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Attorney News - May 2016



Articles & Updates

- **Disciplinary Board Proposes “Marijuana Amendment” to Rules of Professional Conduct**
- **Rules, Rules, Rules**
- **Registration: the Time Is Here**
- **Penny and Schwager Named Board Chair, Vice Chair; Goodrich Joins Board**
- **Missouri Lawyer Suspended for Using Stolen Emails**
- **not yap wa' Hol! Klingon Speakers Fight for their Language**

Things to Remember

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*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 “Marijuana Amendment” to Rules of Professional Conduct

The Disciplinary Board has published a notice of proposed rulemaking, seeking comments on a possible amendment to **Rule 1.2 of the Rules of Professional Conduct**, regarding scope of representation. According to the preface, the proposal responds to numerous inquiries received regarding advice to clients regarding the marijuana business.

Marijuana laws across the United States have been changing rapidly. To date, over 20 states and the District of Columbia have enacted laws relating to marijuana. Pennsylvania’s **Medical Marijuana Act** was signed into law on April 17, 2016.

The proposed amendment would modify Subsection (d) of Rule 1.2, which prohibits a lawyer to counsel or assist a client in criminal conduct. An exception would be established in a new Subsection (e), stating: “A lawyer may counsel or assist a client regarding conduct expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”

The preface notes that the Federal Controlled Substances Act, **21 U.S.C. § 811** et. seq, still classifies marijuana as a Schedule I drug, and thus its manufacture, distribution, dispensing, or possession are still illegal under Federal law. Under the current language of Rule 1.2(d), a Pennsylvania lawyer arguably is prohibited from assisting a client in various activities such as drafting or negotiating contracts that may relate to the purchase, distribution or sale of marijuana, even where such activities may be legal under state law.

Interested persons may submit written comments by mail or facsimile regarding the proposed amendments. Address comments to the Office of the Secretary, the Disciplinary Board of the Supreme Court of Pennsylvania, as follows:

- By mail:
PO Box 62625
Harrisburg, PA 17106-2625

- By delivery:
601 Commonwealth Avenue
Suite 5600
Harrisburg, PA

- By facsimile to 717-231-3382; or
- By email to Dboard.comments@pacourts.us [please DO NOT send comments to the “comments” email at the end of this newsletter].

Comments are due on or before **June 3, 2016**.

Rules, Rules, Rules

The Disciplinary Board has published two other rules change proposals for comment.

A proposal to amend one of the comments to **Rule 1.15** regarding safeguarding property of third parties was published May 14, 2016, at **46 Pa.B. 2407**. Under the current language, the comment states that a lawyer must hold third-party funds intact when “the third party claim is not frivolous under applicable law.” The revised comment would eliminate that language and require that a lawyer keep the funds whenever “a letter of protection has been issued by an attorney or a lien on the funds exists under applicable law.” The revised comment requires a greater degree of diligence in maintaining third-party funds until their ownership is determined.

Another proposal published on May 14 at **46 Pa.B. 2407** proposes an amendment to **Rule 402** of the Pennsylvania Rules of Disciplinary Enforcement, regarding access to information and disciplinary system confidentiality.

Under the current Rule 402(h), agencies seeking confidential information about disciplinary proceedings must make certain certifications. The Pennsylvania Judicial Conduct Board and the Pennsylvania Lawyers Fund for Client Security Board are exempt from this requirement. The proposed amendment would add lawyer disciplinary agencies from other jurisdictions to this exempt list, making it easier for such agencies to gain access to disciplinary records.

Another amendment would add language to Rule 402(c)(4) regarding disciplinary proceedings involving an attorney with an alleged disability. The current language provides that only the Supreme Court order transferring such an attorney to inactive status is public, but language would be added to state that other information is protected under the terms of **Rules 301(e)** and Rule 402. The additional language is intended to underscore the heightened privacy interests in a respondent-attorney's health information, which are protected by specific prohibition in Rule 301 against the release except under very limited circumstances.

Comments on either or both amendments will be accepted through **June 24, 2016**. Comments may be submitted to the 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 [please DO NOT send comments to the “comments” email at the end of this newsletter].

Registration: the Time Is Here

Notices for completion of annual registration forms have gone out, and the **registration portal** is now open. All Pennsylvania attorneys must complete their annual registration and pay the applicable fee by **July 1, 2016**.

As we **reported last month**, electronic registration through the electronic portal is mandatory this year and in future years. Information on the registration process is available **here**.

The Disciplinary Board has received expressions of concern from attorneys, firms, and organizations that do not have credit cards they can use to pay annual fees electronically. The registration portal offers

a voucher system allowing such individuals and organizations to pay registration fees by checks sent through the mail. Choose to "Pay by Mail" and print a voucher to be mailed with your check/money order payable to **Attorney Registration, P.O. Box 3313, Lancaster, PA 17604-3313**. The registration is not complete until the printed voucher and payment are received by the Attorney Registration Office, so persons unable to pay by credit card should not wait until the last few days to complete their registration forms.

