THE FOLLOWING INFORMAL ADMONITION WAS ISSUED
BY BAR COUNSEL ON
January 3, 2006

BY FIRST-CLASS AND CERTIFIED
MAIL NO. 7160 3901 9849 0189 5372

John S. Lopatto, III, Esquire
1776 K Street, N.W.
Suite 800
Washington, D.C. 20006-2333

Re: *In re John S. Lopatto, III, Esquire*
Bar Docket No. 2005-D035

Dear Mr. Lopatto:

This office has completed its investigation of the above-referenced matter. We find that your conduct reflected a disregard of certain ethical standards under the District of Columbia Rules of Professional Conduct (the "Rules"). We are, therefore, issuing you this Informal Admonition pursuant to D.C. Bar Rule XI, §§ 3, 6, and 8.

This matter was docketed for investigation based upon correspondence from the Disciplinary Board of the Supreme Court of Pennsylvania, advising that on or about September 13, 2004, you had attempted to pay your Pennsylvania bar dues with a check written against your IOLTA (hereinafter "trust account") in the District of Columbia.[1/]

In connection with our investigation, we subpoenaed from Branch Banking & Trust Co. ("BB&T") records of your trust account activities for the period August through October 2004. We received submissions from you dated January 21 and July 7, 2005.

Based upon our investigation, we find that you have violated Rule 1.15(a), in that you have engaged in a commingling of your personal/business funds with the entrusted funds of your clients.

[1/] IOLTA is the acronym for the Interest on Lawyer's Trust Account program. *See* Comment [3] to Rule 1.15.

1. Rule 1.15(a) provides pertinently that

> [*a*] *lawyer shall hold property of clients or third persons* that is in the lawyer's possession in connection with a representation *separate from the lawyer's own property.* Funds shall be kept in a separate account . . . ."[2/] [Emphasis added.]

Commingling involves the placing of entrusted funds with the attorney's own funds. *In re Hessler*, 549 A.2d 700, 701-02 (D.C. 1988); *see also In re Choroszej*, 624 A.2d 434, 438 (D.C. 1992) (Wagner J. concurring); *In re Parsons*, Bar Docket No. 72-91 (BPR Feb. 1, 1996), *adopted*, 678 A.2d 1022 (D.C. 1996).

In your July 7, 2005, submission, you enclose copies of your trust account statements for August through October 2004, along with copies of the checks written against the account and settlement distribution sheets reflecting the disposition of entrusted funds deposited into the account during that time period. Among other things, you report that the trust account statement for July 2004 shows a month-ending balance of $1,163.38, which represented earned attorney's fees which you left in the trust account. You explain that it was your practice "to retain or fund a modest balance of earned fees in the trust account so that non-client money could be used to write a small number of checks each month . . . for litigation, office and professional expenses." You state that you have discontinued this practice after reviewing Comment [1] to Rule 1.15.[3/]

Based upon our analysis of your trust account records, we find clear and

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[2/] *See also* Rule 1.17(a), which provides pertinently that

> [f]unds coming into the possession of a lawyer that are required by these Rules to be segregated from the lawyer's own funds . . . shall be deposited in one or more specially designated accounts . . . . The title of each such account shall contain the words "trust account" or "escrow account" . . . .

[3/] Comment [1] to Rule 1.15 provides pertinently that

> [a] lawyer shall hold property of others with the care required of a professional fiduciary . . . . All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property . . . .

convincing evidence that you failed to keep separate your business and personal monies from the entrusted funds you received in connection with your representation of clients, by failing to promptly withdraw your earned fees.

You acknowledge that the $1,163.38 in your account on July 30, 2004, represented funds belonging solely to you. In August 2004, you drew several checks against these funds for, *inter alia*, personal or business expenses, leaving in the trust account a balance of $143.59 in funds belonging solely to you. On August 20, 2004, you deposited into your trust account a check in the amount of $2,000, representing a $1,600 settlement for a client and a $400 earned fee from another client. The balance of your trust account on that day stood at $2,143.59. Consequently, as of August 20, 2004, you commingled, at least, $543.59 of your money with $1,600 in entrusted funds.[4/]

On August 30, 2004, you deposited into your trust account a settlement check on behalf of a client in the amount of $2,250. You were entitled to $749.25 in attorney's fees, but you did not timely withdraw your fee from the account. On September 3, 2004, you deposited into your trust account a settlement check on behalf of a client in the amount of $5,100. You were entitled to $1,683, representing your attorney's fees, but you did not timely withdraw that amount from your trust account. On October 27, 2004, you deposited $200 into your trust account, representing advanced costs given to you by a client to cover filing fees in a client matter.[5/]

At all times referenced above, your earned fees remained in your trust account when the entrusted funds were deposited therein.[6/] In addition, instead of timely

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[4/] The settlement distribution sheet that you provided in connection with the referenced settlement shows that you were entitled to $422 in attorney's fees from the $1,600 recovery in that matter. Accordingly, you technically commingled $965.59 of your own funds with entrusted funds totaling $1,078, because you did not timely withdraw your fee from the account.

