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Attorney News - November 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.***

Supreme Court Adopts Rule 1.2 Amendment on Legal/Illegal Conduct

In **May** we reported on the proposed “marijuana law” amendment to **Rule 1.2 of the Rules of Professional Conduct**, dealing with whether a lawyer can counsel a client on conduct that is legal under some law and illegal under other law. The issue arose with the adoption of law allowing medical marijuana in Pennsylvania and other states, while the substance remains illegal under Federal law.

On October 26, 2016, in a rulemaking published at **46 Pa.B. 7164** (November 12, 2016), the Supreme Court of Pennsylvania adopted an amendment to Rule 1.2, which addresses the subject. The rule adopted adds a new subsection (e) to Rule 1.2, which states:

A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.

The rule adopted differs slightly from the **proposed rule change** published in May. The proposal allowed lawyers to counsel clients on conduct expressly permitted by the law of the state where it takes place or has its predominant effect. The adopted rule addresses only conduct permitted under Pennsylvania law.

The revised rule took effect November 25, 2016.

It’s Official: Disciplinary Board Adopts Online Registration Rule

In an order published October 29, 2016 at **46 Pa.B. 6814**, the Disciplinary Board adopted a change to its **Rules of Organization and Procedure**, modifying several of the rules to require electronic filing of annual attorney registration forms.

Section 93.141, Annual registration, now states that the Board will no longer send annual fee forms, but will make the annual fee form available for filing through a link on the Board’s website (www.padisciplinaryboard.org) or directly at the website of the Pennsylvania Courts at ujportal.pacourts.us.

An amendment to **Section 93.142(a)** provides that the Disciplinary Board will send an email to all registered attorneys by May 15 of each year, advising them of the procedure for electronic registration. Failure to receive notice shall not excuse the filing of the annual form or payment of the annual fee. Attending to annual registration is an inherent duty of admission to practice law in Pennsylvania.

The order also amends Section 93.142(b) to require that an attorney supply an email address, which was not obligatory under the previous version of the rule.

Amendments to Section 93.142(b) also change the disclosure of financial institution information. Attorneys must disclose each financial institution in which they held funds of a client or a third person subject to **Rule 1.15 of the Pennsylvania Rules of Professional Conduct** between May 1 of the

previous year and the date of the filing of the annual fee form. The amended rule sets forth a summary of what funds are considered “funds of a client or a third person.”

The amended Section 93.142(b)(2) states that payment of the annual fee can be made in two ways: by credit or debit card, including a nominal processing fee, or by check or money order using a printable, mail-in voucher.

The amended Section 93.142(b)(3) sets forth requirements for updating one’s information when any of the required information changes. Most items must be updated within 30 days by sending a written notice by mail or facsimile. Certain information regarding financial institutions may be reported on the next annual registration form.

A new section (5) states that submission of the annual fee form through electronic means signifies the attorney’s intent to sign the form, by which the attorney certifies that the electronic filing is true and correct.

In addition to changes regarding the annual registration process, the rule modifies the provisions of Sections [93.145](#), [93.146](#), and [93.148](#) regarding resumption of practice by administratively suspended, inactive, and retired attorneys. A new Section 93.149 provides for resumption of practice by former or retired justices or judges.

Judicial Conduct Board Adopts Electronic Communications Policy

The scandal involving inappropriate emails passing through the mailboxes of judicial officials has led the Judicial Conduct Board to announce a new [policy](#) regarding electronic communications. The policy seeks to state the Board’s tentative intention for interpreting and enforcing the Code of Judicial Conduct, the Rules Governing Standards of Conduct of Magisterial District Judges, and the Constitution with respect to allegations of judicial misconduct stemming from the use of electronic communications in the future.

The policy states that Board counsel will investigate a complaint about a judge’s electronic communications activity if it occurred while the individual was a judge or while the individual was a candidate for judge. It will look into actions occurring before the individual was a judicial official only if they raise questions of the honesty, trustworthiness, integrity, or fitness of the individual to serve as a judge.

Several factors for consideration in the investigation are set forth, including whether the conduct is legal, the role of the judicial official in the transmission of the information, the frequency and offensiveness of the conduct, and its potential effects on the independence, integrity, and impartiality of the judiciary, and the public’s confidence in the judiciary.

Tip of the Month: How to Find Disciplinary Law

In times past, decisions in Pennsylvania disciplinary cases were reported in the District and County

Reports, although for most of its history those reports were styled “In Re Anonymous,” even if public discipline was imposed.

In recent years, the primary source of information on Supreme Court disciplinary decisions and reports of the Disciplinary Board has been through the posting of those decisions at the website of the Administrative Office of the Pennsylvania Courts, at [this link](#). You can also reach the page through the Board’s website by choosing the “Disciplinary Board Opinions” link under the “Look Up” tab, or under “Information for Attorneys” -- “Research and Links.” The “**Supreme Court Search**” tab on that page leads directly to the search page.

You can search the decisions by keywords. A list of keywords^[1] known to be entered into the system may be found [here](#), under “Research and Links” – “Research tips.” The “**Research and Links**” page also includes a listing of Supreme Court opinions, which are rather rarely issued, by name of the respondent-attorney. The search allows combining search terms, so by combining a keyword on the list with the term “disciplinary,” one can narrow down the range of findings to those arising from the disciplinary system. For instance, a search for [“false statements” and disciplinary] yields 134 results, most of which are disciplinary cases dealing with false statements made by attorneys.

The search capability is limited for citation to the Rules of Professional Conduct or Rules of Disciplinary Enforcement, but Board staff are adding more keywords and rule searches on an ongoing basis.

IAQ (Infrequently Asked Question): May a Lawyer Represent Opposing Counsel?

When a lawyer needs a lawyer, may he or she hire an attorney who is opposing counsel in an ongoing case?

This ABA Ethics Tip examines a hypothetical situation in which an attorney who represents an insurance company and its insured against a claimant represented by a personal injury lawyer suffers an accident himself and, impressed by opposing counsel’s skills, decides to retain her to represent him in his own claim. Would such a relationship violate either lawyer’s duties to their respective clients in the original matter?

The discussion examines several ethics opinions, including ABA Formal Opinion 97-406 and Pennsylvania Opinion 2007-27. Both apply **Rule 1.7(b) of the Rules of Professional Conduct**, which states:

b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal;

and

(4) each affected client gives informed consent.

Both opinions conclude that the representation is permitted if all clients give informed consent – in the hypothetical case, the insurance company represented by the hiring lawyer, the insured party, the claimant represented by the lawyer being hired, and the hiring lawyer himself. The facts of the situation may affect whether the representation is permissible. The ABA committee identified several factors that may come into play:

(1) the relative importance of the matter to the represented lawyer;

(2) the relative size of the fee expected by the representing lawyer;

(3) the relative importance to each lawyer and to his client, of the matter involving the "third-party" clients;

(4) the sensitivity of each matter;

(5) the substantial similarity between the subject matter or issues of the two representations; and

(6) the nature of the relationship of one lawyer to the other and of each lawyer to his third-party client.

Under the definition of **Rule 1.0(e)**, informed consent requires "communication of adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Obtaining informed consent can sometimes be a problem, if it requires disclosure of information that is privileged or that a client would prefer not be disclosed. If any of the disclosures are not permitted or the lawyer chooses not to make any of them, the representation cannot proceed.

[1] "Striking Opposing Counsel" is actually a keyword.

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The Disciplinary Board of the Supreme Court of Pennsylvania
PA Judicial Center
601 Commonwealth Ave., Suite 5600
P.O. Box 62625
Harrisburg, PA 17106-2625
(717) 231-3380

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