Attorney News - September 2015

The Disciplinary Board of the Supreme Court of Pennsylvania

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Things to Remember

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Florida Bar Overrules Advertising Committee, Approves Text Message Ads

The Board of Governors of the Florida Bar, reversing a position taken by its staff and Advertising Committee, has concluded that lawyers and law firms may solicit business by text messages to potential clients.

In a **decision at its July 24 meeting**, the Board of Governors accepted the recommendation of the Board Review Committee on Professional Ethics, which voted unanimously to allow the communications. In June, the Board's Standing Committee on Advertising had **voted, by a 6-1 margin**, that text messages resemble unsolicited telephone calls, which are prohibited under the rules. The Board Review Committee, in contrast, viewed text messages as written communications more akin to email correspondence, which is allowed. The full Board agreed with the Review Committee's recommendations.

The messages must still comply with all Bar rules, including requirements that the first line of the text clearly identify the communication as advertising, that targeted messages must contain a disclaimer to ignore the text if the recipient already has an attorney, and that the message disclose how the law firm got the recipient's name.

Bar President Ramon Abadin told **The Tampa Tribune**, "It's an adaptation to reality. Most people communicate by mobile data devices that happen to be phones, too." The law firm advocating the change provided data indicating that 90% of Florida adults have at least one mobile device, and 90% of them report using their devices for text messaging.

Because texts have been deemed to fall within the existing scheme of bar advertising rules, the Board's decision took effect immediately, and state Supreme Court approval is **not required**.

Colorado Lawyer Suspended for Responding to Internet Criticism

In the Internet age, many outlets provide a forum for dissatisfied former clients to make their complaints known over a broader scale than they could before. Such events pose a strong temptation for lawyers to respond in their own defense. In making such responses, lawyers must still keep in mind the requirements of the Rules of Professional Conduct.

A Colorado lawyer who went overboard in responding to criticism learned this the hard way. **James C. Underhill, Jr**. received an eighteen-month suspension for a pattern of misconduct which included two instances of responding to criticism posted on the Internet with counterattacks on the clients that included the revelation of confidential information. The Presiding Disciplinary Judge found that these postings violated Colorado RPC 1.6(a) (a lawyer shall not reveal information relating to the representation of a client) and Colo. RPC 1.9(c)(2) (a lawyer shall not reveal information relating to the representation of a former client). In addition, Underhill committed other violations relating to attorney fees and expenses, contacting former clients represented by counsel, and filing a frivolous defamation action against the former clients. The Presiding Disciplinary Judge also **revoked Underhill's probation** and reinstated a previous suspension which had been stayed by probation.

Rule 1.6(c)(4) does allow a lawyer to "establish a claim or defense … in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer …, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." However, the Comments to Rule 1.6 indicate that this privilege is not unlimited. Comment 14 suggests the right to respond is primarily centered on legal proceedings. Paragraph (c) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish the stated purposes. Comment 23 urges care in exercising the discretion to respond.

"Nuclear War" Litigation Costs Pennsylvania Attorney his License

The Pennsylvania Supreme Court has **disbarred attorney John J. Koresko V** of Montgomery County for misconduct committed in various proceedings which flowed from his sale of a home to a former co-worker.

Koresko and his wife sold a house in East Norriton to a co-worker, Maria White, in 2004. Ms. White was a nonlawyer and first-time home buyer, unsophisticated in real estate matters. As the approved attorney for the title company, Koresko performed the legal work in the transfer of the property to Ms. White.

At the time of the sale, the property was subject to two mortgages. In his capacity as approved attorney, Koresko concluded that the second mortgage was an invalid conveyance. He neither satisfied the mortgage nor disclosed its existence to Ms. White.

Four years later, the holder of the second mortgage took action to enforce it. Koresko told Ms. White he would take care of the matter, then advised counsel for the mortgagee that he represented her, although she never retained him.

Subsequently both Ms. White and the mortgage holder filed litigation against Koresko. In the litigation, he filed frivolous claims against the opposing parties and interpleaded third parties, inhibited discovery, prepared conflicting affidavits for his employee, and attempted to represent his employee despite a conflict of interest. The court disqualified Koresko from representing his employee, and all claims were ultimately resolved against him.

In the disciplinary proceeding, Koresko denied any misconduct, claiming the other parties brought on the "nuclear war" litigation by bringing claims against him. The Disciplinary Board found his lack of remorse and refusal to admit any wrongdoing a significant aggravating factor.

Koresko asserted that some of the matters were barred by **Section 85.10**, the "stale matters" rule, because some of the events charged occurred more than four years before the filing of the Petition for Discipline. The Board held that the four-year interval is measured by the filing of a complaint with the Office of Disciplinary Counsel, not the Petition for Discipline.

The Disciplinary Board found that by filing meritless claims and appeals, obstructing discovery, and various acts toward opposing and third parties, Koresko violated RPC **1.1** (competence), **1.3** (diligence), **3.1** (meritorious claims), **3.2** (expediting litigation), **3.3(a)(1) and (3)** (candor to tribunals), **3.4(b)** (fairness to opposing parties), **4.1(a**) (truthfulness in statements to others), and **4.4(a)** (respect for rights of third persons). He also violated RPC **1.7(a) and 1.7(b)** by representing his employee when his own interests

diverged from hers. The Disciplinary Board recommended suspension for five years, but the Supreme Court disbarred him.

Dogs in Courtrooms Comfort Witnesses

Are courtroom proceedings going to the dogs?

In recent years, more and more courts have been allowing the use of therapy or comfort dogs to assist children and certain adults in the process of testifying in court. This year, two states – Arkansas and Illinois – have adopted statutes specifically allowing the use of dogs **to aid young or vulnerable witnesses in stressful court testimony.** The Illinois statute allows specially trained facility dogs to accompany witnesses 18 or younger, or developmentally disabled adults, to the witness stand in certain instances for cases involving sexual abuse or exploitation.

The **specially trained dogs** used in such circumstances are considered facility dogs, serving many people who become involved in a facility, rather than service dogs, who are dedicated to the assistance of a particular individual. Most are graduates of accredited training programs and work with handlers who are professionals qualified in criminal justice fields, such as victim advocates, detectives, forensic interviewers, and assistant prosecutors.

The use of dogs in courtrooms has not met with universal approval. Many defense attorneys and advocates for defendants have expressed concern that the presence of dogs on the witness stand may cultivate sympathy for the witnesses and distort the jury's perception of the testimony, compromising the rights of defendants. Courts in **Washington**, **California**,[1] and **New York** have upheld the practice when the court exercises discretion and takes steps to minimize the effect of the animal's presence on decorum and practice in the courtroom. In Indiana, **inmates of a women's prison trained therapy dogs** for use in the prosecutor's office. A **report on WITF-FM** indicates that facility dogs have been used in approximately one-third of Pennsylvania courts of common pleas, although not necessarily in courtroom situations.

An organization called **the Courthouse Dogs Foundation** works to promote the proper use of professionally trained facility dogs in the justice system. They offer **resources on the law of facility dogs,** and even offer a **trial checklist** for attorneys and court officials considering the use of dogs.

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[1] In which the court concluded a dog is not a "person" for purposes of a statute limiting the number of persons accompanying a witness to one.

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