

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1915 Disciplinary Docket No. 3
Petitioner :
 : No. 69 DB 2012
v. :
 : Attorney Registration No. 26110
JOHN J. O'BRIEN, III, :
Respondent : (Montgomery County)

ORDER

PER CURIAM:

AND NOW, this 28th day of March, 2013, upon consideration of the Recommendation of the Three-Member Panel of the Disciplinary Board dated January 14, 2013, the Joint Petition in Support of Discipline on Consent is hereby granted pursuant to Rule 215(g), Pa.R.D.E., and it is

ORDERED that John J. O'Brien, III, is suspended from the practice of law for a period of one year, the suspension is stayed in its entirety and he is placed on probation for a period of one year, subject to the condition that, on a quarterly basis, he shall provide the Office of Disciplinary Counsel with bank statements, including monthly statements of account, deposit slips and client ledgers, demonstrating the proper maintenance of his IOLTA account.

A True Copy Patricia Nicola
As Of 3/28/2013

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA


OFFICE OF DISCIPLINARY COUNSEL : No. 69 DB 2012
Petitioner :
v. : Attorney Registration No.26110
JOHN J. O'BRIEN, III :
Respondent : (Montgomery County)

RECOMMENDATION OF THREE-MEMBER PANEL
OF THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

The Three-Member Panel of the Disciplinary Board of the Supreme Court of Pennsylvania, consisting of Board Members David A. Nasatir, Stewart L. Cohen, and Patricia M. Hastie, has reviewed the Joint Petition in Support of Discipline on Consent filed in the above-captioned matter on August 20, 2012.

The Panel approves the Petition consenting to a one year suspension to be stayed in its entirety and a one year period probation subject to the conditions set forth in the Joint Petition and recommends to the Supreme Court of Pennsylvania that the attached Joint Petition be Granted.

The Panel further recommends that any necessary expenses incurred in the investigation and prosecution of this matter shall be paid by the respondent-attorney as a condition to the grant of the Petition.



David A. Nasatir, Panel Chair
The Disciplinary Board of the
Supreme Court of Pennsylvania

Date: 1/14/2013

Please note Ms. Hastie would deny the Joint Petition.

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

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 69 DB 2012
Petitioner	:	
	:	
v.	:	
	:	Attorney Reg. No. 26110
JOHN J. O'BRIEN, III,	:	
Respondent	:	(Montgomery County)

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

Petitioner, the Office of Disciplinary Counsel (hereinafter, "ODC") by Paul J. Killion, Chief Disciplinary Counsel, and Ramona Mariani, Disciplinary Counsel, and John J. O'Brien, III, (hereinafter, "Respondent"), respectfully petition the Disciplinary Board in support of discipline on consent, pursuant to Pennsylvania Rule of Disciplinary Enforcement ("Pa.R.D.E.") 215(d), and in support thereof state:

1. ODC, whose principal office is situated at 601 Commonwealth Ave., Suite 2700, P.O. Box 62485, Harrisburg, Pennsylvania, is invested, pursuant to Pa.R.D.E. 207, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Enforcement Rules.

2. Respondent, John J. O'Brien, III, was born on March 8, 1950, and was admitted to practice law in the Commonwealth on October 26, 1977. Respondent is on active status and maintains his office at 257 East Lancaster Avenue, Suite 201, Wynnewood, Pennsylvania.

FILED

AUG 20 2012

Office of the Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania

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

3. Respondent's affidavit stating, *inter alia*, his consent to the recommended discipline is attached hereto as Exhibit A.

SPECIFIC FACTUAL ALLEGATIONS ADMITTED

4. In October of 2008, in response to notice of an overdraft from the Pennsylvania Lawyers Fund for Client Security (the "CSF"), ODC undertook a review of Respondent's IOLTA account at PNC No. 8608370516.

5. By letter dated April 3, 2009, ODC alerted Respondent to the factual findings of the review, which included providing notice that Respondent had failed to maintain his IOLTA account as required by RPC 1.15, and that as a result, it had been determined that Respondent should receive an informal admonition.

6. By notice dated July 20, 2009, the CSF received notice of an overdraft in Respondent's IOLTA account in the amount of \$117.23.

7. On July 28, 2009, Respondent submitted his 2009-2010 Pennsylvania Attorney's Annual Fee Form enclosing payment of \$200.00 drawn on his IOLTA account.

8. By notice dated August 20, 2009, the CSF received notice of an overdraft in Respondent's IOLTA account in the amount of \$1,166.53.

9. By letter dated August 26, 2009, Paul J. Killion, Chief Disciplinary Counsel, wrote to Respondent and notified him that as a result of ODC's investigation it had been determined that Respondent should receive an informal admonition.

