

STATE OF FLORIDA
COUNTY OF ORANGE

AFFIDAVIT

I, Matthew D. Herdeker, after being duly sworn, say:

1. I am a staff auditor with The Florida Bar, located at 1000 Legion Place, Suite 1625, Orlando, Florida 32801-1050. I have been an auditor with The Florida Bar since January 2012. My duties include conducting compliance audits of attorneys' trust accounts, determining the causes of overdrafts in accounts, investigating allegations of misappropriations from accounts, and preparing written reports of audit findings. I have been qualified as an expert witness in trust accounting matters in bar disciplinary proceedings.

2. Prior to my employment with The Florida Bar, I was a Senior Compliance Auditor with Fidelity National Financial, Inc. from August 2004 through January 2012, where I conducted nationwide forensic audits involving allegations of misappropriation from escrow and trust accounts, performed mortgage fraud investigations, assisted law enforcement agencies with investigations, and provided testimony in depositions.

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3. I am a Certified Public Accountant (CPA), Certified Internal Auditor (CIA), and Certified Fraud Examiner (CFE). I am also Certified in Financial Forensics (CFF) with the AICPA.

4. I conducted a compliance audit of respondent's trust account maintained at First Green Bank, his real estate trust account at CenterState Bank, and his general trust account at CenterState Bank for the period January 1, 2016 to December 31, 2016.

5. I also reviewed respondent's law firm operating accounts and his personal checking accounts maintained at CenterState Bank and First Green Bank for the period July 1, 2013 through December 31, 2016.

6. In addition, I reviewed several client files respondent provided to the bar.

7. I also attended respondent's sworn statements at the bar on January 10, 2017, and April 6, 2017.

8. The audit of respondent's accounts revealed he repeatedly and significantly overdrafted his CenterState operating account due to insufficient funds during 2015 and 2016.

9. For example, in November 2016, the ending daily bank balance in the operating account was negative 26 out of 30 days, by as much as \$10,755.11.

10. Respondent incurred overdraft fees in the account totaling \$5,565 in 2015 and \$6,265 in 2016.

11. Respondent acknowledged that he commingled funds by placing credit card payments, which included clients' cost deposits, into the operating account and failed to timely transfer them to his trust account as required by Rule 5-1.1(a)(1).

12. Because he repeatedly overdrafted his operating account while these cost deposits were in his account and used those funds for operating expenses, respondent caused those funds to be used for a purpose other than which they were intended, as prohibited by Rule 5-1.1(b).

13. The audit of respondent's trust accounts maintained at First Green Bank and at CenterState also revealed that respondent failed to follow the minimum required trust accounting procedures. Specifically, respondent failed to identify the client matter on all trust accounts checks, failed to consistently identify the client and the reasons for transactions in the journal, failed to consistently identify the reasons for transactions on the client ledgers, and failed to maintain separate ledgers for each client matter.

14. The audit for respondent's trust account maintained at CenterState Bank revealed that he failed to provide reconciliations and monthly comparisons.

15. On August 30, 2016, pursuant to a power of attorney issued to him by Christa M. Barry, a 75-year-old client of deteriorating health, respondent transferred \$30,000.00 of the \$32,066.34 balance in Ms. Barry's SunTrust money market account to her SunTrust checking account.

16. On August 30, 2016, respondent transferred the \$30,000.00 from Ms. Barry's SunTrust checking account to his trust account at First Green Bank and recorded it in a ledger titled "Barry, Christa M."

17. Ms. Barry died on September 5, 2016.

18. The following day, respondent transferred \$17,500.00 from the Barry ledger in his First Green Bank trust account to his CenterState Bank operating account by check number 1849. The description on the memo line of check number 1849 indicated that one-half of the \$17,500.00 was for attorney's fees and the other one-half was for a personal representative fee in the Barry matter.

19. The probate court had not appointed respondent as the personal representative for Ms. Barry's estate at the time of the issuance of the check.

20. Respondent used the \$17,500.00 he obtained from Ms. Barry's account to cover an overdraft of \$5,677.38 in his operating account. He also transferred \$3,100.00 from the operating account to his CenterState personal account, where it covered an overdraft of \$3,049.84. Respondent also transferred portions of the \$17,500.00 to his other business accounts and to another personal account, and paid various operating expenses.

