE I; AE II; PE 16; PE 20; PE 28; N.T. 153-155.

The Brittany Mentley Abbey Matter

65. On March 28, 2019, Brittany Mentley Abbey engaged Respondent to represent her in a divorce, custody, and support matter. AE I; AE II; AE III; PE 21; N.T. 104, 106.

66. Respondent and Ms. Abbey agreed that Respondent would represent Ms. Abbey for \$3,500, that Ms. Abbey would immediately provide Respondent \$1,750 and the remaining balance within forty-five days of March 28, 2019, which was to be billed at an hourly rate of \$250. AE I; AE II; AE III; PE 21; N.T. 107.

67. On March 28, 2019, Respondent cashed a check from Matthew Billingsley, Ms. Abbey's then boyfriend, in the amount of \$1,750. AE I; AE II; PE 21; PE 22; N.T. 107-109.

68. Respondent did not deposit the check from Mr. Billingsley in a trust account that was to be drawn upon as earned. AE I; AE II; AE III; PE 22; PE 28.

69. Prior to being represented by Respondent, Ms. Abbey was represented in the same matter by Thomas Brasco, Esquire, who was holding \$785.45 in retainer funds for Ms. Abbey. AE I; AE II; PE 23; N.T. 105, 109-110; 156-158.

70. On April 2, 2019, Respondent emailed Mr. Brasco to inform him that Ms. Abbey had retained Respondent and to request that Mr. Brasco forward the balance of the retainer that Mr. Brasco was holding on behalf of Ms. Abbey to Respondent. AE I; AE II; PE 23; N.T. 156-157.

71. Mr. Brasco shortly thereafter issued Respondent a check for the remaining retainer amount. AE I; AE II; PE 24; N.T. 157-158.

72. On April 3, 2019, Respondent cashed the check he received from Mr. Brasco on behalf of Ms. Abbey. AE I; AE II; AE III; PE 24; PE 28; N.T. 157-158.

73. Respondent failed to deposit the check from Mr. Brasco into a trust account to be drawn upon as earned. *Id.*

74. Ms. Abbey's mother, Shannon Mentley, wrote two additional checks to Respondent on May 16, 2019 and June 11, 2019, each in the amount of \$500 for retainer funds on behalf of Ms. Abbey. AE I; AE II; AE III; PE 25; N.T. 157-158.

75. In total, Respondent was given \$3,534.25 in advanced fees for Ms. Abbey's representation. AE I; AE II; AE III; PE 23; PE 24; PE 25; PE 27; N.T. 157-158.

76. As of June 13, 2019, based on the statement of services prepared by Respondent, he spent eight hours on Ms. Abbey's representation, which totaled \$2,000. Respondent was still entrusted with at least \$1,534.25 in retainer funds provided to him. AE I; AE II; AE III; PE 21; PE 22; PE 23; PE 24; PE 25; PE 26; PE 27; PE 28.

77. By August 25, 2019, Respondent's personal checking account at Marquette Savings Bank was negative \$40.40. AE I; AE II; AE III; PE 28.

Additional Findings

78. Respondent presented three character witnesses.

79. Dexter Au is a roofing contractor in Ohio. Respondent represented Mr. Au in various matters and Mr. Au found Respondent to be a very responsive lawyer. N.T. 163 – 173.

80. Father John Detisch is the pastor of Saint Jude the Apostle Church in Erie and is a chaplain to the Erie Police Department. He has been a priest since 1988 and has known Respondent for more than 30 years. N.T. 181.

81. Father Detisch testified that Respondent is a very good person and close with his family, and is a lawyer who worked well with his clients. N.T. 182-183.

82. Joey Evans, Jr. is the teen center program director at the Erie Downtown YMCA and met Respondent when Respondent volunteered at the YMCA. N.T. 203.

83. Mr. Evans testified that Respondent is a caring, compassionate individual who volunteered in order to have an impact, not to make himself look good. N.T. 204.

84. Respondent testified on his own behalf.

85. In addition to his private practice of law, Respondent is an adjunct professor of history and law at Gannon University in Erie. N.T. 208, 257.

