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Attorney News - December 2016



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- **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.***

Disciplinary Board Proposes Anti-discrimination Rule: Comments Due 2/3/17

In a Notice of Proposed Rulemaking published December 3, 2016, at **46 Pa.B. 7519**, the Disciplinary Board has proposed an amendment to **Rule 8.4 of the Rules of Professional Conduct (Misconduct)**, adding a new subsection (g), which would make it professional misconduct and grounds for discipline for a lawyer to violate a federal, state or local antidiscrimination statute or ordinance. The Board has set a comment period running through February 3, 2017.

The full text of the proposed amendment adds the following language to the misconduct rule:

It is professional misconduct for a lawyer to ...

(g) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. If there is an alternative forum available to bring a complaint, no charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

A few points about the proposed language:

- The rule does not create strict liability for any violation of an antidiscrimination provision. The language of the proposed rule also requires that the action reflect adversely on a lawyer's fitness as a lawyer.
- The language lists a number of criteria that bear on the question of whether the conduct reflects adversely. Factors that enter into the determination include:
 - the seriousness of the act;
 - whether the lawyer knew that the act was prohibited by statute or ordinance;
 - whether the act was part of a pattern of prohibited conduct; and
 - whether the act was committed in connection with the lawyer's professional activities.
- Where an administrative or judicial forum exists which has the power to adjudicate whether the conduct constitutes an illegal act of discrimination, a finding in that forum that discriminatory acts occurred, and completion of all administrative and judicial review necessary for the decision to be final, are prerequisites to disciplinary action.

The proposed rule differs from **Rule 8.4(g) of the ABA Model Rules of Professional Conduct** in its requirement of an adjudication of illegal conduct. The ABA rule forbids a lawyer to "(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." Under the ABA rule, the disciplinary agency itself makes the determination of whether the lawyer committed discriminatory

conduct. Under the Pennsylvania proposal, that conduct must violate an applicable law, and if there is a forum to make the determination of whether the lawyer committed a violation, that process must take place first. Also, the Pennsylvania rule requires that the conduct adversely reflect on fitness, which is not true of the ABA rule.

The Disciplinary Board will consider all comments submitted by members of the public. Send comments to:

Office of the Secretary
The Disciplinary Board of the Supreme Court of Pennsylvania
601 Commonwealth Avenue, Suite 5600
PO Box 62625
Harrisburg, PA 17106-2625
Facsimile number (717-231-3382)
Email address Dboard.comments@pacourts.us

The Disciplinary Board is also seeking comments on a proposal published at **46 Pa.B. 7520** on December 3, 2016, making small changes relating to the taxation of expenses in disciplinary proceedings. Comments are due January 2, 2017.

Please note: Submitting comments by reply to this email newsletter or to the comments email for the newsletter at the bottom of this page does NOT comply with the Notice of Proposed Rulemaking. We cannot guarantee that comments submitted to this newsletter rather than through the process described above will be received and considered by the Disciplinary Board as part of the comment process.

Stairway to Suspension: Lawyer Handling Copyright Cases Receives Reciprocal Suspension

By **order dated November 22, 2016**, the Supreme Court of Pennsylvania entered an order suspending Francis Malofiy, Delaware County, from the practice of law for three months and a day, reciprocal with a suspension entered by the United States District Court for the Eastern District of Pennsylvania.

The District Court disciplined Malofiy finding he violated Rule 4.3 of the Rules of Professional Conduct, which deals with communications with an unrepresented party in a copyright infringement lawsuit against Usher and other defendants. The Third Circuit Court of Appeals' **Opinion** upholding the District Court's determination serves as a study for contacts with an unrepresented party.

The Court found that Malofiy engaged in telephone conversations with an unrepresented defendant, the lyricist for the song in question, in which he allowed the party to believe his involvement was sought as a witness rather than a defendant. Malofiy drafted an affidavit and sent it to the party to sign. He failed to advise the party that his client's relationship with him was adversarial and that damages were sought from him as well as Usher, cultivated a cordial relationship with him, and failed to advise him to seek counsel, although he did indicate that if the lyricist wanted to "review [the affidavit] with a lawyer, that's fine too." Later Malofiy took a default judgment against the lyricist and scheduled him for a deposition. When the lyricist appeared unrepresented for his deposition and learned of the default judgment against him, he realized for the first time that he was more than a witness and that Malofiy was seeking

damages against him too. The District Court determined that this conduct violated Rule 4.3, and suspended Malofiy for three months and a day.