10. By letter dated September 23, 2009, ODC alerted Respondent to the continued improper use of his IOLTA account, including comingled funds and overdrafts.

11. By notice dated October 7, 2009, the CSF received notice of an overdraft in Respondent's IOLTA account in the amount of \$563.41.

12. On October 29, 2009, Respondent appeared at the Office of Disciplinary Counsel and received an informal admonition for the failure to properly maintain his IOLTA Account.

13. As a condition of the private discipline, ODC supplied Respondent with several articles concerning proper maintenance of IOLTA accounts which he was to have read before appearing in ODC's office.

14. Respondent answered ODC's September 23, 2009 letter, by letter dated October 29, 2009, in which Respondent:

- a. Stated that the last time the IOLTA account was used for client funds was February of 2007;
- b. Stated that the IOLTA account was dormant from February, 2007 until June, 2007; and
- c. Enclosed twelve months of IOLTA account statements.

15. Respondent failed to address the continued overdrafts in the IOLTA account.

16. Respondent failed to address the continued payments of personal and business expenses from his IOLTA account.

17. An audit revealed that Respondent continued to fail to maintain his IOLTA account as required by RPC 1.15 in that he:

- a. Deposited his own funds into the account in excess of those funds necessary to pay bank charges; and
- b. Utilized funds in the IOLTA Account to pay both personal and business expenses.

18. By letter dated August 4, 2010, Respondent wrote to ODC and, among other things, stated that there would be no more overdrafts in his IOLTA account, because he would transfer all fees to other accounts.

19. Despite the statements made in his August 4, 2010 letter, Respondent continued to misuse the IOLTA account.

20. In September of 2010 Respondent deposited \$7,821.46 into his IOLTA account.

21. None of those deposits consisted of Qualified Funds as defined by RPC 1.15(a)(9).

22. Instead, the deposits consisted of a mixture of cash, small checks made payable to the O'Brien & O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks Respondent had received for fees from clients.

23. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA for office and personal expenses, including two checks to Bank of America and an on-line payment to Capital One.

24. In October of 2010, Respondent deposited \$9,554.67 into his IOLTA account.

25. None of the deposits consisted of Qualified Funds as defined by RPC 1.15(a)(9).

26. Instead, the deposits consisted of a mixture of cash, small checks made payable to the O'Brien & O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks Respondent received for fees from clients.

27. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA for office and personal expenses, including checks to Bank of America and Independence Blue Cross.

28. In November of 2010 Respondent deposited \$21,316.87 into his IOLTA account.

29. None of those deposits consisted of Qualified Funds as defined by RPC 1.15(a)(9).

30. Instead, the deposits consisted of a mixture of cash, small checks made payable to the O'Brien & O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks Respondent received for fees from clients.

31. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA for office and personal expenses, including five checks to Bank of America, two checks to Independence Blue Cross, one check to GE Capital, one check to United Concordia, one check to Heritage Business Systems, three checks to PECO, three checks to Citi Cards, one check for his malpractice insurance coverage and a check to Geico for car insurance.

32. In December of 2010 Respondent deposited \$15,848.05 into his IOLTA account.

33. None of those deposits consisted of Qualified Funds as defined by RPC 1.15(a)(9).

34. Instead, the deposits consisted of a mixture of cash, small checks made payable to the O'Brien & O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks Respondent received for fees from clients.

35. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA account for office and personal expenses, including ten checks to Bank of America, one check to Heritage Business Systems, three checks to Citi Cards, one check to Honor Snack and one check to Huntington National Bank. In addition, Respondent wrote two bonus checks and a check representing a Christmas gift to an employee.

36. In January of 2011 Respondent deposited \$19,953.41 into his IOLTA account.

37. Several of those deposits consisted of Qualified Funds as defined by RPC 1.15(a)(9), including a Money Order in the amount of \$252.50 which states it is for a "filing fee" and a check in the amount of \$500.00 with the notation "ERSA Court Reporters."

38. The rest of the deposits in January of 2011 consisted of a mixture of cash, small checks made payable to the O'Brien & O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks Respondent received for fees from clients.

39. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA for office and personal expenses, including seven checks to Bank of America, two checks to Citi Cards, two checks to Independent Blue Cross, one check to Huntington National Bank, one check to GE Capital, one check to First Insurance Funding, one check to Aqua PA, one check to St. Joseph's University, one check to Penn Mutual Life Insurance Company and one check to Archbishop Carroll High School, and, in addition, there were nineteen electronic or e-check payments to various creditors.