[5/] Advanced fees or costs are considered entrusted funds until earned by the lawyer. *See* Rule 1.15(d). Accordingly, such funds were properly deposited into your trust account.

[6/] Rule 1.15(d) permits the lawyer to "place a small amount of the lawyer's [own] funds into a trust account for the sole purpose of defraying bank charges . . . ." Our investigation reveals that BB&T does not impose any fees upon its customers for

withdrawing your fees from the trust account, you routinely wrote checks against the trust account to pay your personal and business expenses. Such conduct establishes by clear and convincing evidence that you engaged in a pattern of deliberate commingling for at least three months.

2. We have also analyzed your trust account records to determine whether there was any evidence of misappropriation. Misappropriation is defined as

> any unauthorized use of funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983) (citation omitted). Misappropriation cases are often established by examining the bank records of the financial institution into which the attorney has deposited entrusted funds. Once the balance in the account falls below the amount in trust, misappropriation occurs. *In re Harrison*, *supra*, at 1036; *see also In re Anderson*, 778 A.2d 330 (D.C. 2001) (indiscriminate commingling coupled with an overdraft of entrusted funds is a "hallmark" of reckless misappropriation for which disbarment is the ordinary sanction).

Based upon our review of the bank records, we find no evidence of an overdraft of your trust account. Consequently, we cannot find that you engaged in an unauthorized use of entrusted funds.[7/]

In deciding to issue you this Informal Admonition, rather than bring formal disciplinary charges against you, we have taken into account several mitigating factors. We recognize that your misconduct did not involve dishonesty, that you cooperated with our investigation, and that you have no prior discipline. We have also taken into account that your conduct involved a technical commingling, in that you properly deposited entrusted funds into your trust account, rather than inappropriately deposited entrusted

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maintaining an IOLTA.

[7/] The Bar, however, has been on notice since, at least, 1991 that the indiscriminate use of one's trust account can lead to a misappropriation of entrusted funds due to inadvertence or faulty bookkeeping. *See In re Choroszej*, *supra*.

funds into your business or personal account.[8/] We further appreciate that you maintained complete records of your trust account activities, facilitating a complete and accurate analysis of your trust account.[9/]

Because we are confident that you now understand that upon depositing entrusted funds in which you have an interest into your trust account, you must promptly withdraw from the trust account the undisputed earned fees that belong to you, we have determined that an Informal Admonition is the appropriate disposition for your misconduct. We also find significant that you have voluntarily changed your practices regarding the use of your trust account and that no client or third person was harmed by your conduct.

This letter constitutes an Informal Admonition pursuant to D.C. Bar Rule XI, §§ 3, 6, and 8, and is public when issued. Please refer to the attachment to this letter of Informal Admonition for a statement of its effect and your right to have it vacated and have a formal hearing before a Hearing Committee.

If you would like to have a formal hearing, you must submit a written request for a hearing to the Office of Bar Counsel, with a copy to the Board on Professional Responsibility, within 14 days of the date of this letter, unless Bar Counsel grants an extension of time. If a hearing is requested, this Informal Admonition will be vacated, and Bar Counsel will institute formal charges pursuant to D.C. Bar Rule XI, § 8(b). The case will then be assigned to a Hearing Committee, and a hearing will be scheduled by the Executive Attorney for the Board on Professional Responsibility pursuant to D.C. Bar Rule XI, § 8(c). Such a hearing could result in a recommendation to dismiss the charges against you or a recommendation for a finding of culpability, in which case the sanction recommended by the Hearing Committee is not limited to an Informal Admonition.

Sincerely,

[8/] We also note that the commingling involved *de minimus* sums for a relatively short period of time. Moreover, there is no evidence that you were attempting to hide or shield your personal funds from creditors.

[9/] *See* D.C. Bar Rule XI, § 19(f).

Wallace E. Shipp, Jr.
Bar Counsel

WES:HCS:cms

Enclosure: Attachment to Letter of Informal Admonition