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## Attorney News - January 2017



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## Most Significant Disciplinary Cases of 2016

Each year, we review and select five cases decided in the Pennsylvania disciplinary system as the most significant cases of the year. We look at high-profile cases, such as those involving public officials or judicial misconduct, and cases which involve significant language which sheds light on disciplinary law in Pennsylvania or emerging issues which may be of interest to members of the bar engaging in an evolving profession.

This year, we found the following cases of particular interest:

### 1. **Brian Preski, No. 1813 Disciplinary Docket No. 3, No. 6 DB 2012**

The Preski case was our most significant decision, in part because of the prominence of the Respondent, and in part because the Supreme Court **published an opinion** in support of its actions, the only Supreme Court opinion of the year on discipline.

Preski served as the chief of staff to Rep. John Perzel, former Speaker and Majority Leader of the Pennsylvania House of Representatives. Preski was convicted of three counts of conflict of interest, two counts of theft of services, and five counts of criminal conspiracy relating to diversion of public funds to political campaign operations. He was sentenced to twenty-four to forty-eight months' imprisonment, a five-year term of probation, a fine and restitution.

Although Preski argued that his actions did not warrant disbarment, the opinion written by Justice Wecht disagreed, citing **Office of Disciplinary Counsel v. Jeff Foreman**, a 2014 case arising from a public corruption conviction which resulted in disbarment. The Court found that although Preski stated at one point that he took responsibility for his misconduct, he made statements at other times which tended to minimize his responsibility and accountability for the actions, and misstated his role in the conspiracy and a company he founded to profit from the actions. Although Preski was not acting as a lawyer at the time of his conduct, the Court determined that disbarment was necessary to underscore the significance of public corruption cases. Justice Dougherty concurred and Saylor dissented in favor of a five-year suspension, without opinions.

### 2. **Lynn M. Nichols, No. 2054 Disciplinary Docket No. 3, No. 49 DB 2014**

Nichols was another case involving a public official misusing her office for a private agenda. From 1991 to 2013, Nichols served in the Philadelphia District Attorney's Office, rising to the office of Assistant Chief of Homicide. She began a romantic relationship with a landscaper who worked on her property. When her companion experienced legal problems involving a truck owned by a former lover, Nichols used her influence with a detective she had known for many years to arrange for him to remove the truck from stolen status.

When the relationship went bad, Nichols contacted the detective and prevailed on him to put the truck back on stolen status, which he refused. She also impersonated the owner of the truck in making a false report that the truck had been newly stolen. She also made false statements to an agent of the Attorney General's Office investigating the matter.

For these actions, Nichols was arrested on multiple offenses, and resigned from the District Attorney's Office the same day. She pleaded guilty to one count of criminal mischief and was sentenced to probation and restitution.

Based on her conviction, the Hearing Committee recommended probation, but the Disciplinary Board rejected this and concluded that Nichols should be suspended for thirty months. The Board concluded that Nichols' public position was an aggravating factor, but found mitigation in mental health issues related to her difficult childhood, remorse, lack of prior discipline, and the fact that her conduct was an isolated instance not related to representation of clients. The Supreme Court imposed suspension as recommended by the Board.

3. **Sebastian M. Rainone, No. 1164 Disciplinary Docket No. 3, No. 60 DB 2004**  
**Victor Mba-Jonas, No. 1365 Disciplinary Docket No. 3, Nos. 108 DB 2007 and 47 DB 2008**  
**Wayne D. Bozeman, No. 1551 Disciplinary Docket No. 3, No. 183 DB 2009**  
**Jeffery L. Krain, No. 1551 Disciplinary Docket No. 3, Nos. 96 and 138 DB 2007**

This year was notable for the denial of four reinstatement petitions.

Rainone's petition for reinstatement was denied despite his post-disbarment career in academia, rising to become the dean of a university campus. The Disciplinary Board found that Rainone had not been honest in his reinstatement questionnaire and testimony, and that he failed to demonstrate remorse for his actions. Rainone failed to file tax returns although he had a master's degree in taxation and practiced tax law prior to his disbarment.

Mba-Jonas was denied reinstatement from reciprocal suspension because he failed to candidly describe discipline imposed in other states, and had not been reinstated in the jurisdiction from which he was originally suspended.

