Attorney News - March 2016

The Disciplinary Board of the Supreme Court of Pennsylvania

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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****.*

2015 Discipline Numbers Published

The Disciplinary Board has published statistics on discipline administered in 2015.

A few highlights:

- Fifty-eight informal admonitions were issued, near the middle of the pack for the last several years.
- Only 10 private reprimands were given – more than the six in 2014, but still the second lowest number since 1983. This may be because ---
- Public reprimands, a new form of discipline since 2012, swelled to 24, nearly half the total given in the four years the sanction has been available.
- Probations amounted to 16, the highest number in a decade.
- Suspensions and disbarments were down somewhat with 75. The average for the last few years has been in the 80's. About half of these were by consent.
- One hundred six attorneys were reinstated, with one denial. This equals the historic high level set in 2010 and 2011.

You can see the historical chart **here**.

Dean Denied: University Dean Falls Short in Rare Reinstatement Denial

Reinstatement denials are rare; in 2014 and 2015, only two out of 215 applications were denied. But a disbarred former attorney now working in academia saw his application denied after the Disciplinary Board found numerous discrepancies between the facts and statements in his application and testimony.

Sebastian M. Rainone was disbarred in 2006 based on financial improprieties in his solo law practice. After his disbarment he undertook employment with Strayer University, eventually becoming Dean of the Willingboro, New Jersey campus, where he taught business and ethics classes. He also taught at Villanova University.

Rainone applied for reinstatement. After hearing the case and reviewing the record, the Hearing Committee recommended that Rainone's application be denied. On review, the Disciplinary Board agreed. The Board found that Rainone failed to file numerous income tax returns and failed to report tax findings and judgments entered against him. Rainone testified that he found filing tax returns "annoying." At the time of the hearing, his tax liability was estimated at $117,988. The Board found this particularly egregious as Rainone had a master's degree in taxation and practiced tax law while he was active.

He also failed to turn over client files, claiming his ex-wife had thrown them away during a contentious divorce. However, he made no effort and manifested no idea how to reconstruct or recreate the files. He also failed to notify clients of his disbarment.

The Board found numerous discrepancies in his reinstatement questionnaire, as he failed to reveal civil actions, judgments, taxes, and debts. Four of his former clients testified against his reinstatement, describing instances of failing to communicate with them and neglect, mistakes, and delays in the handling of their cases.

From a 2007 letter to the Villanova community denying that he had violated the Rules of Professional Conduct to his testimony at hearing, the Board found that Rainone showed little or no remorse or awareness that his conduct was wrong.

The Board concluded that while Rainone's misconduct was not so severe as to bar reinstatement, he had not met his burden of proving that he possesses the moral qualifications, competency, and learning in the law required for admission to the practice of law, nor that he had made significant rehabilitative efforts since his disbarment. The Board determined that his resumed practice of law would be detrimental to the integrity and standing of the bar and the administration of justice, and would be subversive of the public interest. Accordingly it recommended that his application for reinstatement be denied. By a ***per curiam* order dated March 17, 2016**, the Supreme Court denied the application.

ABA Committee Instructs on Subpoena Compliance

The American Bar Association's **Standing Committee on Ethics and Professional Responsibility** has issued **Formal Opinion 473** (February 16, 2016), addressing the ethical obligations of lawyers required to produce evidence in response to subpoenas or other compulsory process for documents or information relating to the representation of a client under **ABA Model Rule 1.6**. The opinion updates Formal Opinion 94-385 (1994). The update takes into account an amendment of Rule 1.6 in 2002 which states, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary … to comply with other law or a court order."

The opinion notes that this amendment precludes argument that Rule 1.6(a) categorically bars compliance with a subpoena or other process. This imposes on the lawyer a number of issues to be resolved:

- what challenges should be considered;
- what specific information should be disclosed; and
- what protective measures should be sought.