86. Respondent works with a nonprofit that has developed a curriculum for active duty state troopers to enter classrooms and teach. At this time, Respondent does not receive a salary for his work. N.T. 257-258.

87. Respondent's career intention is to leave the practice of law and go full-time as a professor, while moving forward with the nonprofit and volunteer work. N.T. 258-259.

88. As to the Bhatia matter, Respondent admitted that the fee agreement did not contain language indicating that the retainer was nonrefundable. N.T. 234.

89. Respondent further admitted that he was bound by the terms of a written fee agreement, including the Bhatia fee agreement. *Id.*

90. Even though Respondent agreed that the fee agreement did not state that the monies were nonrefundable, Respondent testified that he believed the fee was nonrefundable and the funds could be used at his "discretion." N.T. 239.

91. Respondent claimed he discussed the fee with Parth and that it was a one-time fee. *Id.*

92. Respondent admitted that at the time he represented Parth Bhatia, he did not maintain an IOLTA account. *Id.*

93. Respondent testified that he was aware of what an IOLTA was but he did not appreciate the necessity to maintain one. N.T. 235.

94. Respondent utilized one bank account for both personal matters and professional business. *Id.*

95. Reflecting on his actions, Respondent testified that he should have "probably placed the amount [Bhatia funds] in not even an IOLTA account, but an actual separate account and not touched any of it." N.T. 240.

96. During the time Respondent practiced in his family's law firm, he had no responsibility for practice management, such as bookkeeping, but was aware that an IOLTA account was in place and was maintained by the firm's office manager. N.T. 210-211, 274-275.

97. Respondent reported an IOLTA account on his 2020-2021 attorney registration form, but failed to list a business/operating account as required by the rules. PE-8.

98. Respondent did not apologize to this clients and did not express remorse for his misconduct.

99. Respondent continued to claim that he had an oral agreement with the Bhatias that overrode his written fee agreement. N.T. 240-242.

100. Respondent explained that he has had credit problems in the past and was able to reimburse \$39,188.50 to the Pennsylvania Lawyers Fund for Client Security after he was able to get a loan. N.T. 244-245.

101. On or about August 12, 2019, a lien for \$3,172.37 was recorded against Respondent in the Court of Common Pleas of Erie County, Pennsylvania for Personal Income Tax assessed on February 10, 2015 and December 4, 2018, and for interest computed as of October 19, 2019. Respondent has not satisfied the lien. *Id.* at ¶ 89.

102. On December 1, 2014, Northwest Savings Bank filed a complaint and confession of judgment in the amount of \$70,073.45 against Respondent in the Erie County Court of Common Pleas, docket No. 2014-31874. This judgment was subsequently revived after a writ of revival was issued on January 11, 2019 in the Erie County Court of Common Pleas, docket No. 2019-10075. *Id.* at ¶¶ 90-91.

III. CONCLUSIONS OF LAW

By his actions as set forth above, Respondent violated the following Rules of Professional Conduct ("RPC") and Pennsylvania Rules of Disciplinary Enforcement "Pa.R.D.E.":

In the Parth Bhatia Matter:

1. RPC 1.5(a) - A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee;
2. RPC 1.15(b) - A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded;
3. RPC 1.15(e) - Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property;
4. RPC 1.15(f) - When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved;
5. RPC 1.15(i) - A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn

by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner;

6. RPC 1.16(d) - Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... refunding any advance payment of fee or expense that has not been earned or incurred;

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

8. Pa.R.D.E. 219(d)(1)(iii), (iv), (v) - On or before July 1 of each year all attorneys required by this rule to pay an annual fee shall electronically file with the Attorney Registration Office an electronically endorsed form prescribed by the Attorney Registration Office in accordance with the following procedures: (1) The form shall set forth: ... (iii) The name of each Financial Institution ... in which the attorney ... held funds of a client or a third person The form shall include the name and account number for each account in which the attorney held such funds. . . . For purposes of this subparagraph, the phrase 'funds of a client or a third person ... ' means funds that belong to a client or third person and that an attorney receives: (A) in connection with a client-lawyer relationship ... (iv) Every account not reported under subparagraph (iii), that held funds of a client or a third person, and over which the attorney had sole or shared signature

authority or authorization to transfer funds to or from the account, during the same time period specified in subparagraph (iii) ... [and] (v) Every business operating account maintained or utilized by the attorney in the practice of law during the same time period specified in subparagraph (iii). For each account, the attorney shall provide the name of the financial institution, location and account number.

