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CORRECTED - Attorney News - February 2017

The Disciplinary Board of the Supreme Court of Pennsylvania

The Disciplinary Board apologizes to the readers of the February 2017 newsletter who were offended by the Board's republishing of the American Bar Association Journal's list of 2016's top stories. The Board is also grateful to the loyal and attentive readers who reported errors the Board made in the newsletter.

Articles & Updates

- **Chief Justice Saylor Asks Bar to Consider Pro Bono Service**
- **Supreme Court Amends Magisterial District Judge Rules**
- **Ethics Tip: Can I Withdraw from a Case if I'm Not Paid?**
- **New Jersey Attorney Challenges New York Office Requirement**
- **Justice Denied: Rooster Booster Charged in North Carolina**

Things to Remember

- **Follow the Disciplinary Board on Twitter**

This newsletter is intended to inform and educate members of the legal profession regarding activities and initiatives of the Disciplinary Board of the Supreme Court of Pennsylvania. To ensure you receive each newsletter and announcement from the Disciplinary Board of the Supreme Court of PA, please add us to your "safe recipients" list in your email system. ***Please do not reply to this email. Send any comments or questions to comments@padisciplinaryboard.org****.*

Chief Justice Saylor Asks Bar to Consider Pro Bono Service

On January 23, 2017, Chief Justice Thomas G. Saylor of the Supreme Court of Pennsylvania addressed the following letter to the members of the Pennsylvania bar:

> Dear Counselor,
>
> I write to thank you for your contributions of financial support which you have provided to legal aid programs, as a component of your annual attorney registration fees.
>
> As I have done in the past, I join with Pennsylvania Bar Association President Sara Austin in asking that you consider an additional personal commitment by providing pro bono service through direct representation of the poor and financial support of the Commonwealth's legal aid programs.
>
> Rule of Professional Conduct 6.1 calls for lawyers licensed in Pennsylvania to "render public interest legal service." It is these volunteer efforts, beyond the mandatory payment, that most greatly impact those in need.
>
> The Pennsylvania Supreme Court is dedicated to ensuring that the civil legal needs of those who cannot afford the services of a lawyer are met. The Court supports civil legal aid in a variety of ways, from securing funding for a loan forgiveness program for legal services practitioners to honoring the work of pro bono volunteers.
>
> Pennsylvania's efforts in this area will be highlighted when it hosts the 2017 American Bar Association and National Legal Aid and Defender Association Equal Justice Conference in Pittsburgh May 4-6. We can take pride in what we have done, but must realize there is more to do. To see the many *pro bono* opportunities that exist, please consider visiting **palawhelp.org** and registering at **paprobono.net**.
>
> In searching for a persuasive rationale to encourage your participation, I came across the words of former U.S. Supreme Court Justice Sandra Day O'Connor. To close, I offer them for your reflection and thank those of you who already contribute your time and financial support, which demonstrates the best of our profession.
>
> > Certainly, life as a lawyer is a bit more complex today than it was a century ago. The ever-increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of

> community service quite difficult. But public service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure. — *Justice Sandra Day O'Connor, speech at the University of Oregon (1999)*

Sincerely,

Thomas G. Saylor
Chief Justice of Pennsylvania

Supreme Court Amends Magisterial District Judge Rules

In a rule published December 31, 2016, at **46 Pa.B. 8171**, the Supreme Court rescinded Rule 3.9 of the Rules Governing Standards of Conduct of Magisterial District Judges and adopted new Rules 3.10 and 3.11, rewording the same content. These rules provide for what activities magisterial district judges may or may not participate in, and makes particular provision for lawyers who are magisterial district judges. The substantive content of the new rules is similar to the old provision, but the adoption of the new rule provides an opportunity to recapitulate the prohibitions that apply to lawyers who serve as magisterial district judges. They are prohibited from practicing law:

- before any magisterial district judge in the Commonwealth;
- in any proceeding in which they have served as a magisterial district judge;
- in any proceeding related to a proceeding in which they served as a magisterial district judge;
- in any criminal proceeding in the county within which their magisterial district is located; and
- either practicing before or acting as an attorney or solicitor for any county or local municipal, governmental or quasi-governmental agency, board, authority or commission operating within the Commonwealth.

In addition, magisterial district judges who are attorneys may not permit their employers, employees, partners or legal associates to appear or practice before them.

Like all magisterial district judges, attorneys serving in this capacity are forbidden to:

- engage in any activity prohibited by law;
- perform any activity related to the collection of a claim or judgment for money;
- accept any premium or fee for any judicial bond.
- exploit their judicial position for financial gain or for any business or professional advantage;
- hold another office or position of profit in the government of the United States, the Commonwealth or any political subdivision thereof, except in the armed services of the United States or the Commonwealth; or
- receive any fee or emolument for performing the duties of an arbitrator or a mediator.