The process for resolving these issues is the same with both current and former clients. The lawyer must notify the client of the event requiring disclosure, and consult with the client as to:

- a description of the protections afforded by Rule 1.6(a) and (b);
- whether and to what extent the attorney-client privilege or work product doctrine or other protections or immunities apply; and
- any other relevant matter.

If the client elects to challenge the demand, the lawyer should, consistent with the client's instructions, challenge the demand on any reasonable ground. This may include an appeal of any order requiring disclosure.

The lawyer is not, however, expected to perform these services without compensation. The lawyer may need to discuss fee and retention arrangements during the consultation.

Formal Opinion 94-385 stated a requirement that the lawyer comply with "final orders" requiring disclosure. The Committee reviewed this and determined that the language of the rule does not support a limitation that orders be final, although the lawyer may seek appropriate measures such as stays and appeals as allowed by law.

If after a reasonable search the client is unavailable for consultation, the lawyer should still assert all reasonable objections and claims, but is not expected to pursue an appeal if disclosure is still required after such efforts.

Once disclosure is required, the lawyer may produce documents and information "only to the extent the lawyer reasonably believes . . . is necessary" and should seek protective orders and similar arrangements "to the fullest extent practicable."

Cloudy with Chance of Rain: Microsoft AGC Advises on Cloud Storage

Dennis Garcia, Assistant General Counsel for Microsoft Corporation, has **published an article** on ethical considerations of cloud data storage that provides valuable advice for lawyers who store data in internet-based servers.

Garcia notes that **Rule 1.1 of the Rules of Professional Conduct** requires lawyers to represent their clients competently. Comment 8 specifically states: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**" Lawyers have an affirmative duty to ensure that information maintained through new technology is safeguarded as diligently as that kept in traditional ways.

Garcia suggests several ways lawyers can ensure the safety of their data, including:

- Building skills by enlisting the active support of technology specialists, attending cloud-related CLEs, and using resources from cloud-centric organizations like the **Cloud Security Alliance**.
- Developing well thought out cloud service agreements, including provisions such as:
    - detailed data protection terms;
    - meaningful service level obligations;
    - prompt security incident notification;
    - clarity on third party (e.g., law enforcement) access to data;
    - barring use of data by a cloud provider for advertising or similar commercial purposes;
    - customer ownership of data;
    - data location specificity;
    - independent verification of key commitments; and
    - cloud provider responsibility for third party subcontractors.
- Written notice to and consent from clients for cloud storage;
- Development of a written information security policy (WISP) to instruct staff and members on issues such as password selection and maintenance, authentication practices, and identifying harmful contacts and schemes.

Garcia has also provided **steps to choosing a cloud provider** to assist lawyers in safe data storage practices.

Bot and Sold: Teen Creates App to Appeal Parking Tickets

A teenaged British programmer has created a **software application**, or robot, which is designed to allow

users to appeal parking tickets without the use of a lawyer. Joshua Browder, 19, claims that his application has saved users over $3 million on parking ticket appeals.

The application queries users as to the circumstances of their citations, and identifies potential defenses. If a possible defense is discovered, it generates an appeal letter for the user to send to the court. It is also designed to help with payment-protection insurance (PPI) claims for delayed or canceled flights. The software design is based on British law, but Browder claims it can also be useful in the United States. The program is still in beta testing, but the full version is slated for launch in the spring of 2016.

Browder is not the only programmer developing applications that simulate the practice of law. Software packages that generate legal forms have been available for years. Products by Acadmx and Lex Machina also offer law-related services such as brief generation and data mining of case records.

Leading-edge analysists predict that the automation of legal work will affect the practice of law even more in the future. Richard and David Susskind write in their new book *The Future of the Professions,* "we foresee that, in the end, the traditional professions will be dismantled, leaving most (but not all) professionals to be replaced by less expert people and high-performing systems." The Susskinds and **D. Casey Flaherty, founder of the legal tech consultancy Procertas**, argue that the future of legal practice lies not in resisting the transition of more and more legal work to technology, but developing new ways to use technology to provide better, less expensive service to clients. The employment of human lawyers, they argue, is a byproduct rather than the goal of this process.

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