In the J. David Eubank Matter:

1. RPC 1.15(b) - A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded;
2. RPC 1.15(e) - Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property;
3. RPC 1.15(i) - A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner;

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

5. Pa.R.D.E. 219(d)(1)(iii), (iv), (v) - On or before July 1 of each year all attorneys required by this rule to pay an annual fee shall electronically file with the Attorney Registration Office an electronically endorsed form prescribed by the Attorney Registration Office in accordance with the following procedures: (1) The form shall set forth: ... (iii) The name of each Financial Institution ... in which the attorney ... held funds of a client or a third person The form shall include the name and account number for each account in which the attorney held such funds. . . . For purposes of this subparagraph, the phrase 'funds of a client or a third person ... ' means funds that belong to a client or third person and that an attorney receives: (A) in connection with a client-lawyer relationship ... (iv) Every account not reported under subparagraph (iii), that held funds of a client or a third person, and over which the attorney had sole or shared signature authority or authorization to transfer funds to or from the account, during the same time period specified in subparagraph (iii) ... [and] (v) Every business operating account maintained or utilized by the attorney in the practice of law during the same time period specified in subparagraph (iii). For each account, the attorney shall provide the name of the financial institution, location and account number.

In the Brittany Mentley Abbey Matter:

1. RPC 1.15(b) - A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded;
2. RPC 1.15(i) - A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner; and
3. RPC 8.4(c) - It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

IV. DISCUSSION

Here, the Board considers the allegations against Respondent that he committed professional misconduct in three client matters. Our review follows the filing of the Committee's Report, wherein it concluded that Respondent engaged in professional misconduct and recommended a three year period of suspension followed by a one year period of probation with a practice monitor after reinstatement; the parties' exceptions to the Committee's Report; and oral argument before a Board panel. Petitioner bears the burden of proving ethical misconduct by a preponderance of the evidence that is clear and satisfactory. ***Office of Disciplinary Counsel v. John Grisgby***, 425 A.2d 730, 732 (Pa. 1981). Upon our review, we conclude that Petitioner met its burden of proving that

Respondent violated the Pennsylvania Rules of Professional Conduct and Pennsylvania Rules of Disciplinary Enforcement charged in the Petition for Discipline.

The record established that during the time frame in question, Respondent engaged in the private practice of law and failed to properly safeguard the property of three separate clients, which resulted in the misappropriation of approximately \$46,722.

The most serious of the three matters is that of Parth Bhatia. In May 2019, Respondent entered into a written fee agreement with his client that required the advance payment of a \$50,000 retainer with an hourly rate of \$250. Significantly, the written agreement did not state that the fee was nonrefundable. The Bhatias paid Respondent \$50,000 as a retainer. Respondent failed to place any portion of the \$50,000 retainer in an IOLTA or other trust account to be drawn upon as earned. Instead, Respondent deposited the check into his personal account and immediately began to disburse the funds for personal expenditures, despite the fact that he had not earned those funds.

After approximately five days, Parth Bhatia terminated Respondent's representation and sought an accounting of services rendered and a refund of the unearned portion of the advance fee. Unfortunately, Respondent did not accept the Bhatias' decision to terminate his representation in a professional manner. He attempted to refute that he owed any monies to the Bhatias and on various occasions misrepresented to the Bhatias that: the \$50,000 advance was "nonrefundable" despite the absence of such a provision in the written terms of his fee agreement; retainers for criminal matters "are deemed to be earned at the time of their execution"; and his bank notified him the Bhatias had stopped payment of the \$50,000 check. Troublingly, Respondent used his license as an attorney to threaten the Bhatias with a lawsuit if and when they terminated his representation. Respondent continued to use the Bhatias'

funds, even after the Bhatias terminated his services and he was aware there was a dispute concerning the funds.