40. In February of 2011 Respondent deposited \$14,598.55 into his IOLTA account.

41. None of those deposits consisted of Qualified Funds as defined by RPC 1.15(a)(9).

42. Instead, the deposits consisted of a mixture of cash, small checks made payable to the O'Brien & O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks Respondent received for fees from clients.

43. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA for office and personal expenses, including six checks to Bank of America, three to Citi Cards, two to PECO, two to First Insurance Funding, one to Huntington National Bank and one to Honor Snack, and, in addition, there were fourteen electronic or e-check payments to various creditors.

44. In March of 2011 Respondent deposited \$28,164.41 into his IOLTA account.

45. None of those deposits consisted of Qualified Funds as defined by RPC 1.15(a)(9).

46. Instead, the deposits consisted of a mixture of cash, small checks made payable to the O'Brien and O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks Respondent received for fees from clients.

47. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA account for office and personal expenses, including eleven checks to Bank of America, four checks to Citi Cards, two checks to Huntington National Bank, one check to GE Capital, three checks to Aqua, one check to Honor Snack, one check to Capital One, two checks to Heritage Business Systems, two checks to Gulf Oil, one check to Upper Merion Sewer Revenue, one check to Rose M. Hykel, Esquire, Upper Merion Tax Collector, and one check made payable to K. Schmidt for \$660.00 with the notation "sec pay." There were twenty-nine electronic or e-check payments to various creditors.

48. In April of 2011 Respondent deposited \$10,411.92 into his IOLTA account.

49. At least one deposit consisted of Qualified Funds as defined by RPC 1.15(a)(9) – a check dated April 18, 2011, in the amount of \$255.00 with the notation "filing fees."

50. The other deposits in April of 2011 consisted of a mixture of cash, small checks made payable to the O'Brien & O'Brien pension plan and the O'Brien & O'Brien profit sharing plan, and checks he received for fees from clients.

51. Rather than transferring fees to an operating account as earned, Respondent wrote checks from the IOLTA account for office and personal expenses, including seven checks to Bank of America, two checks to Citi Cards, one check to Honor Snack, one check to Gulf Oil, one check to St. Joseph's University, one check to Ace Unlocks, two checks to Independence Blue Cross, one check to PECO and two checks made payable to K. Schmidt, each for \$660.00

and both noted “sec pay”; there were nineteen electronic or e-check payments to various creditors.

52. Respondent regularly overdrew his IOLTA account between the period of September of 2010 through June of 2011.

53. Respondent’s bank notified the CSF of overdrafts in his IOLTA account occurring on:

- a. September 28, 2010;
- b. September 29, 2010;
- c. February 23, 2011;
- d. March 9, 2011;
- e. May 5, 2011; and
- f. June 20, 2011.

54. By letter dated August 12, 2011, ODC notified Respondent of the findings of its audit.

SPECIFIC RULES OF PROFESSIONAL CONDUCT VIOLATED

54. Respondent violated the following RPCs:
- A. RPC 1.15(b), RPC 1.15(b)[effective 9-20-08], which states that 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.
 - B. RPC 1.15(h)[effective 9-20-08], which states that a lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying service charges on that account, and only in an amount necessary for that purpose.
 - C. RPC 1.15(i)[effective 9-20-08], which states that 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.
 - D. RPC 1.15(j)[effective 9-20-08], which states that at all times while a lawyer holds Rule 1.15 Funds, the lawyer shall also maintain another account that is not used to hold such funds.

JOINT RECOMMENDATION FOR DISCIPLINE

ODC and Respondent jointly recommend that the appropriate discipline for Respondent's misconduct is a one-year suspension, stayed in its entirety, and that Respondent be placed on probation for one year, with the condition that during the period of the probation Respondent supply ODC with his IOLTA bank statements and ledger cards on a quarterly basis. As an additional condition, Respondent has promised to locate and take a continuing legal education course (either in this or a neighboring jurisdiction) addressing the proper maintenance of an IOLTA account.¹ This case involves the failure to properly hold fiduciary funds and maintain an IOLTA account. Despite conducting fairly protracted and extensive audits, ODC uncovered no evidence suggesting actual conversion of client funds. However, the evidence is plain that for at least the past four years, Respondent has improperly used his IOLTA account as both a personal and business operating account.

On October 29, 2009, Respondent received an informal admonition as a result of his misuse of the IOLTA. As a condition of the informal admonition, ODC supplied Respondent with three different articles concerning how to properly maintain an IOLTA account. Nonetheless, despite the private discipline and efforts at education, Respondent continued to misuse the account. Indeed, between September of 2010 and June of 2011, ODC received notice from the Client Security Fund of six additional overdrafts. These repeated notices prompted additional, time-consuming audits, all of which revealed the continued misuse of the IOLTA.

