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Attorney News - June 2016



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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.**

Attorney Registration Due July 1. Act Now!

All Pennsylvania attorneys are required to file the forms and pay the fee to renew their annual registration by July 1, 2016. By the time you are reading this, that deadline will have passed or will be frighteningly imminent. Most likely you have already attended to this annual ritual, but if you have not, the time to do so is right now. It is not something to add to your to-do list; it is something to get on your got-done list.

As we have **mentioned several times**, all attorneys must register through the Supreme Court's electronic **registration portal**. If you have not already done so, you will need to **set up an account**. Once you log in, you will need to pull down the eCommerce menu (sixth from the left), choose Attorney Annual Registration (last item), then click "Registrations to Complete." You should see a line with your name and directions to edit or complete the registration. You may pay by credit card, or print out a voucher to mail in with your check. A description of the voucher procedure is **here**. If you have any problem with this, an online tutorial is available **here**.

Attorneys whose payment is not received by July 31 will incur a late fee of \$200 (up from \$150 last year). If payment is not made by August 31, an additional \$200 late fee will be added on for a total of \$400. So, timely payment is a rather big deal.

Online payment requires a "convenience fee" of \$2.75. We know that this small charge is not popular, but it is imposed by the financial institution that handles the payments, and cannot be absorbed by the Disciplinary Board under court rule. If it helps you feel any better about having to pay an extra \$2.75 for the right to practice law for a year, here is a short list of things that cost more than the convenience fee:

- One quart of Pennzoil 10W40 motor oil [\$3.81^[1]];
- A Latte Macchiato at Starbucks [\$3.95];
- A McDonald's Quarter Pounder with Cheese [\$4.35];
- The Pennsylvania Turnpike toll from Cranberry (Exit 28) to Pittsburgh (Exit 57) [\$4.45];
- A 2-pack of Pilot Frixxon erasable pens^[2] [\$4.95];
- One issue of *People Magazine* [\$5.99]; and
- The Kindle version of *50 Shades of Gray* [\$5.99].

US Supreme Court Rules on Pennsylvania Capital Post Conviction Case Questioning Judicial Conduct: Former Prosecutor on Bench with "Significant Personal Involvement" Should Recuse

In a decision rendered June 9, 2016, the Supreme Court overturned a decision of the Supreme Court of Pennsylvania, based on the participation of the Chief Justice in the appeal of a death penalty he approved in his former role as District Attorney.

The case of *Williams v. Pennsylvania*, No. 15-5040, arose from a murder that occurred in 1984. When the case came to trial, Ronald Castille held the office of District Attorney of Philadelphia. The internal decision to pursue the death penalty was personally endorsed by Castille. The jury found Williams guilty and he was sentenced to death.

Appeals and state and Federal post-trial proceedings went on for nearly 30 years. In 2012, interviews led investigators to believe exculpatory evidence may have been withheld, and a fourth state Post Conviction Relief Act proceeding was filed. The prosecution was ordered to disclose additional documents. The documents included the prosecutor's sentencing memorandum with Castille's authorization to pursue the death penalty. Following an evidentiary hearing, the Court of Common Pleas concluded that the trial prosecutor had suppressed material evidence, and issued a stay of execution, ordering a new sentencing hearing.

The prosecution submitted an emergency application to the Pennsylvania Supreme Court, seeking reversal of the stay of execution. By that time Castille had been elected to the Supreme Court and served as Chief Justice. The defense filed a motion to recuse Chief Justice Castille, which he denied without referring the question to the full Court. In a **2014 opinion**, the Pennsylvania Supreme Court vacated the stay of execution and reinstated the death sentence. Chief Justice Castille joined in the majority opinion and wrote a concurrence. Two weeks later he retired from the Court.

The U.S. Supreme Court granted certiorari. Justice Kennedy wrote in the majority opinion that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case" [5-6]. He added, "The due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision" [6]. As a result, the Court vacated the decision of the Pennsylvania Supreme Court, and remanded the matter for unspecified further proceedings. Chief Justice Roberts wrote a dissenting opinion joined by Justice Alito, and Justice Thomas also wrote a dissenting opinion.

New Jersey Warns Lawyers about Advertising "Superlawyers" Designation

There are a number of services that offer lawyers such accolades as "Super Lawyers," "Rising Stars" and "Best Lawyers." For lawyers who receive such designations, the temptation to use them in advertising is strong.