21. On October 19, 2016, respondent wrote a check in the amount of \$15,500.00 from the Estate of Christa M. Barry account to himself for fees as personal representative. This was the same day respondent's bank dishonored a \$15,000.00 check respondent issued from the power of attorney account of Edward A. Lowman, a 74-year-old client of respondent. When questioned about the transaction during his sworn statement, respondent testified under oath that "It wasn't a coincidence...I needed that money, so I thought I would take my – take a portion of my personal representative's fee." Respondent utilized Ms. Barry's funds for expenses in his personal account and transferred a portion to his other businesses.

22. Respondent represented Edward Lowman in preparing a revocable living trust and a power of attorney.

23. Mr. Lowman requested to name respondent as a 50% beneficiary in the living trust. As such, respondent drafted the fifth amendment to the living trust naming himself as a beneficiary in the distribution, dated July 19, 2011.

24. In September 2016 and October 2016, Mr. Lowman agreed to give respondent loans totaling \$90,000.00. Respondent, using a power of attorney issued to him by Mr. Lowman, issued three checks to himself as loans from Mr. Lowman's SunTrust checking account totaling \$90,000.00 on September 9, 2016, September 26, 2016 and October 5, 2016.

25. Respondent used Mr. Lowman's funds to cover overdrafts in his personal checking account and his law firm operating account, to repay a personal loan, and to make payments to the United States Treasury. He also transferred portions of the loans to accounts of his other business entities.

26. During his sworn statement to the bar, respondent testified under oath that he initially did not provide a promissory note to Mr. Lowman and did not advise Mr. Lowman to seek the advice of independent legal counsel regarding the transaction. Respondent did not provide a promissory note to Mr. Lowman until approximately November 14, 2016.

27. In addition to the abovementioned \$90,000.00 in loans, on October 5, 2016, respondent issued a check for \$1,000.00 to himself from Mr. Lowman's

SunTrust checking account. He deposited the funds into his operating account maintained at CenterState Bank to cover an overdraft and to make a payment to the United States Treasury.

28. Mr. Lowman advised the bar that he did not give respondent authorization to issue the \$1,000 check, and when he discovered it, he closed his SunTrust Bank account.

29. Respondent maintained that he was entitled to the \$1,000.00 as compensation for various services he provided to Mr. Lowman while acting under the power of attorney.

30. In his sworn statement, Respondent testified under oath that he did not create an invoice for these services and arrived at the amount of \$1,000.00 by estimating the time he spent on the services.

31. On October 14, 2016, respondent wrote another check to himself in the amount of \$15,000.00 from Mr. Lowman's SunTrust Bank account, and attempted to deposit the funds into his personal checking account maintained at CenterState Bank.

32. On October 19, 2016, CenterState Bank returned the check for insufficient funds because Mr. Lowman had removed most of the funds from his SunTrust checking account with a "Closing Debit."

33. Mr. Lowman advised the bar that he did not agree to loan respondent the \$15,000.00.

34. Richard O'Connell, 85 years old, was also respondent's client. Mr. O'Connell currently resides in an assisted living facility and relies upon a certified nursing assistant for his daily needs. Respondent provided legal services to Mr. O'Connell from 2014 through 2017.

35. Before August 2014, Mr. O'Connell's checking accounts maintained at Chase Bank were titled in his name only and reflected his home address.

36. Beginning with the August 2014 statements, Mr. O'Connell's accounts maintained at Chase Bank were changed to reflect "Richard OConnell or Dennis L Horton POA."

37. On or around November 4, 2014, respondent issued a letter to Chase Bank directing the bank to change the address on the bank statements for Mr. O'Connell's bank accounts to respondent's law office address.

38. From August 2014 through November 2016, respondent issued eighty checks totaling \$139,540.00 from Mr. O'Connell's Chase Bank checking accounts and deposited the funds into his law firm operating accounts.

39. Respondent testified under oath during his sworn statement that these payments were for various legal services he provided to Mr. O'Connell but that he did not prepare an engagement agreement for Mr. O'Connell nor did he draft invoices for the legal services provided in 2015 and 2016.

40. From December 2015 through November 2016, respondent issued twenty-five checks totaling \$44,850.00 from his personal account or operating accounts payable to Richard O'Connell and deposited the funds back into Mr. O'Connell's Chase Bank checking accounts.

41. In his sworn statement to the bar, respondent testified under oath that there were times when Mr. O'Connell's checking account "would fall short". Respondent testified that he deposited funds into Mr. O'Connell's checking account to pay medical bills and Mr. O'Connell's caregiver.