Remember that if you are in private practice, you will need to identify the financial institution or institutions at which your trust accounts for Rule 1.15 funds will be maintained. Click [here](#) to see if your bank is approved as a repository for client funds. If you need help answering the Financial Data questions, click [here](#) to view the Financial Data Reference Table and Frequently Asked Questions.

Penny and Schwager Named Board Chair, Vice Chair; Goodrich Joins Board

The Supreme Court of Pennsylvania has **designated Jane G. Penny**, of Dauphin County, as Chair of the Disciplinary Board for the 2016-2017 term.

Penny is the founder of **Penny Legal Group, LLC**, established in 2010. She has more than 35 years of experience as a defense attorney in private practice. She has represented clients through federal and state grand jury investigations, Nuclear Regulatory Commission and Department of Labor investigations, and related enforcement and dispute resolution proceedings. Also, Penny conducts confidential investigations for clients into whistleblower concerns and ethics hotline reports. Penny earned her Bachelor of Arts, maxima cum laude, from La Salle University in Philadelphia in 1974 and her Juris Doctorate from the Pennsylvania State University's Dickinson School of Law in 1977. She has been a member of the Disciplinary Board since 2012 and was Vice Chair in 2015-2016. She succeeds Howell Rosenberg as Chair.

The Court designated **David E. Schwager**, of Luzerne County, as Vice Chair, he has served on the Board since 2012. Schwager is a partner in the Wilkes-Barre law firm of Chariton, Schwager & Malak. He serves as treasurer of the Pennsylvania Bar Association (PBA), and chair of the PBA Bylaws, Strategic Planning, Finance, and Investment Committees. He is a past chair of the PBA Real Property, Probate and Trust Law Section and Financing of Real Estate Committee and Real Estate Taxation Committee, and previously served as chair of the PBA Statutory Law Committee.

The Court **appointed John "Jack" Goodrich**, Allegheny County, to a three-year term as a member of the Disciplinary Board. Goodrich, an acclaimed trial attorney, is the principal of the law firm **Goodrich & Associates, P.C.**, where he specializes in personal injury with a concentration in head trauma and vehicular accidents, including wrongful death, alcohol intoxication, and complex personal injury litigation. He graduated from St. Francis University with a Business degree and earned his law degree from Duquesne University School of Law.

The Supreme Court also **reappointed Brian J. Cali**, Lackawanna County, to a second three-year term as a member of the Disciplinary Board. Cali is the owner of the **Law Offices of Brian J. Cali** in Dunmore, Pa., where he concentrates his practice on family law throughout northeastern Pennsylvania.

Missouri Lawyer Suspended for Using Stolen Emails

A Missouri lawyer has been suspended for using evidence in a divorce case which his client obtained by guessing his wife's password and intercepting her private emails.

In an **opinion** dated April 5, 2016, the Supreme Court of Missouri suspended attorney Joel Eisenstein indefinitely with leave to apply for reinstatement in six months. The court found that Eisenstein violated **Missouri Rule 4-4.4(a)**, which is similar to **Pennsylvania's Rule 4.4(a)**, by using information as to the wife's payroll and a list of questions sent to her by her attorney. Opposing counsel discovered the latter when Eisenstein turned it over to her in a stack of exhibits. The court found that Eisenstein used methods of obtaining evidence that violated the rights of a third party, and failed to notify opposing counsel of his improper receipt of counsel's private emails to her client.

The court also found that Eisenstein violated other rules by concealing his receipt of the documents until the second day of trial and by threatening opposing counsel with professional retribution if she reported his misconduct. Eisenstein had five prior incidents of discipline, including a prior suspension.

not yap wa' Hol! Klingon Speakers Fight for their Language¹

All the best cases happen in the Central District of California, and ***Paramount Pictures Corporation v. Axanar Productions, Inc.***, has to be one of the best. Paramount and CBS Studios, owners of the copyright to *Star Trek* and all its associated uses, is suing Axanar Productions, which is seeking crowdfunding to produce a *Star Trek* fanfilm called, appropriately enough, *Axanar*. The Plaintiffs claim control of the intellectual property rights to, among other items, the Klingon language.

The Klingon language was never spoken in the televised series, but was developed by **Mark Okrand**, a linguist specializing in Native American languages. He was hired by Paramount to develop a Klingon language for the *Star Trek* film series^[2], and coach the actors in it. He has published **three books** teaching the vocabulary and grammar of the invented language. There are a small number of people who have learned to speak in Klingon, and a **Klingon Language Institute** exists to promote the language.

The small but determined community of Klingon speakers did not take the threat to shut down their efforts lightly. An organization for invented languages called the **Language Creation Society** hired attorney Mark Randazza to represent the organization as amicus curiae. Randazza's brief, replete with Klingon quotations, proverbs and *Star Trek* references, makes a serious argument that copyright and intellectual property laws cannot be used to restrict the use of a spoken language. It concludes, "Qapla'" ("Success!") Mental Floss has a rundown of some of the best parts of the brief **here**.

[1] "One language is never enough." Or so the **Internet** tells us. No representation is made that anyone associated with this publication is fluent or even conversant in Klingon. We have been accused of geekery, but we are not that geeky.

[2] Assisted by no less than James Doohan, a/k/a "Scotty."

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