Bozeman was denied reinstatement from a suspension for criminal conduct because he continued to engage in law-related activities with a lawyer who had previously employed him, in violation of Rule 217 (j), Pa. R.D.E., and tried to create the impression he had done so on behalf of another lawyer. The Board concluded he did not meet his burden of proof in light of his circumvention of the requirements of the rule.

Krain was suspended in Pennsylvania for conduct including practicing for seven years after being transferred to inactive status. During his suspension, he practiced in New Jersey and assisted an unlicensed person in the practice of law, for which he was suspended in New Jersey as well. The Disciplinary Board concluded that Krain's suspension for the same kind of conduct that led to his Pennsylvania discipline was reason for denial of his application for reinstatement.

4. **Terry Elizabeth Silva, No. 2275 Disciplinary Docket No. 3, No. 164 DB 2014**

Silva represented an 82-year-old woman in a slip and fall case. The woman's son accompanied her to all meetings and conducted many of the communications with Silva on his mother's behalf. The fee agreement provided for Silva to receive a contingent fee.

After settlement, Silva's staff deposited the check into her operating account. While still holding the remaining proceeds, Silva wrote several checks which reduced the balance in the account less than the amount owing to the client, and failed to deliver the balance. Silva claimed she was entitled to a charging lien on the proceeds, based on her representation of the son and his wife in an unrelated matter. She also claimed that the mother authorized the use of the proceeds to pay debts of the son.

The Disciplinary Board found that Silva's exercise of a charging lien was improper. A charging lien applies only to funds received on behalf of the client whose case generated the claimed fee. Since the

son was not a client in the slip and fall case that generated the recovery, and the mother did not authorize the withholding, Silva's claim to a charging lien failed and she was not justified in retaining the funds. Silva was suspended for three years.

#### 5. **Kimberly Kitchen, Huntingdon County Court of Common Pleas**

Our final case is not a disciplinary system case, but one related to the practice of law. **Kimberly Kitchen** arrived in Huntingdon County with what appeared to be an impressive resume. She represented that she had graduated with top honors from Duquesne University School of Law and taught estate planning at Columbia Law School. She became an estate-planning partner at BMZ law, practiced in Huntingdon for ten years, and even served as president of the Huntingdon County Bar Association.

However, Kitchen's qualifications were not what she claimed. She never attended law school and never gained admission to the practice of law in Pennsylvania. Her legal experience consisted of a stint as a legal secretary at Reed Smith. The truth came to light when a fellow lawyer, compiling a list for the county bar association, tried to check her bar admission and came up empty. Her deception unraveled quickly, and the Attorney General's Office brought criminal charges against Kitchen for unauthorized practice of law, forgery, and felony records tampering. Judge Frederic Ammerman **sentenced her** to two to five years in state prison.

## **Texas AG: ABA Harassment Rule Violates Free Speech**

Last month we **reported** on the **proposal** of the Disciplinary Board to adopt an amended version of the **ABA's Model Rule 8.4(g)**, which would make conduct involving harassment or discrimination grounds for disciplinary action. (Comments on the Pennsylvania proposal may be submitted through February 3, 2017).

The original ABA Model Rule is controversial, however. The Attorney General of Texas, in a **letter to the chair of a Texas Senate committee**, has expressed the view that the rule is unconstitutional. Attorney General Kenneth Paxton wrote, "While decisions of the United States Supreme Court have concluded that an attorney's free speech rights are circumscribed to some degree in the courtroom during a judicial proceeding and outside the courtroom when speaking about a pending case, Model Rule 8.4(g) extends far beyond the context of a judicial proceeding to restrict speech or conduct in any instance when it is related to the practice of law." Paxton added that courts might also find that rules based on the Model Rule may violate freedom of religion and association, and may be invalid for overbreadth or vagueness.

Linda Klein, President of the ADA, sharply disagreed with Paxton's interpretation. "Texas Attorney General Paxton misinterprets ADA policy," she told the **ABA Journal**. "This proposed rule expressly states that it in no way infringes on free speech or the ability of an attorney to zealously defend any client (or choose not to defend a client) based on the client's beliefs. This proposed rule exemplifies the ABA's strong policy that there is no place in the practice of law for discrimination or harassment."