Malofiy's main claim to fame lies in the case he brought on behalf of the estate of Randy Wolfe, professionally known as Randy California of the band Spirit, claiming that Led Zeppelin lifted the opening figure of "Stairway to Heaven" from a Spirit instrumental composed by Wolfe, "Taurus." The **trial on the case** is the stuff of rock and roll legend:

- Malofiy showed up with a briefcase resembling a Fender amplifier;
- He annoyed the judge and opposing counsel with extended questioning and showing videos that had not been offered into evidence;
- Zeppelin guitarist Jimmy Page acknowledged he found a copy of the Spirit album on which Taurus appeared among his collection of over 10,000 albums and CDs (although he did not recall hearing it);
- When asked if he remembered appearing on concert bills with Spirit, Zeppelin lead singer Robert Plant, in the grand rock star tradition, answered that he couldn't remember anything or anyone from the Sixties.

The jury found in the Led Zeppelin trial that "Stairway" was not copied from "Taurus" and handed down a verdict for the Led Zeppelin defendants.

New Hampshire Provides Guidance for Standby Counsel

One of the most difficult roles for criminal defense counsel is that of **standby counsel**, in cases where a defendant chooses to represent him or herself, but the court designates counsel to stand in reserve in case things get too bad or the defendant's mind changes. Standby counsel live in a gray zone – do they represent the defendant, or not? Should they intervene if the defendant goes off course, or not? What standards of diligence and zealous representation bind the standby counsel?

The New Hampshire Bar Association Ethics Committee has published a helpful **opinion** that clarifies the responsibilities of standby counsel.

The opinion examines whether the standby counsel has an attorney-client relationship with the defendant, and concludes that while the defendant's decision to self-represent waives the right of counsel, some ethical duties still apply, including the duties of confidentiality and attorney-client privilege, and the duty to avoid conflicts.

The Committee notes that **ABA Standards for Criminal Justice, Defense Function, Standard 4-3.9** provides some guidance:

- (a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.
- (b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed by the court.

The Committee suggests that standby counsel seek and abide by direction from the court as to counsel's role. Duties that might fall to standby counsel include:

- Assisting in investigation of the case.
- Identifying or prioritizing issues.
- Developing understanding of the prosecution's records, documents, reports and other investigations.
- Attending pre-trial hearings and conferences.
- Assisting in specific areas or aspects of the case, such as discovery.
- Researching and rendering advice about specific areas of the law.
- Interviewing, researching or developing knowledge about witnesses, and assisting the defendant in locating witnesses helpful to the defense, including expert witnesses.
- Generally communicating with the defendant to offer assistance instead of merely responding to requests for assistance.
- Bringing matters beneficial to the defendant to the defendant's attention.
- Affirmatively counseling the defendant against offering false evidence, or if necessary revealing that evidence offered by the defendant is false or if the defendant intends to commit a fraudulent or criminal act.
- Seeking more defined guidance at specific points in a case, such as competency hearings, pre-trial discovery, trial and sentencing.

The New Hampshire opinion is not binding in Pennsylvania, but it provides citations to decisions of the U.S. Supreme Court and ABA standards that will be helpful to Pennsylvania attorneys who find themselves in a standby role.

Volunteer Opportunities for Supreme Court Boards

On December 30, the Supreme Court will post at the website of the Pennsylvania courts the following volunteer opportunities:

- Board of Law Examiners
- Lawyers Fund for Client Security (non-lawyer member)
- Disciplinary Board (lawyer member)
- Continuing Legal Education Board
- Minor Court Rules Committee

Some of the positions will have specific criteria for eligibility. Check the [Pennsylvania Courts website](#) for information on or after December 30.

Fa La Law: 12 Gifts for Lawyers

This may come a little late in the giving season, but the ABA Journal has kindly provided a [slideshow of gift suggestions](#) for the 12 days of Christmas for the lawyers on your list (or, ahem, yourself).

There's a plethora of cool stuff here. Ultra-portable scanners (#6) are always useful, as are the emergency lint roller and clothes presser (#8). The Essential Novels Scratch-off Chart (#13) would look

impressive on our wall, once we had scratched off a few more than our current count. The Cubii Under-desk Elliptical (#9) makes much sense for those days spent treading water, and there have been times when the Ostrich Pillow (#4) seems like essential survival gear. But *The Defenders* played a major role in our decision to pursue law in the first place, so the Season 1 DVD (#12) makes our personal list. Happy Holidays to all.

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.

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