Attorney News - December 2015

The Disciplinary Board of the Supreme Court of Pennsylvania

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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****.*

Maybe Someday, But Not Yet

Can the conduct of a disbarred lawyer be so egregious that he can never qualify for reinstatement?

That question came up in the **reinstatement proceeding of Michael Radbill** of Philadelphia. Radbill was disbarred in 2006, retroactive to 2004, for a pattern of conduct that included conviction of health care fraud for representing 29 clients he knew were not injured, causing a loss to insurance companies of $261,447.16. He also concealed income and exaggerated his business expenses on his tax returns, reporting less than 24% of his income over a four-year period.

The Board found that Radbill committed additional misconduct after his disbarment, including making false statements and concealing assets at several stages of his criminal proceedings and reinstatement application. He continued to deny wrongdoing in the reinstatement hearing.

The Hearing Committee concluded that Radbill had not met his burden of proof for reinstatement. Further, the Hearing Committee expressed the view that his misconduct was so severe that reinstatement should be barred forever. The Office of Disciplinary Counsel took the same position.

On review, the Disciplinary Board considered the question of whether Radbill could ever be reinstated under the principles in *Office of Disciplinary Counsel v. Keller*, 506 A.2d 872 (Pa. 1986). The Board noted that the Supreme Court has only held once that the magnitude of a disbarred attorney's conduct precluded future reinstatement, in the *Matter of Romaine Phillips*, 801 A.2d 1208 (Pa. 2001). Comparing Radbill's conduct to that of other attorneys who were reinstated after disbarment, the Board concluded that while serious, Radbill's conduct did not preclude his future reinstatement. The Board did, however, conclude that Radbill did not meet his burden of proof for reinstatement, and recommended his petition be denied. On November 19, 2015, the Supreme Court denied his position without comment on whether he will be eligible for reinstatement in the future.

New York Proposes Limited Foreign Attorney License; Pennsylvania Already There

The Office of Court Administration for New York is **accepting comments on a proposed amendment** to allow out-of-state and foreign attorneys to practice law on a temporary basis in the state. **Under the proposal**, a lawyer licensed in another U.S. or a foreign jurisdiction could provide legal services in New York state on a temporary basis in certain circumstances, including:

- on matters where a New York attorney assumes joint responsibility;
- in a proceeding before a tribunal in New York where the out-of-state lawyer is authorized to appear;
- in certain alternative dispute resolution situations; and
- for services related to a matter that arises in the jurisdiction in which the lawyer was admitted, for example, in a transactional matter where an attorney representing a client in another state comes to New York to negotiate a contract.

New York, like most states, already allows pro hac vice admission to lawyers from other states, but the new rule is intended to provide a more flexible alternative for lawyers working in less formal situations.

The proposal would make New York the **tenth state in the union** to allow foreign attorneys to practice

under certain circumstances.

Pennsylvania has allowed lawyers licensed in other countries to practice as foreign legal consultants for over a decade. In 2005, the Supreme Court adopted **Rule 341 of the Pennsylvania Bar Admission Rules**, subject to certain limits set in **Rule 342**. Graduates of foreign law schools who have been admitted to practice in another country may also apply for admission to the bar under the terms of **Rule 205**.

Hack Attack: Must a Lawyer Replace Funds Stolen in High-Tech Theft?

In today's fast-moving, high-tech, interconnected world, crafty thieves have many new ways to victimize the innocent. An ethics opinion from the North Carolina Bar considers whether the lawyer has a duty to replace client funds stolen by high-tech means. The opinion is summarized by the ABA/BNA Lawyer's Manual on Professional Conduct **here**.

2015 Ethics Opinion No. 6, issued October 23, 2015, poses several scenarios under which client funds can be stolen from a lawyer's trust account. The common thread in the answers is that a lawyer is obligated to replace the funds if he or she has not taken reasonable precautions to protect the security of the account. The committee referred to a previous opinion which defined reasonable precautions for online banking to include strong password policies and procedures, the use of encryption and security software, hiring a technology expert for advice, and making sure relevant firm members and staffers are trained on and abiding by the security procedures.

In one hypothetical, a hacker gains access to the lawyer's online banking account and transfers funds to an account controlled by the hacker. The committee concluded that the lawyer would not have a duty of reimbursement if the security precautions identified above were followed and the theft did not result from a failure to supervise or prepare staff.

In another, a hacker gains access to information about the email account of another participant – client or counsel – and sends an email from a spoof address, perhaps with a character different from the genuine address, requesting that the funds be wired or transferred to a destination controlled by the hacker. In that case, the committee concluded that the lawyer may have an obligation to repay the funds if he or she failed to exercise reasonable diligence to confirm the authority for the transfer, such as by contacting the alleged addressee through another channel of communication.