¹ ODC is not aware of any course offered on a regular basis in Pennsylvania; however, Respondent's counsel has indicated that the State of Delaware offers such a course. Despite variations in the Rules, it is respectfully suggested that a course offered in a neighboring jurisdiction will still be relevant and provide value. Virtually all iterations of RPC 1.15 prohibit co-mingling and incorporate record keeping and notice requirements.

Respondent's primary defense throughout has been his claim that he is not converting client funds. That defense misses the mark. The rule against commingling protects a client's funds from more than attorney misconduct. Funds held in an IOLTA account are insulated from attachment or garnishment by a lawyer's creditors precisely because the funds do not belong to the lawyer. Commingling jeopardizes that status and opens the door to the possibility that funds belonging to both the lawyer and the client could be reached. Similarly, commingling potentially jeopardizes FDIC insurance. Currently, the FDIC insures accounts up to \$250,000.00 in any one financial institution. If the IOLTA account is properly maintained, FDIC will insure funds for each client who has funds in the trust at the time of the bank failure. Finally, a lawyer holds client funds as a fiduciary. It is a basic tenant of fiduciary law that the funds of others must be held separate from the fiduciary's own funds.

Respondent denies that he used the IOLTA as a personal account as a means to avoid attachment or garnishment by his creditors. Nonetheless, Respondent's continued misuse of the account over a lengthy period of time is willful. Respondent has been given every opportunity to voluntarily correct the situation, but for over four years has failed to do so. In *Office of Disciplinary Counsel v Steven M. Stein*, No. 106 DB 2010 (2011) the Pennsylvania Supreme Court approved the Disciplinary Board's recommendation for a one-year stayed suspension coupled with probation and a quarterly reporting requirement. *Stein* involved the failure to place monies in an escrow account, which led to Stein holding an insufficient balance in the account. In addition, Stein made misrepresentations to Office of Disciplinary Counsel in connection with the investigation. While *Stein* involved additional misconduct not present here, Respondent's misuse of his IOLTA account is far more pervasive than was the misconduct in *Stein*.

In *In Re David A. Overboe*, 745 N.W.2d 852 (Minn. 2008) the Court suspended Overboe for one year where Overboe deceptively labeled his personal account a trust account in order to avoid his creditors. The Court rejected Overboe's argument that no client had been hurt by the misconduct – pointing out that “Overboe’s commingling of personal and client funds put his client funds at risk of attachment by Overboe’s judgment creditors.” *Id.* at 867. Further, Overboe had been disciplined twice before for similar misconduct.

Respondent’s misconduct is aggravated by his history of discipline for precisely the same misconduct. However, by entering into this joint petition and acceding to the conditions, Respondent has expressed recognition of his violations of the Rules of Professional Conduct. Respondent is currently represented by counsel who has strongly impressed upon her client the need for compliance. Moreover, the proposed discipline provides a mechanism to impose an immediate license suspension in the event of continued non-compliance with the applicable Rules.

WHEREFORE, Joint Petitioners respectfully pray that your Honorable Board:

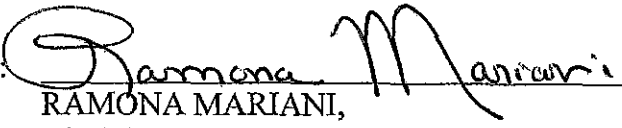
- a. Approve this Petition;
- b. File a recommendation with the Supreme Court of Pennsylvania recommending that the Supreme Court enter an Order imposing a one-year suspension stayed in its entirety, and a one-year period of probation, with the condition that during the period of probation, Respondent is to provide ODC on a quarterly basis with bank statements, including monthly statements of account, deposit slips and client ledgers, demonstrating Respondent’s proper maintenance of his IOLTA account; and
- c. Pursuant to Pa.R.D.E. 215(i), enter an order for Respondent to pay the necessary expenses incurred in the investigation and prosecution of this matter as a condition to

the grant of the Petition, and that all expenses be paid by Respondent before the imposition of discipline under Pa.R.D.E. 215(g).