Such advertising may be risky, however. The New Jersey Supreme Court Committee on Lawyer Advertising has issued a **Notice to the Bar** advising that **Rule 7.1** allows such claims only when the basis for the comparison can be verified and the organization has made adequate inquiry into the fitness of the individual lawyer. The Notice observes that some such awards are based on popularity contests, membership in organizations or websites, or payment of fees. The Notice states that a lawyer may not use such designations in advertising unless the lawyer confirms that the conferring organization made adequate and individualized inquiry into the professional fitness of the lawyer. Even if this is so, the lawyer must:

- provide a description of the standard or methodology on which the award, honor, or accolade is based;
- include the name of the comparing organization that issued the award;
- disclaim that the advertisement has not been approved by the state Supreme Court; and
- if the advertisement contains a superlative, such as "super," "best," "superior," "leading," "top-rated," or the like, the lawyer must state only that he or she was on a list so designated, not that he or she possesses those qualities.

The lawyer must make these disclosures even if the advertisement contains only a badge or logo of the award.

The New Jersey notice is not binding in Pennsylvania. Pennsylvania's **Rule 7.1** is different from New Jersey's; it was amended in 2005 to remove language prohibiting direct comparisons to other lawyers. However, Comment 3 notes that "an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated."

No cases on this issue have been decided by the Disciplinary Board, and the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility has not issued a formal ethics opinion on the subject. In informal inquiries, however, the Committee has urged lawyers to assure that accurate information concerning the process employed and criteria used for selection of the designation is included in the advertisement, and advised lawyers that awards that could be misleading or create unjustified expectations in clients may not comply with the requirements of Rule 7.1. The Committee has undertaken a review of the issue in the aftermath of the New Jersey notice, and may provide further guidance in the near future.

Helpful Hint: While the New Jersey notice is not binding on Pennsylvania lawyers advertising awards they have received, it does contain valuable guidelines which a lawyer advertising such accolades may take into account. It's not the law here, but it's still a good idea.

Phishing Scam Aimed at Lawyers Invokes Fear of Discipline

Lawyers in **several states** have received emails purporting to be from disciplinary authorities, advising lawyers that they are under disciplinary investigation and providing links or attachments for them to receive notice and respond to charges. It is suspected that lawyers who respond to such emails may be tricked into revealing personal and confidential information. Such efforts are known as "phishing" scams.

The emails are tailored to appear as though they are from the disciplinary counsel for the recipient's state. The email instructs the lawyer to click on a link or attachment to view the complaint. Doing so opens a path into the recipient's computer through which the scammers may extract information or plant malware. In some cases victim's computers were locked up, and could only be unlocked upon payment of a "ransom."

While the Disciplinary Board and the Office of Disciplinary Counsel have not received any reports of such emails to Pennsylvania lawyers, the scam is widespread enough that lawyers in any state may be targeted.

The Office of Disciplinary Counsel never sends notice of complaints by email. Any lawyer who receives an email purporting to be from either the ODC or the Disciplinary Board, advising of receipt of a complaint of which the recipient has not been notified by mail or by telephone, should refrain from answering the email, opening any attachments, or clicking any links in the message. Notify your **local Office of Disciplinary Counsel** if you receive such a communication.

The Registration Office does send emails reminding lawyers of unpaid annual fees and providing links to pages of the Office of the Pennsylvania Courts.

AI “Lawyer” Takes over Firm’s Bankruptcy Caseload

Have you ever teased someone that their job will someday be done by robots? Don’t. Yours may, too.

The law firm **BakerHostetler** has contracted to use the **artificial-intelligence machine ROSS**,^[3] billed as the “world’s first artificially intelligent lawyer,” to manage its bankruptcy practice. BakerHostetler employs approximately 50 human lawyers in its bankruptcy section.

Built on the platform of Watson, IBM’s cognitive computer, ROSS is a digital legal expert designed to plow through unstructured data at a rate of over a billion documents a second to answer questions. The system is also structured to query this data intelligently to identify the most relevant authority, rather than producing raw results based on keywords. Andrew Arruda, chief executive of Ross Intelligence, states that “ROSS surfaces relevant passages of law and then allows lawyers to interact with them. Lawyers can either enforce ROSS’s hypothesis or get it to question its hypothesis.”

Both BakerHostetler and Arruda insist that the role of Ross is not to replace lawyers in the advocacy process, but to make them more efficient and free them up to provide services of greater value to clients. Joe Patrice at **Above the Law** notes that while the process of young lawyers researching cases and writing memos may be less efficient than having that process done in fractions of a second by computers, it is how many lawyers develop their analytical skills. He questions whether systems like ROSS do not provide short-term efficiency at the expense of long-term loss to the development of skills in the profession.

The replacement of human with artificial intelligence in the practice of law will probably offer great benefits but also pose new challenges in the years to come. The legal profession has been evolving at a rapid pace for decades, and the arrival of artificial promises a future that looks even less like our parents’ law practice.

[1] On sale.

[2] The best crossword/Sudoku pens we have tried, and we’ve tried a lot.

[3] Before you ask, ROSS is apparently not an acronym for anything. [4]

[4] We would like to think it stands for “**Rodents of Substantial Size.**”

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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