42. On or around November 22, 2016, subsequent to the bar's investigation, respondent issued a letter to Mr. O'Connell informing him for the first time of respondent's compensation for 2015 and 2016.

43. In the letter, respondent attempted to explain his fees. However, respondent failed to disclose the total amount he paid himself in those years and the amounts he returned to Mr. O'Connell. In 2015, respondent paid himself \$43,000 from Mr. O'Connell's checking account and returned \$4,800, for a net total of \$38,200. Respondent represented to Mr. O'Connell in the letter that his compensation for 2015 was \$38,200. In 2016, respondent paid himself \$82,840 from Mr. O'Connell's checking accounts and returned \$40,050, for a net total of \$42,790. Respondent represented to Mr. O'Connell in the letter that his compensation for 2016 was \$39,760.

44. In the letter, respondent also enclosed timesheets previously not sent to Mr. O'Connell and offered to provide legal services for Mr. O'Connell in 2017 for no charge.

45. Respondent stated in the letter, "Based on what we have been compensated for in 2015 and 2016, if we were to take those figures down to the \$500.00 per week, although I feel the fees charged were justified, then that would result in me handling your affairs for the whole year of 2017 with no additional compensation which I am willing to do. Thus you would pay me no monies in 2017."

46. Mr. O'Connell also maintained a brokerage account with JP Morgan Chase.

47. On or around February 12, 2016, Mr. O'Connell signed a letter, prepared by respondent, authorizing Respondent to "liquidate and use monies for my care from my JP Morgan Chase Brokerage Account."

48. From February 2016 through January 2017, the brokerage account statements were addressed to respondent's office address.

49. From February 2016 through December 2016, Respondent made sixteen transfers totaling \$66,500.00 from Mr. O'Connell's Chase brokerage account to Mr. O'Connell's savings account maintained at Chase Bank.

50. During his sworn statement, respondent testified under oath that he made the transfers when Mr. O'Connell ran short of money. Respondent testified that he used the funds to pay for Mr. O'Connell's expenses, such as his certified nursing assistant.

51. In some instances, respondent used the funds from the Chase brokerage account primarily for his own benefit.

52. On February 17, 2016, respondent transferred \$5,000.00 from Mr. O'Connell's Chase brokerage account to Mr. O'Connell's Chase Bank savings

account. On February 18, 2016, Respondent transferred the \$5,000.00 from the Chase Bank savings account to Mr. O'Connell's checking account maintained at Chase Bank. On the same day, Respondent transferred the \$5,000.00 from the Chase Bank checking account to Respondent's operating account maintained at CenterState by issuing check number 1982. Respondent then used the funds in his operating account to cover an overdraft and to pay overdraft charges in the operating account, the IRS, and Thomson Reuters.

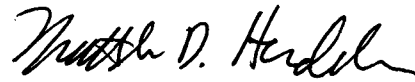
53. On February 22, 2016, respondent transferred \$5,000.00 from Mr. O'Connell's Chase brokerage account to Mr. O'Connell's Chase Bank savings account. On February 25, 2016, respondent transferred \$4,000.00 of the \$5,000.00 to Mr. O'Connell's checking account maintained at Chase Bank. On the same day, respondent transferred \$3,850.00 of those funds to his CenterState Bank operating account by check number 1938. From the operating account, he then transferred a portion of the funds to one of his other business entities and made payments to the IRS.

54. On July 11, 2016, respondent transferred \$3,500.00 from Mr. O'Connell's Chase brokerage account to Mr. O'Connell's Chase Bank savings account. On July 12, 2016, respondent transferred \$2,650.00 of the \$3,500.00 to Mr. O'Connell's Chase Bank checking account. On the same day, respondent

transferred the \$2,650.00 to his CenterState Bank operating account by check number 1989. From the operating account, respondent used the funds to cover an overdraft and to pay an overdraft fee in the operating account, and transferred portions to his personal checking accounts.

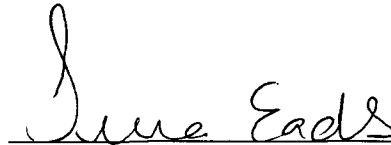
55. It is my professional opinion that respondent was not in substantial compliance with the bar's rules governing trust accounts.

FURTHER AFFIANT SAYETH NOT.



Matthew D. Herdeker

SWORN TO AND SUBSCRIBED before me this 27 day of April, 2017.



Notary Public

Print, type, or stamp commission
name of notary public

☒ Personally known to me
☐ Produced the following identification
Type of Identification produced: _____