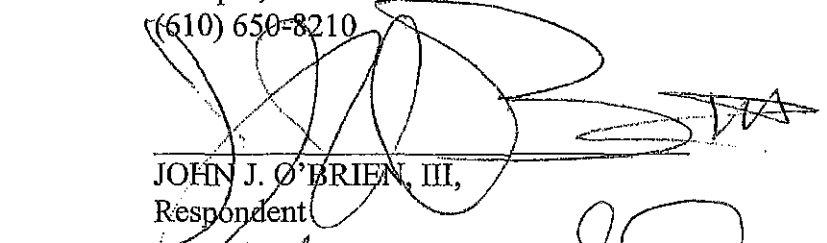
Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL
PAUL J. KILLION,
Attorney Reg. No. 20955,
Chief Disciplinary Counsel

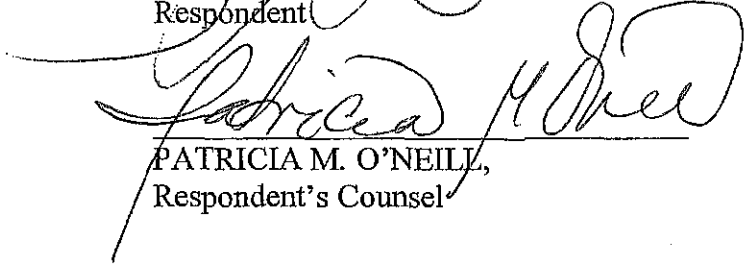
Date: 8/13/12

By: 
RAMONA MARIANI,
Disciplinary Counsel
Attorney Registration Number 78466
Suite 170, 820 Adams Avenue
Trooper, PA 19403
(610) 650-8210

Date: 8/2/12


JOHN J. O'BRIEN, III,
Respondent

Date: 8/10/12


PATRICIA M. O'NEILL,
Respondent's Counsel

VERIFICATION

The statements contained in the foregoing *Joint Petition In Support of Discipline on Consent Pursuant to P.A.R.D.E. 215(d)* are true and correct to the best of my knowledge or information and belief and are made subject to the penalties of 18 Pa.C.S.A. §4904, relating to unsworn falsification to authorities.

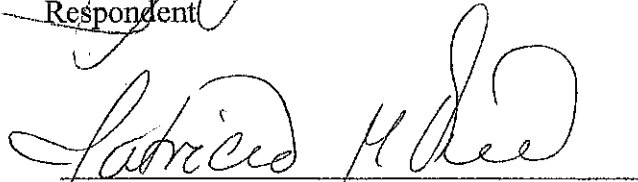
8/13/12
Date


RAMONA MARIANI
Disciplinary Counsel

8/2/12
Date


JOHN J. O'BRIEN, III
Respondent

8/10/12
Date


PATRICIA M. O'NEILL
Respondent's Counsel

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

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 69 DB 2012
Petitioner	:	
	:	
	:	
JOHN J. O'BRIEN, III,	:	Attorney Reg. No. 26110
Respondent	:	(Montgomery County)


CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 204 Pa. Code §89.2e (relating to service upon counsel).

First Class Mail Service, as follows:

Respondent's Counsel:
Patricia M. O'Neill, Esquire
32927 Mimosa Cove
Millsboro, DE 19966
Telephone (302)531-7736

Dated: 8/14/12


RAMONA MARIANI,
Disciplinary Counsel
Attorney Reg. No. 78466
Office of Disciplinary Counsel
Suite 170, 820 Adams Avenue
Trooper, PA 19403
(610) 650-8210

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

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 69 DB 2012
Petitioner	:	
v.	:	
	:	Attorney Reg. No. 26110
JOHN J. O'BRIEN, III,	:	
Respondent	:	(Montgomery County)

AFFIDAVIT

JOHN J. O'BRIEN, III hereby tenders this affidavit in support of the Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d), and further states as follows:

1. he freely and voluntarily consents to the proposed discipline; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting the consent; and he has consulted and followed the advice of counsel in connection with the decision to consent to discipline.
2. he is aware that there is presently pending a proceeding involving allegations that he has been guilty of misconduct as set forth in the Petition.
3. he acknowledges that the material facts set forth in the Petition are true.

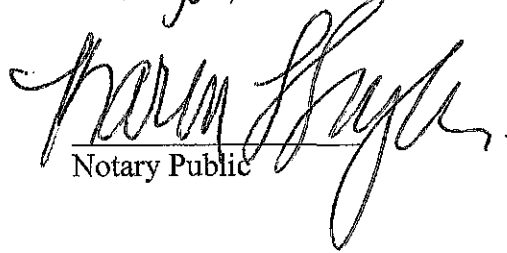
4. he consents because she knows that if charges continued to be prosecuted in the pending proceeding, he could not successfully defend against them.

Signed this 1st day of AUGUST, 2012.



JOHN J. O'BRIEN, III
Attorney Registration No. 26110

Sworn to and subscribed
Before me this 1st day
of August, 2012.



Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Karen L. Snyder, Notary Public
Springfield Twp., Delaware County
My Commission Expires Sept. 1, 2015
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES