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## Attorney News - September 2014



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### Things to Remember

- **Comments on Proposal for Rulemaking to Prevent Misappropriation due November 3**
- **Connecting with us just got easier. See how!**
- **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](mailto:comments@padisciplinaryboard.org).***

## Disciplinary Board Announces Major Rulemaking to Prevent Misappropriation

The Disciplinary Board has published an extensive proposal for comment, which sets forth a number of changes to the Rules of Professional Conduct and Rules of Disciplinary Enforcement, intended to reduce the risk of large-scale misappropriation of funds causing severe stress on the Pennsylvania Lawyers Fund for Client Security and losses to individuals. The proposal was published September 27, 2014, at **44 Pa.Bull. 6070**.

After several incidents of large-scale losses, including cases in which 20 or more claims were filed and millions of dollars in losses identified, the Board convened a working group comprised of the Board Chair, the Chair of the Rules Committee, the Board Secretary and representatives of the Office of Disciplinary Counsel. The group considered disciplinary mechanisms to prevent large-scale defalcations, beyond the deterrent effect of discipline and short of barring attorneys from handling fiduciary funds.

Several significant changes are set forth in the rulemaking intended to:

- impose certain restrictions on the brokering, offer or placement of investment products in relation to the provision of legal services;
- clarify required financial records, specify account reconciliations on a monthly basis, mandate prompt availability and production of records upon request or demand, and allow for the temporary suspension of an uncooperative respondent-attorney;
- require attorneys to provide on the annual fee form additional account information to assist ODC in the investigation of misappropriation cases and the preservation of fiduciary funds and other property;
- streamline procedures that impede investigations and that unnecessarily extend the time from initial detection of signs of theft to successful prosecution; and
- compel a suspended or disbarred attorney to promptly and completely disengage from the practice of law, and give ODC enhanced oversight authority to ensure that a formerly admitted attorney is not practicing.

Significant amendments to the following rules are proposed:

- Rule 1.15, RPC:
  - Extensive changes to required records;
  - Keep RPC 1.5(b) fee agreement with records;
  - Individual ledgers for each client whose funds are kept in an account;
  - Records must be electronically backed up daily;
  - Trial balance must be performed on at least a monthly basis and kept for five years;
  - Only lawyer or person directly responsible to a lawyer may be signatory or authorized to make transfers.
- Rule 5.6, RPC:
  - New Paragraph (b) prohibits brokering, offering, selling, or placing any investment product in relation to the provision of legal services unless so licensed.
  - New Paragraph (c) prohibits recommending or offering an investment product or investing fiduciary funds if the lawyer or a relative has an interest in the product.

- Rule 208, RDE, Procedure: the Board may seek temporary suspension of an attorney who has failed to maintain or produce records required by RPC 1.15.
- Rule 213, RDE, Subpoena power, depositions and related matters: changes to procedure for challenging a subpoena.
- Rule 215, Discipline on Consent:
  - The fact of disbarment by consent becomes public immediately upon delivery of the resignation statement to Disciplinary Counsel;
  - Upon entry of the order disbaring the attorney on consent, the attorney must promptly comply with the notice, withdrawal, resignation and cease-and-desist provisions of Rule 217, RDE.
- Rule 217, RDE, Formerly Admitted Attorneys:
  - Notice of suspension or disbarment is delivered to clients by the most efficient means available that provides for proof of delivery;
  - Wards, heirs and beneficiaries must be notified;
  - Any tribunal, court, agency or jurisdiction in which the attorney is admitted to practice must be notified;
  - Formerly admitted attorney must:
    - Resign all appointments as personal representative, executor, administrator, guardian, conservator, receiver, trustee, agent under a power of attorney, or other fiduciary position;
    - Close every IOLTA, trust, client and fiduciary account;
    - Properly disburse or otherwise transfer all client and fiduciary funds;
    - Cease and desist from using all forms of communication that express or imply eligibility to practice law in the state courts of Pennsylvania, including professional titles, letterhead, business cards, signage, websites, and references to admission to the Pennsylvania Bar;
    - Cancel or discontinue the next regular publication of all advertisements and telecommunication listings stating or implying eligibility to practice in Pennsylvania;
    - Cooperate with Disciplinary Counsel and respond completely to questions by Disciplinary Counsel regarding compliance with Rule 217.
- Rule 218, RDE, Reinstatement: The waiting period for eligibility to apply for reinstatement to the practice of law does not begin until the formerly admitted attorney files the verified statement required by Rule 217.
- Rule 219, RDE, Annual Registration of Attorneys:
  - All attorneys must report all accounts that held funds of a client or third party;
  - Must report business operating accounts;
  - The statement that attorney understands RPC 1.15 and RDE 221 requirements is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, and attorney is subject to discipline for a false statement.
- Rule 221, RDE, Funds of Clients and Third Persons:
  - Echoes record-keeping requirements of Rule 1.15;

- If Disciplinary Counsel requests production of required records, an attorney must produce them within five business days (eight under some circumstances);
- Failure to produce required records may result in the initiation of proceedings for emergency temporary suspension.

