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Attorney News - November 2015



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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 Amendment on Sale of Law Practice, Seeks Comments

The Disciplinary Board is seeking comments on a proposed amendment to the Rules of Professional Conduct regarding the sale of a law practice or area of practice.

By a notice of proposed rulemaking published November 14, 2015 at **45 Pa.B. 6583**, the Disciplinary Board requests comments on a proposal to amend **Rule 1.17** of the **Rules of Professional Conduct, dealing with sale of a law practice**.

The proposed amendment would make several changes to the rule regarding sale of a law practice, including:

- allowing sale of an area of practice;
- permitting the seller to assist the buyer in the orderly transition of active client matters without a fee;
- allowing sale to more than one lawyer or law firm;
- requiring the seller to give written notice to the clients of the sold practice or practice area;
- requiring court approval of transition of a client's representation if the client cannot be given notice;
- Comment 6 provides a list of client information which may be disclosed in effecting the sale of a practice or area of practice.

Interested persons are invited to submit written comments by mail or facsimile regarding the proposed amendments on or before **January 5, 2016** to:

Office of the Secretary
The Disciplinary Board of the Supreme Court of Pennsylvania
601 Commonwealth Avenue, Suite 5600
P. O. Box 62625, Harrisburg, PA 17106-2625
Facsimile number (717-231-3382)
Email address Dboard.comments@pacourts.us

Disciplinary Board Amends Probation Termination Procedure

On November 14, 2015, the Disciplinary Board **published** an amendment to **Section 89.294 of the Rules of the Disciplinary Board**, which addresses termination of probation.

Under the prior version of the rule, an attorney who completed a term of probation was required to file an application for termination of probation, and the probation did not end until the Disciplinary Board issued an order of termination, which it was required to do if:

1. all costs of the proceedings were paid;
2. the respondent-attorney complied with the terms of probation; and
3. no formal proceedings for discipline were pending against the respondent-attorney.

Under the amendment, the requirement to file an application to terminate the probation is eliminated. The probation automatically terminates upon the filing of the final quarterly report and expiration of the fixed period of probation, unless:

1. the respondent-attorney has violated or failed to meet conditions of the probation;
2. costs are not paid; or
3. formal proceedings have been filed against the respondent-attorney.

The amendment was published at **45 Pa.B. 6586**, and takes effect 30 days after publication, on December 14, 2015.

Full Nondisclosure

Two lawyers received discipline in October for failure to make full disclosure in applications.

On October 15, the Supreme Court of Pennsylvania suspended **Robert Philip Tuerk** of Philadelphia for one year and one day, based on his failure to disclose adverse facts in an application for admission to a federal court.

Tuerk, who was admitted to the Pennsylvania bar in 1991, was suspended for one year and one day in 1996 for failing to reveal a prior arrest in his application for admission. He was reinstated in 2001.

In 2012, Tuerk filed an application for admission to the bar of the United States District Court for the Eastern District of Pennsylvania. A local rule required that an attorney who has received public discipline must reveal that fact, file an application with the Chief Judge of the court, and show his qualification in a hearing. Tuerk neither revealed his Pennsylvania suspension nor filed the application with the Chief Judge.

Upon discovery of Tuerk's suspension, the Chief Judge convened a committee to review his application and issued a rule requiring Tuerk to show cause why his admission should not be vacated. Tuerk filed a bankruptcy petition on behalf of a client after service of the rule to show cause.

At the hearing, Tuerk admitted he had filed matters in the Eastern District and other federal courts prior to his admission, stating he did not realize he had to be admitted separately to the federal court. At a second hearing after he retained counsel, Tuerk agreed to withdraw his application for admission, and the Chief Judge vacated his admission and barred him from filing another application for one year.

At his disciplinary hearing, Tuerk blamed his conduct on the attorney who moved his admission and on the Deputy Clerk of Court. The Disciplinary Board found as aggravating factors that he failed to accept full responsibility for his conduct and did not show remorse. The Board recommended suspension for one year and one day, which the Supreme Court imposed.

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On October 20, the Supreme Court **disbarred Thomas M. Nocella**, also of Philadelphia. One of the counts against Nocella arose from his quest for a Philadelphia judgeship.

In two evaluation questionnaires submitted to the Philadelphia Bar Association Commission on Judicial Selection and Retention in connection with his application, Nocella failed to reveal material facts,

including the fact that he was a defendant in numerous actions, that IRS liens and judgments had been entered against him, that he had filed a petition for bankruptcy, and that he had received an informal admonition as discipline. Nocella was elected to the Court of Common Pleas and served on the bench for ten months, until he was placed on interim suspension by the Supreme Court. Subsequently the Court of Judicial Discipline removed Nocella from the bench and barred him from holding judicial office in the future.

The Disciplinary Board concluded that Nocella had violated several of the Rules of Professional Conduct in a series of knowingly false statements and failures to disclose required information. After reviewing several precedents of false statements made in official settings, the Board unanimously recommended disbarment, and the Supreme Court **imposed that same sanction**.

Suspended Attorneys May Not Practice in Administrative Tribunals with Impunity

Last month we reported on the case of **Powell v. Unemployment Compensation Board of Review**, in which the Commonwealth Court held that the UCBR did not have authority to enforce the Rules of Disciplinary Enforcement to prohibit representation of a party by a suspended lawyer in administrative proceedings where nonlawyer representation is permitted.

Administrative tribunals may not have the authority to enforce the Rules of Disciplinary Enforcement, but the Supreme Court and the Disciplinary Board definitely do. The fact that a suspended lawyer is permitted to represent a client by the tribunal does not mean that conduct is acceptable under the terms of the suspension. The Supreme Court has suspended or disbarred lawyers in contempt for advocacy in administrative tribunals. In the case of disbarred attorney **Barry Goldstein**, the Court found him in **contempt** for continuing to represent clients before the Pennsylvania Liquor Control Board. The Court also found suspended attorney **David Barger** in **contempt** for appearing before the UCBR.

To Thine Own Selfie Be True

“A monkey, an animal-rights organization and a primatologist walk into federal court to sue for infringement of the monkey’s claimed copyright. What seems like the setup for a punchline is really happening.”

So begins the **Defendants’ Motion to Dismiss** in *Naruto et al. v. Slater et al.*, a case pending in the United States District Court for the Northern District of California, now popularly known as the “Monkey Selfie Case.”

In 2011, photographer David J. Slater was in Indonesia, taking pictures of endangered crested macaques. He left his camera unattended, and it was cameranapped by curious monkeys. A macaque named Naruto snapped a **smiling selfie**.

Slater made a cover model of Naruto in his book **Wildlife Personalities**, publishing the photo along with numerous other simian self-portraits. The image became quite popular and valuable. However, the popularity of Naruto’s sensational smile led Slater into two legal controversies.

First, **Wikipedia** published the photo as part of its gallery on macaques, without Slater’s permission, and

refused Slater's request to remove it from Wikimedia Commons, an online repository of free images from which users are allowed to copy and use images. Wikipedia took the position that the copyright for a photograph belongs to the person who took the picture, and that since Naruto, not Slater, snapped the selfie, Slater does not have an enforceable copyright in the photo.

Eventually the U.S. Copyright Office sided with Wikipedia, [issuing guidelines](#) stating that "The Office will not register works produced by nature, animals, or plants."

But Slater's legal troubles were not over. In September, People for the Ethical Treatment of Animals (PETA) and a primatologist and ethologist filed a [complaint](#) in the Northern District of California, asserting a status as next friends of Naruto, in which they seek to have Naruto declared the author and copyright owner of the image, to restrain the defendants from publishing or exploiting the monkey selfies, for accounting and payment of all profits, and permitting the Next Friends to administer all rights and proceeds of Naruto and her comrades in photography. This complaint led to the [Motion to Dismiss](#) quoted above.

There is much to chuckle at in the Monkey Selfie case, but Benjamin Cardozo School of Law professor Christopher Buccafusco argues [here](#) that it may shed light on copyright issues raised by new, nontraditional works that don't necessarily fit into traditional forms of art subject to copyright protection.

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comments@padisciplinaryboard.org.

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