Despite several requests from the Bhatias, Respondent initially refused to refund any portion of the \$50,000, but eventually accounted for his services on September 17, 2019 and made a partial refund of \$5,000 on November 1, 2019, nearly six months after the Bhatias' initial request. The timing is significant, as the partial refund occurred after Petitioner had become involved in the matter. Finally, having been frustrated in their attempts to obtain a refund of the large balance of their retainer fee, the Bhatias were forced to seek the assistance of the Pennsylvania Lawyers Fund for Client Security, which paid a claim to the Bhatias in August 2020. Respondent reimbursed \$39,188.50 to the Fund on August 28, 2020.

Similar to the Bhatia matter, Respondent failed to protect Mr. Eubank's and Ms. Abbey's funds. Although Respondent successfully represented Mr. Eubank and earned most of the \$10,000 advance in the Eubank matter, his commingling and misuse of entrusted funds also contributed to his months-long delay in refunding the \$1,000 unearned portion to his client. In Respondent's representation of Ms. Abbey, he immediately cashed the checks for advance fees that he received on his client's behalf, failing to deposit the proceeds in a trust account to be drawn upon as earned. All told, Respondent was entrusted with fee advances totaling \$3,534.25 on behalf of Ms. Abbey and as of June 13, 2019, Respondent had spent eight hours on Ms. Abbey's matter for a total of \$2,000, was still entrusted with at least \$1,534.25, but by August 25, 2019, the balance in his personal account was in the negative.

There is no dispute that during the time frame in question, Respondent failed to maintain an IOLTA Account and used a single account for both personal and

professional purposes, commingling his own funds with client funds and otherwise misusing funds that did not belong to him. Respondent failed to properly report accounts on his attorney registration forms. As to Respondent's failure to maintain an IOLTA account, we note that he practiced law with his family firm for a period of time and was aware that trust and operating accounts were utilized by the firm, even though he was not personally tasked with the bookkeeping responsibilities. Inexplicably, Respondent did not utilize proper accounts when he practiced on his own. Respondent's testimony on this issue was sparse and did not shed much light on his actions; he simply stated that he did not appreciate the necessity of maintaining an account to safeguard client funds. For an attorney who has practiced law for more than two decades, this explanation rings hollow. Moreover, Respondent failed to demonstrate that he has remediated his practice problems by establishing proper accounts and showing he understands how to safeguard client funds in compliance with the rules. According to the record, Respondent has opened an IOLTA account, but it does not appear that he has opened a business/operating account as is required.

The record before us reveals numerous weighty aggravating factors, which serve to increase the severity of the recommended sanction. In aggravation, we find that Respondent did not agree to refund the initial \$5,000 portion of the unearned fee to the Bhatias until after Petitioner commenced its investigation, and Respondent failed to make full restitution until after the Fund paid the Bhatias' claim. The fact that Respondent delayed payment weighs against his claims that he has accepted responsibility and shown remorse. Similarly, although Respondent acknowledged rules violations in his Answer to Petition for Discipline, he maintained his self-serving claims throughout the disciplinary hearing that he was entitled to keep the entire fee advance of \$50,000

because the Bhatias somehow knew his fee was “nonrefundable.” Respondent’s position offsets any mitigation for acknowledging wrongdoing. We find that Respondent failed to demonstrate sincere and credible remorse.

In mitigation, we consider that Respondent has practiced law since 1997 and has no prior record. Respondent provided testimony from a client who spoke about Respondent’s compassion for his clients. Respondent presented testimony of two other witnesses as to his good reputation in the community. However, we conclude, as did the Committee, that the mitigating evidence put forth by Respondent is not sufficiently weighty or convincing to balance the weighty aggravating factors and to impact our ultimate decision on discipline.

