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# Attorney News - July 2015

The Disciplinary Board of the Supreme Court of Pennsylvania

## Articles & Updates



## Things to Remember

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## Hearing Committee Members Reappointed

The Disciplinary Board announced that forty-seven lawyers have been reappointed to terms as members of hearing committees in the four districts effective July 1st. Hearing committee members volunteer to

serve in a demanding role critical to the function of the disciplinary system. Hearing committees sit through many hours of hearings and conferences, and spend time writing extensive and detailed findings of fact and reports on which the Disciplinary Board and the Supreme Court rely. In addition, they review recommendations of Disciplinary Counsel. Before private discipline can be imposed or formal charges filed in a case, a member of a hearing committee must approve or modify that recommendation. The Disciplinary Board owes a debt of gratitude to the hearing committee members for their dedication and service.

The following lawyers have been reappointed to three-year terms as hearing committee members:

**District I:**

| | | |
|---|---|---|
| Peter C. Buckley, Jr. | Michele D. Hangley | Jillian A.S. Roman |
| Henry F. Canelo | Karen S. Kelly | Elizabeth J. Rubin |
| A. Harold Datz | Sarah A. Kelly | Karen M. Sanchez |
| Mark B. Goodheart | Meredith A. Mack | Stephanie J. Sprenkle |

**District II:**

| | | |
|---|---|---|
| Margaret J. Amoroso | David R. Jacquette | Dara Rosenthal |
| Eric J. Bronstein | Maureen M. McBride | Daniel J. Rovner |
| Guy A. Donatelli | Dianne M. Nast | Nelson J. Sack |
| Diane Edbril | Carin Ann O'Donnell | Elizabeth Ann Schneider |
| James E. Gavin | | |

**District III:**

| | | |
|---|---|---|
| Rita G. Alexyn | Dean V. Dominick | Joanne C. Ludwikowski |
| Timothy P. Brennan | James L. Goldsmith | Kathleen B. Murren |
| Jane M. Carlonas | Larry S. Keiser | Kenneth R. Shutts |

**District IV:**

| | | |
|---|---|---|
| Lorrie Kay Albert | Julie W. Meder | Kirsten J. Sigurdson |
| Jennifer O'Neal Arnette | Philip J. Murray, III | Ansley S. Westbrook, II |
| James R. Burn, Jr. | Melaine S. Rothey | Regina C. Wilson |
| Angela M. Heim | M. Cristina Sharp | Laura Cohen |
| Nicola V. Henry-Taylor | | |

## Lawyer Suspended After Probation Violation

A lawyer who is placed on probation after a disciplinary proceeding can usually breathe a sigh of relief at avoiding a more serious sanction. The imposition of probation does not mean one is off the hook, as a Montgomery County lawyer learned.

In March 2014, Joseph F. Lawless entered into a Joint Petition in Support of Discipline on Consent, which provided that he would receive a year and a day suspension stayed in its entirety by two years of probation. The terms of the probation required that he abstain from alcohol, drugs or other mind-altering chemicals, and that he maintain weekly telephone contact and twice monthly meetings with a sobriety monitor.

Lawless failed to keep up with the required schedule of contacts. His sobriety monitor warned in May that

he was “not taking this seriously,” but despite promises to improve, Lawless’s compliance with the regimen deteriorated over the following months. By January 2015, his monitor reported that he had only one telephone call from Lawless in December, and in February he reported no further contact since that call. In a voicemail left with the sobriety monitor in April, Lawless admitted to a relapse.

Disciplinary Counsel filed a Petition to Schedule Probation Violation Hearing, and a hearing was held April 27, 2015. Respondent failed to attend the hearing.

Based on the evidence of Lawless’s noncompliance, the Board recommended that the probation be lifted and Lawless’s suspension for one year and one day be imposed. The Supreme Court did so by **order dated June 25, 2015**.

## ABA Ethics Committee Hands Down Opinion on Returning Client Papers

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association has issued its **Formal Opinion 471** on the subject of the ethical obligations of a lawyer to surrender papers and property to which former client is entitled. Specifically, the opinion examines whether documents generated for the lawyer’s own purposes must be turned over. The opinion presumes that the lawyer’s fees have been paid, so factors such as retaining liens are not considered. The opinion examines the requirements of **Rules 1.15(d)** and **1.16(d)** of the Model Rules of Professional Conduct.