Ethics Tip: Can I Withdraw from a Case if I'm Not Paid?

Most lawyers in private practice have been confronted with a common dilemma – what do you do when you have become engaged in a case, but the client refuses or fails to live up to a fee agreement? Can

you withdraw from the case if the client fails to pay?

The Rules of Professional Conduct do provide the lawyer with a way out if the client fails to honor a fee agreement. **Rule 1.16**, regarding Declining or Terminating Representation, states:

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: … (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

Subsection (c) provides a limitation on that right:

> A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Rule 1012(b) of the Rules of Civil Procedure provides that an attorney who enters an appearance cannot withdraw except by leave of court or substitution of counsel, so an attorney who appears in a proceeding at the Common Pleas or appellate level cannot withdraw for nonpayment of fees without leave of court.

Filing a motion for leave to withdraw for nonpayment of fees can be a tricky matter. Comment 9 to Rule 1.16 states, “Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.” The lawyer should take care to avoid revealing confidential information in the motion or any statements to the court in support of the withdrawal. Rule 1.6(c) allows the lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,” but this exception should be construed very narrowly.

The Standing Committee of Ethics and Professional Responsibility of the American Bar Association has recently published **Formal Opinion 476**, which provides detailed analysis of the confidentiality issues which may arise when a lawyer moves to withdraw from representation due to nonpayment. The opinion notes that disclosure of the details of a client’s nonpayment may be valuable information if revealed to the opposing party. The opinion suggests that before revealing client information, the lawyer should seek to withdraw on unspecified “professional grounds,” and only provide more information if the court requires. Under some circumstances lawyers have sought to present evidence in support of a motion to withdraw on camera or under seal to prevent risks to the client of public disclosure. The opinion also notes that a motion to withdraw also places a burden on the court to take steps to protect the interests of the movant’s client. The opinion concludes:

> [A] lawyer must consider the duty of confidentiality under Rule 1.6 and seek to reconcile that duty with the court’s need for sufficient information upon which to rule on the motion. Similarly, in entertaining such a motion, a judge should consider the right of the movant’s client to confidentiality. This requires cooperation between lawyers and judges.

The ABA opinion provides a much more detailed analysis than is possible in this space, and any attorney considering withdrawal from a case for nonpayment would find its guidance useful.

New Jersey Attorney Challenges New York Office Requirement

Last month we **discussed the problem** of practicing in a state where one does not have a physical office or location.

A New Jersey lawyer who is admitted in New York, but does not reside or maintain an office there, has challenged a New York statute requiring nonresident members of its bar to maintain a physical office for the transaction of law business within the state.

In **Schoenefeld v. Schneiderman, 821 F.3d 273 (2016),** the plaintiff argues that the Privileges and Immunities Clause prohibits New York to treat nonresidents by a more stringent standard than residents, as residents are allowed to practice out of home offices while nonresidents are not. On April 22, 2016, the United States Court of Appeals for the Second Circuit issued an **opinion** rejecting the plaintiff's argument. The Court noted recent Supreme Court decisions holding that the Privileges and Immunities Clause only applies to legislation that is enacted for the protectionist purpose of burdening out-of-state citizens in order to afford advantages to residents. It noted that the requirement in question places resident and nonresident attorneys on equal footing, in the sense that both must have some kind of physical presence in the state. One judge dissented.

Schoenefeld has filed a **petition for writ of certiorari** with the United States Supreme Court, which remains under consideration. Amicus briefs have been filed by the Association of Corporate Counsel, the Association of Professional Responsibility Lawyers, and the New Jersey State Bar Association in support of the application.

Justice Denied: Rooster Booster Charged in North Carolina

Andrew Emilious Justice, of Taylorsville, North Carolina, is in a ton of trouble – a ton and a half, to be exact. The **Alexander County Sheriff's Office** has charged Justice with the theft of a 4-foot statue of a rooster that once stood in front of a poultry farm.

The authorities accuse Justice of making orloff with the 3000-pound adornment using a tractor stolen from a nearby farm to pullet off. The tractor was found with white paint scrapings matching the description of the missing effigy. Justice was arrested as he sped off the highway and slid into the driveway of his house, where police awaited.

Justice did not chicken out and kept his beak shut about the whereabouts of the heisted figurine. Pieces of the missing simulacrum were found on the highway, along with damage to the road. If convicted of the fowl deed, Justice could face cockerel punishment.

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