Even in situations where the lawyer does not have an obligation to restore the funds, he or she is required to take remedial steps, including:

- Notifying clients of the theft and advising them about its consequences for the representation;
- Helping clients identify and use any source of funds, such as bank liability and insurance, to cover the losses;
- Deferring a client's matter (by seeking a continuance, for example) if necessary to protect the client's interest;
- Notifying and explaining what happened to third parties or opposing parties to the extent necessary to protect the clients' interests;
- Taking protective steps if stop payments are issued against outstanding checks; and
- Reporting the theft to law enforcement and the state bar.

The opinion would not be binding in Pennsylvania should a similar situation arise, but the responses of the North Carolina committee point to precautionary measures every lawyer and firm handling client funds should consider.

ABA Seeks Supreme Court Review of Work Product Decision

The American Bar Association has filed an amicus brief urging the United States Supreme Court to review a decision of the Court of Appeals for the District of Columbia Circuit, which the association says seriously undermines the attorney work product privilege.

The D.C. Circuit's decision in ***Boehringer Ingelheim Pharmaceuticals, Inc. v Federal Trade Commission*** addressed the distinction between opinion work product, which concerns the analysis and thought process of counsel, and fact work product, which encompasses information gathered in connection with decision-making, and which may be discovered under a more lenient standard under **Federal Rule of Civil Procedure 26(b)(3)**.

At issue in the *Boehringer* litigation is an inquiry by the Federal Trade Commission into whether a settlement agreement reached between Boehringer and a competitor regarding distribution of a patented drug violated antitrust laws. The FTC subpoenaed certain documents, including financial analyses of a co-promotion deal, forecasting analyses of alternative time lines for generic entry into the market, and financial analyses of the business terms of the settlement agreement. Boehringer asserted the work-client privilege as to these documents. The Court of Appeals held that the documents were fact work product rather than opinion, and ordered disclosure based on a finding that "the materials are relevant to the case, the materials have a unique value apart from those already in the movant's possession, and 'special circumstances' excuse the movant's failure to obtain the requested materials itself." 778 F.3d at 155-57. Due to a conflict between the DC Circuit ruling and other circuits, Boehringer seeks Supreme Court review of the decision.

In its **amicus brief**, the ABA argues that the DC Circuit's approach dramatically widens the scope of counsel-directed information subject to discovery. The ABA urges that discovery of information gathered on direction of counsel should be compelled only upon a showing of substantial need as required by Rule 26(b)(3), F.R.C.P. The ABA brief argues that "because the standard articulated in Boehringer weakens protection of work product when government asks questions, lawyers will think twice about conducting the analysis and research needed to provide competent, complete, and well-informed advice to a client at the very time the client most needs it." The ABA explains its position in a press release available **here**.

The docket listings for *Boehringer Ingelheim Pharmaceuticals, Inc. v Federal Trade Commission*, No. 15-560, are available **here**.

Gollum on Trial: Is Smeagol a Smear?

Turkish physician Bilgin Çiftçi is the subject of a criminal case which revolves around a fascinating question: did Çiftçi insult Turkish President Recep Erdoğan by circulating on social media a graphic comparing the president to the character of **Gollum** from the *Lord of the Rings* series?

In the United States far worse ridicule is tolerated as the normal course of business in political discourse,

but the matter is quite serious in Turkey, where the President has cracked down hard on adverse portrayals in the media. The Turkish penal code prescribes a prison term of up to four years for anybody who insults the president of the republic.

Çiftçi, who was already fired from his job with the Public Health Service for sharing the image on social media, raised a remarkable defense in his criminal trial. He asserts that he did not insult the President, because for all his strange and slimy ways, Gollum (born Smeagol) was actually a good guy. The trial judge conceded he had not seen enough of the movies to resolve the issue,[1] so he convened a panel of five experts -- two academics, two behavioral scientists or psychologists, and an expert on cinema and television productions, to review the evidence and advise the courts on the merits of the issue. The panel has two and a half months to complete its work.[2]

The whole episode fills us with gratitude for the First Amendment and ***New York Times v. Sullivan***. You might even call it our precious.

[1] Apparently reading the books is out of the question.

[2] Running time for the *Lord of the Rings* cycle is 9 hours and 18 minutes; running time for *The Hobbit* trilogy is just under 8 hours.[3]

[3]In contrast, one **paperback edition** of the *LOTR* cycle ran 1,241 pages, while *The Hobbit* ran 304 pages. We suppose that editorializing on the merits of splitting fantasy books into cinematic trilogies is beyond the scope of this newsletter.

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