Pennsylvania's proposed rule differs from the ABA version, by providing for discipline only after an adjudication that a lawyer has committed acts constituting harassment or discrimination. The Pennsylvania version also requires a showing that the conduct adversely reflects on the lawyer's fitness to practice. For these reasons, it may be less subject to the kind of Constitutional issues identified by Mr. Paxton.

## Ethics Tip: Can I Telecommute from Another State?

*Q: I am a Pennsylvania-admitted attorney working in a Philadelphia law firm. I live in New Jersey, but I am not admitted to the New Jersey bar. My firm recently offered me the opportunity to do most of my work by telecommunicating from a home office. Can I practice law in Pennsylvania from a New Jersey home office?*

The answer to this question is more complicated than one might think. In an age when so much work is performed electronically at a distance, one might not think the location at which the work is done is all that critical. But an **Ethics Tip from the ABA Journal** suggests that this is a difficult question to answer.

Rule 5.5, regarding the unauthorized practice of law, states:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) except as authorized by these Rules, Pa.B.A.R. 302 or other law, establish an **office or other systematic and continuous presence in this jurisdiction for the practice of law...**

The key question for our hypothetical inquirer is not whether her home office violates Pennsylvania law, but whether it would constitute the practice of law in New Jersey under that state's law. **New Jersey's version of Rule 5.5** allows a lawyer licensed elsewhere to practice within the geographical limits of the state only under certain circumstances, including:

- (iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or
- (v) ... with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is **occasional and is undertaken only** when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

Both of these exceptions require that the lawyer's practice be "occasional" and do not contemplate a situation in which the lawyer would handle client matters on an everyday basis, even if those matters are undertaken on behalf of clients of a law firm based in the state where the lawyer is licensed. Comment 6 to the Pennsylvania rule states:

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

By the same logic, Pennsylvania's Rule 5.5(c) allows a lawyer a lawyer located but not admitted in Pennsylvania, working for an employer based in another state, to provide legal services only on a temporary basis. Rule 5.5(b)(1) prohibits a person not admitted from "establish[ing] an office or other systematic and continuous presence in this jurisdiction for the practice of law," which a home office occupied on a regular basis would seem to do. Comment 4 states:

{A} lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here.

The last quoted sentence of Comment 4 raises an intriguing question. If physical presence is not necessary to establish a "systematic and continuous presence," is the converse true? Is it possible that a lawyer could be physically present, yet her "systematic and continuous presence" would be somewhere else, such as in the main office of her employer in a jurisdiction where she is licensed?

Answering this question is beyond the scope of this newsletter. But the note in the ABA Journal and the language of state rules suggest that the lawyer considering an interstate telecommuting arrangement needs to examine carefully the provisions of both the unauthorized practice law of the state of residence and Rule 5.5 for the state of admission.

## Disciplinary Board Publishes Schedule of Reinstatement Courses

Under Sections **89.275** and **89.279** of the Disciplinary Board Rules, attorneys who are disbarred, suspended, or on administrative suspension, retired, or inactive status must take continuing legal education courses to qualify for reinstatement. On January 21, 2017, at **47 Pa.B. 311**, the Disciplinary Board published a schedule of required continuing legal education courses. A lawyer seeking reinstatement must take a minimum of 36 hours of accredited PA CLE courses with a minimum 12 of those hours in the area of Ethics. Eighteen credits may be taken in pre-approved, interactive, Internet or computer based CLE programs. Applicants must also take the Bridge the Gap course taken through an accredited PA CLE provider, which may count toward the 36 hours.

## Volunteer Opportunities to Be Posted by Office of Courts

On February 1, 2017, the Administrative Office of the Pennsylvania Courts will post a notice seeking volunteers to serve in two capacities. The Office is seeking volunteers for:

- The Juvenile Court Procedural Rules Committee; and
- The Disciplinary Board of the Supreme Court.

The Disciplinary Board member must be admitted to the bar of Pennsylvania.

On February 1, the details for the positions will be published at the [website of the Pennsylvania courts](#). Applications will be due February 27, 2017.

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## Let Us Know

Got a tip, a link, a correction, a question, a comment, an observation, a clarification, a wisecrack, an idea you'd like to see addressed? We are always glad to hear from you. Please do not reply to this email. Write us at [comments@padisciplinaryboard.org](mailto:comments@padisciplinaryboard.org).

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