Written comments by mail, email, or facsimile regarding the proposed amendments should be sent on or before **November 3, 2014**, to:

Office of the Secretary  
The Disciplinary Board of the Supreme Court of Pennsylvania  
601 Commonwealth Avenue, Suite 5600  
PO Box 62625, Harrisburg, PA 17106-2625  
E-mail address [Dboard.comments@pacourts.us](mailto:Dboard.comments@pacourts.us)  
Facsimile number (717-231-3382)

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## Does Attorney-Client Privilege Overcome Security Concerns? N.S.A. Surveillance Raises Issues

The American Bar Association has **communicated with the National Security Administration** (N.S.A.), raising the question of whether N.S.A.'s acceptance of surveillance over communications between American law firms and foreign clients from allied intelligence agencies violates the privilege for attorney-client communications.

The ***New York Times*** has reported that documents released by former N.S.A. contractor Edward J. Snowden reveal that an American law firm was monitored while representing the government of Indonesia in trade disputes with the United States. The N.S.A.'s Australian counterpart, the Australian Signals Directorate, monitored communications between Indonesian officials and the American law firm, and offered to share the information with the N.S.A.

In February, the United States Supreme Court upheld **Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a**. In the case of **Clapper v. Amnesty International, Inc.**, several parties, including lawyers asserting attorney-client privilege, challenged provisions of the law allowing the Attorney General and the Director of National Intelligence to jointly authorize the targeting of communications with persons located outside the United States to acquire foreign intelligence information. But by a 5-4 vote, the Supreme Court held that the parties objecting to the surveillance did not have standing to bring the challenge in the absence of a showing of harm already accrued. The N.S.A. is prohibited from targeting Americans, including businesses, law firms and other organizations based in the United States, for surveillance without warrants.

In 2012, the ABA amended **Rule 1.6 of the Model Rules of Professional Conduct** to add a new Subsection C, stating:

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

This provision was added to the Pennsylvania Rules of Professional Conduct as **Rule 1.6(d)** by **amendment effective November 13, 2013**.

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## **This Just In: Board Issues Public Discipline Press Releases to Local Media**

Historically, the publication of news of the disbarment or suspension of attorneys has been low-key. Notices were issued to newspapers in the area where the lawyer practiced, for publication in the little-read legal notices section of the classified ads. Public discipline is also **posted on the Board's website**. The Disciplinary Board believes that communities should know when discipline is imposed on one of their bar, so that practice is changing. The Disciplinary Board has begun issuing press releases of disbarment and suspension cases to media outlets in the market where the disciplined lawyer practices.

"As members of the Disciplinary Board, our duty is to assist the Supreme Court in protecting the public, preserving the integrity of the legal profession and safeguarding the reputation of our courts and the legal system," said R. Burke McLemore, Jr., Chair of the Disciplinary Board. "By raising awareness of attorney discipline, we highlight our commitment to achieving these goals by demonstrating to the public how the profession is policing itself."

The decision to focus additional efforts on raising public awareness of such actions arose in part from an incident earlier this year when a Dauphin County lawyer failed to notify his clients that he was forced to surrender his law license.

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## **Judge Socks Sockless Lawyer with Dress-up Order**

Indiana lawyer Todd Glickfield doesn't like socks. There, you have it. Sadly, Glickfield received no support from Blackford Circuit Judge Dean Young, who felt hosed when Glickfield appeared sockless in his court. Judge Young tried to be a good sport and advised Glickfield in chambers that this wasn't appropriate attire for his crew, but Glickfield argyled that his fashion choice should be respected. Judge Young then issued an **order** making it clear that a local rule requiring "appropriate business attire" included socks. Just to show he wasn't stocking Glickfield, Judge Young directed the order to all members of the Blackford County Bar, whether they Lycra<sup>®</sup> or not.

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