The opinion notes that jurisdictions in the United States divide into two views. Many states take a “whole file” approach, concluding that all papers generated in the course of the representation become the property of the client and must be turned over at the conclusion of the representation. Pennsylvania is most likely within this group, based on the law stated in the case of ***Maleski v. Corporate Life Insurance Company***, 163 Pa.Cmwth. 36, 641 A.2d 1 (1994). The other view is an “end product” approach, which distinguishes between documents that are the “end-product” of a lawyer’s services, and other material that may have led to the creation of that “end-product,” which need not be automatically surrendered. “End-product” documents would include pleadings, briefs, instruments such as wills, deeds, and contracts, documents of legal significance, and correspondence. These documents affect the legal rights of the client and must be surrendered.  Examples of documents that would not be considered end-product include memoranda concerning potential conflicts of interest, the client’s creditworthiness, time and expense records, personnel matters, personal notes, drafts of legal documents, and legal research. **[1]**

The Committee concludes that while Rule 1.16(d) does not require surrender of all materials in the lawyer’s possession related to the representation, at a minimum, the client is entitled to those materials that would likely harm the client’s interest if not provided. This would include:

- any materials provided to the lawyer by the client;
- legal documents filed with a tribunal, or those completed, ready to be filed, but not yet filed;
- executed instruments like contracts;
- orders or other records of a tribunal;
- correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence;
- discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits;

- legal opinions issued at the request of the client; and
- third party assessments, evaluations, or records paid for by the client.

On the other hand, the Committee concluded that Rule 1.16(d) does not require the lawyer to surrender materials intended for internal use, such as:

- drafts or mark-ups of documents to be filed with a tribunal;
- drafts of legal instruments;
- internal legal memoranda and research materials;
- internal conflict checks;
- personal notes;
- hourly billing statements;
- firm assignments;
- notes regarding an ethics consultation;
- a general assessment of the client or the client's matter; and
- documents that might reveal the confidences of other clients.

The Committee noted that when a matter is ongoing, protecting the interests of a client may require releasing some documents that would not be required in a concluded matter. For instance, if a filing deadline is looming, the lawyer may be required to release unfiled drafts, if failure to do so would put successor counsel in a difficult position to meet the deadline.

## Lawyer Runs Afoul of Godwin's Law

Most Internet discussion group buffs are familiar with **Godwin's Law**,**[2]** which is often quoted to mean that the first party to an argument who compares the opposing party to the Nazis loses the argument.**[3]**

A California lawyer ran into a real-life application of the law. In **Martinez v. State of California, Department of Transportation,** a lawyer for the defendants asked questions implying that the association of motorcycle enthusiasts to which the plaintiff belonged was associated with Nazis.**[4]** The attorney reiterated her reference to the Nazi association in her closing remarks.

The Court found that this reference, along with other statements by defense counsel, amounted to attorney misconduct warranting reversal of a judgment on a defense verdict. The Court also referred the matter to the state bar.

The Court also found fault with the lawyer for continuing to ask questions to which objections had been sustained, putting the question before the jury again and again, despite the adverse ruling.**[5]** While the Court of Appeal recognized that the trial court exhibited the "patience of Job," normally considered a virtue, the Court concluded the failure to rein in counsel's excesses was prejudicial to the plaintiffs. The Court commented, "Imagine a football game in which the referee continually flagged one team for rule violations, but never actually imposed any yardage penalties on it. That happened here and requires reversal."

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**[1]** We question whether legal research should not be considered end-product, if the client has paid the lawyer to conduct such research (perhaps even being billed for the online research charges as well as the time to review it), and would have to pay successor counsel to do the same research if not provided.
**[2]** Michael Godwin, who coined the law, actually is a lawyer.

**[3]** Most do not realize, though, that Godwin did not say that. His actual Law reads, “As an online discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches 1.” But that’s less catchy than “loses the argument.”
**[4]** The fact that the group wore pointed helmets resembling German army helmets, known as “Fritz helmets,” might have had something to do with that.
**[5]** The Court writes, “Bilotti now exploited the opportunity to psychologically link Martinez to Nazis by paraleptically using the word ‘Nazi’ six times in rapid succession.” “Paraleptically” has to be our Word of the Month. It derives from **paralepsis**, the rhetorical strategy (and logical fallacy) of emphasizing a point by seeming to pass over it. For example, “I won’t even mention my opposing counsel’s boorish behavior,” by which the speaker, of course, mentions it.

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