Having concluded that Respondent violated the rules charged in the Petition for Discipline, we turn to the appropriate discipline to address his serious misconduct. The Committee recommended that Respondent be suspended for three years, and that upon reinstatement, if such were to occur, Respondent be placed on probation for one year with a practice monitor. Respondent filed exceptions to the Committee’s recommendation, contending that his misconduct at most warrants a public reprimand. Petitioner opposed Respondent’s exceptions, contending that the Committee’s recommended discipline is supported by the facts and the decisional law. Having considered the parties’ arguments, we conclude that Respondent’s exceptions are without substance. We further conclude that the Committee’s reasoning is sound and we concur that a three year period of suspension is warranted.

In looking at the general considerations governing the imposition of final discipline, it is well-established that each case must be decided individually on its own unique facts and circumstances. ***Office of Disciplinary Counsel v. Robert Lucarini***,

472 A.2d 186 (Pa. 1983). In order to “strive for consistency so that similar misconduct is not punished in radically different ways,” **Office of Disciplinary Counsel v Anthony Cappuccio**, 48 A.3d 1231, 1238 (Pa. 2012) (quoting **Lucarini**, 472 A.2d at 190), the Board is guided by precedent for the purpose of measuring “the respondent’s conduct against other similar transgressions.” **In re Anonymous No. 56 DB 94**, 28 Pa. D. & C. 4th 398 (1995). The Board is mindful when adjudicating each case that the primary purpose of the lawyer discipline system in Pennsylvania is to protect the public, preserve the integrity of the courts, and deter unethical conduct. **Office of Disciplinary Counsel v. Akim Czmus**, 889 A.2d 117 (Pa. 2005).

Turning to the ultimate question to be resolved - the determination of discipline - we are guided by decisional law and find that a suspension of three years is appropriate. As is often the case with attorney disciplinary matters, there is no case precedent that is precisely on all fours, but a suspension of three years is within the range of discipline imposed in prior cases.

Respondent failed to maintain an IOLTA or trust account to safeguard client funds, misappropriated funds and used them to pay for personal items such as a boat and school tuition, insisted that he had an oral agreement with his client that superseded the clear terms of the written agreement as to the handling of the \$50,000 retainer, threatened his client with a lawsuit and made misrepresentations, persisted in his claim to the funds for as long as he could until forced to reimburse the payout made by the Pennsylvania Lawyers Fund for Client Security, continued to advocate his wrongful position at the disciplinary hearing that there was an oral agreement that entitled him to the funds, never apologized to any of his clients, has not fully remediated his practice problems and has not shown genuine contrition.

In the matter of ***Office of Disciplinary Counsel v. Darren Keith Parr***, No. 193 DB 2019 (S. Ct. Order 8/10/2020), the Court approved consent discipline for a suspension of one year and one day to address Parr's misconduct where he misappropriated entrusted funds through IOLTA account misuse. In mitigation, Parr demonstrated that he had remediated the problems with his IOLTA and exhibited remorse. In the instant matter, Respondent never bothered to use an IOLTA and ran his practice and his personal life through the same checking account. Further, he has not shown that he took measures to remedy his deficient account practices and he did not express remorse.

In the matter of ***Office of Disciplinary Counsel v. William R. Balaban***, No. 23 DB 2019 (S. Ct. Order 4/15/2019), Balaban was suspended on consent for one year and one day following his misappropriation of \$75,000 of escrowed funds. Balaban was a forty year practitioner with no prior history who had an extensive record of charitable affiliations, cooperated with Office of Disciplinary Counsel and expressed remorse. Here, Respondent's misconduct is more serious as it involved three client matters and dishonest conduct, and no compelling mitigation.

In ***Office of Disciplinary Counsel v. Perry Lynn Flaugh***, No. 112 DB 2015 (D. Bd. Rpt. 6/15/2016) (S. Ct. Order 8/12/2016), Flaugh failed to protect his client's interests upon termination of representation, misrepresented the status of the client's matter, and misappropriated \$1,000 of the client's funds, which he failed to reimburse. Flaugh, who had no prior record of attorney discipline, failed to demonstrate credible remorse. The Court suspended Flaugh for one year and one day, with Justice Mundy dissenting for a two year period of suspension. By comparison, the instant Respondent's conduct is more egregious than Flaugh's as it involved three client matters, not one, and

substantially more misappropriated funds. As well, Respondent threatened one of his clients with a lawsuit and lied to the client in an attempt to keep monies that did not belong to Respondent.

An attorney was suspended for a period of three years after she improperly deposited settlement funds in her operating account instead of a trust account, failed to promptly disburse the funds, and converted a portion of the funds to her own use because she falsely claimed she had a charging lien on the settlement funds. The clients were forced to file a claim for \$18,800 with the Pennsylvania Lawyers Fund for Client Security, which paid the clients in full. The attorney expressed no remorse and continued to assert she did nothing wrong. ***Office of Disciplinary Counsel v. Terry Elizabeth Silva***, No. 164 DB 2014 (D. Bd. Order 5/24/2016) (S. Ct. Order 7/14/2016).

In ***Office of Disciplinary Counsel v. David Allen Gniewek***, No. 171 DB 2008 (S. Ct. Order 4/21/2009), the Court approved a Joint Petition in Support of Discipline on Consent and suspended Gniewek for three years for his misuse of \$60,000.00 of entrusted client funds, failure to communicate, failure to account for entrusted funds, and failure to timely disburse entrusted funds. After investigation by Office of Disciplinary Counsel, Gniewek reimbursed the client. A similar result occurred in ***Office of Disciplinary Counsel v. Robert Louis Frey, Jr.***, No. 211 DB 2010 (S. Ct. Order 5/23/2011), where the Court imposed a three year suspension on consent following Frey's misappropriation of \$15,000.00 of entrusted funds, inappropriate use of his IOLTA account, failure to return the unearned portion of a fee, lack of communication and diligence, and dishonest conduct. Respondent's conduct is similar to that in ***Frey*** and ***Gniewek***, in that he used approximately \$46,722 of client funds for personal use, ignored

his client's requests for a refund to avoid paying them, and belatedly reimbursed the funds after Petitioner's intercession.

A more serious matter resulted in an attorney's five year suspension from the practice of law. In ***Office of Disciplinary Counsel v. James Barnett Gefsky***, No. 162 DB 2009 (D. Bd. Rpt. 1/26/2011) (S. Ct. Order 5/16/2011), Gefsky failed to hold client funds separate from his own, failed to promptly provide clients their property, and engaged in dishonest and deceitful conduct by converting \$75,000 of client funds to his personal use. Additionally, Gefsky misrepresented the status of a client's matter and settled it without the client's consent. Here, Respondent's conduct is not as serious as Gefsky's because it did not include misrepresenting the status of a matter and wrongfully settling a case without a client's consent.

The Committee recommended that if Respondent is reinstated from his suspension, he be placed on probation for one year with a practice monitor to review his financial accounts. We decline to adopt this portion of the Committee's recommendation. A reinstatement proceeding is a "searching inquiry into a lawyer's present professional and moral fitness" and requires the lawyer to establish by clear and convincing evidence that he or she is morally qualified, competent and learned in the law and that the resumption of the practice of law within the Commonwealth by such person will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest. ***Philadelphia News, Inc. v. The Disciplinary Board of the Supreme Court of Pennsylvania***, 363 A. 2d 779 (Pa. 1976); Pa.R.D.E. 218(c)(3). If a petitioner-attorney meets that heavy burden and proves fitness to resume practice, there is no reason to subject the lawyer to probation.

The totality of the facts and circumstances of this matter warrant a suspension for three years, which discipline is consistent and appropriate to address Respondent's serious misconduct and protect the public.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that Respondent, David Charles Agresti, be Suspended for three years from the practice of law in this Commonwealth.

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: David S. Senoff
David S. Senoff, Member

Date: 5/21/2021