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## Unified Judicial System of Pennsylvania Coronavirus Information

The Pennsylvania Judiciary has provided <u>updates</u> regarding local court operations and proceedings. The Court continues to monitor developments regarding the spread of the coronavirus (COVID-19) and its impact on court operations.

By <u>Order</u> of the Supreme Court of Pennsylvania, the general statewide judicial emergency declared and maintained in previous Court Orders of March 16, March 18, March 24, April 1, and April 28 ceased as of June 1, 2020. Any previous Orders in this line shall expire according to their own terms.

The Court communicates regularly with the Governor's Office and the state Department of Health for guidance on measures to continue protecting the health and safety of court users and court employees.

Contact your local court for more information or <u>visit their website</u>. Learn more about <u>filing</u> <u>emergency PFAs</u> during this pandemic. You can also learn more about mitigating the spread of the virus at <u>Health.pa.gov</u>.

## From the Chair

The start of a new year brings renewed hope of a return to normality. As we begin 2021, some events of 2020 are worth noting. The Articles of Interest section of this Newsletter reviews several cases of note addressed by the Board and the Court. In addition to the <u>Baldwin</u> and <u>Fina</u> matters, the <u>Altman</u> case highlights the Board's intolerance of attorneys abusing their position of power in dealing with clients.

Although 2020 was tumultuous in many ways, we did benefit from the experience. Spending time with spouses, children, and



grandchildren; learning new technologies; and seeing our unique system of government work as envisioned by the Founding Fathers, are but a few. As attorneys and individuals, we learned and survived. The experiences of 2020 will hopefully lead to a healthy and prosperous 2021. On behalf of the entire Board, we wish you a Happy and Healthy New Year.

James C. Haggerty Board Chair





Phillip Charles Blackman Jill Wittenborn Duffy Cheryl Denise Hardy John A. Ridgway Thomas G. Scully Charles Douglass Thomas

## Craig S. Hudson Timothy J. Prol

Jamie D. Valentine Stephen S. Weaver

From Administrative Suspension Rachel R. Hager James Michael Lavelle From Disbarment Cory Adam Leshner

Note: The above-listed reinstatements reflect <u>only</u> those granted by Supreme Court Order. An attorney listed above whose current license status does not reflect reinstatement has yet to submit the fees necessary to finalize reinstatement.

# Upcoming Public Proceedings

We encourage you to observe our public disciplinary and reinstatement hearings, oral arguments, and reprimands on the <u>Board's YouTube channel</u>. View "Upcoming Public Proceedings" at the bottom of the Board's home page, <u>www.padisciplinaryboard.org</u>.

January 11, 10:00am	Valerie Andrine Hibbert	Oral Argument
January 13, 10:15am	Penelope A. Boyd Kristen Doleva-Lecher John Joseph Grenko Evan Shingles	Public Reprimands
February 16, 9:30am	Jon Ari Lefkowitz	Reinstatement Hearing
March 18, 9:30am	William H. Lynch, Jr.	Disciplinary Hearing

# Disciplinary Board News

### Philadelphia Attorney Jerry M. Lehocky Re-Appointed Disciplinary Board Member

Attorney Jerry M. Lehocky of Philadelphia has been re-appointed by the Supreme Court of Pennsylvania to serve as a member of the Pennsylvania Disciplinary Board. Mr. Lehocky was first appointed to the Board in February 2018. His reappointment means that he will serve on the Disciplinary Board until April 1, 2024. Mr. Lehocky previously served the Disciplinary Board as a Hearing Committee Member from 2000 to 2006, 2008 to 2014, and 2016 to 2018. <u>Read more...</u>



## CDC Corner

#### John Wayne, Jimmy Stewart, and Successorship

Like many of my generation, I grew up with the four o'clock movies, the black and white Westerns, and war movies that filled my time between school and supper. One of my favorites was *The Man Who Shot Liberty Valance*. Indiana County's own Jimmy Stewart played the lawyer trying to bring lawfulness to the frontier, John Wayne the brave and violent cowboy who understands that his way must cede to Stewart's more civilized approach. The bad guy – Liberty Valance (Lee Marvin) -- eventually calls out Stewart to a gunfight; Wayne shoots Valance from the shadows and watches as Stewart gets the credit. Besides the accolades, Stewart gets the girl that both he and Wayne wooed.

In real life, Jimmy Stewart was the hero. A licensed pilot, after Pearl Harbor he set aside the Best Actor Oscar he just won and tried to enlist, but the Air Force rejected him because he was underweight. Stewart hired a trainer and put on the weight through diet and exercise. Accepted, he rejected a behind the lines assignment and flew more than twenty combat missions over Europe, and then served in Vietnam, retiring as a Brigadier General in the Air Force Reserves.

John Wayne was no hero. When WWII started, Wayne was a B-list actor. Wayne saw that all the A-list stars, such as Stewart and even the louche dipsomaniac Clark Gable, were volunteering to serve their country. So Wayne claimed a deferment as the married father of four young children. During the war, he became the studios' star of choice. After the war, he was known for starring roles that glorified militarism, such as *Sands of Iwo Jima* and *The Green Berets*.

His family? He left his wife and children during WWII to have an affair with Marlene Dietrich.

Like Wayne and Stewart, someday we will be nothing but memories. We don't want to be remembered as having evaded our duties. All of us have an obligation to see that our clients do not suffer when we leave this vale of tears – that at the minimum, someone can find their files, their original documents, access their escrowed funds, and pick up their cases.

Pennsylvania, like all jurisdictions but <u>lowa</u> and <u>Florida</u>, lacks a disciplinary rule that requires lawyers to identify a successor. The annual registration form has been changed for 2021-2022 to require that lawyers answer as to whether they have designated successor and to identify that person, but designation of a successor is not mandatory.

The Office of Disciplinary Counsel is exploring remedies: CLEs, rule changes, and pro bono projects to enlist lawyers and firms as conservators to clean up the messes left behind by irresponsible lawyers. But you all can avoid this problem easily. Designating a successor to handle your cases in case of death or disability (with her assent, of course) is best, but, please, just maintain your files and original documents like wills in a place they can be found, have a client list, identify your accounts and passwords, and enlist a trusted someone – your executor, support staff, or an associate – to maintain those records and provide access to files and accounts when the Grim Reaper calls.

Be Jimmy Stewart, not John Wayne.

Thomas J. Farrell Chief Disciplinary Counsel

# Articles of Interest

### **Disciplinary Board Cases of Interest for 2020**

Each year we review the cases decided by the Disciplinary Board and/or the Supreme Court of Pennsylvania and identify the most significant cases. Cases may be considered of interest for several reasons:

- That they involve prominent individuals or major news in the Pennsylvania legal community;
- That they raise or decide issues that cast light on ethical considerations in the practice of law;
- That they illuminate some aspect of the function of the disciplinary process; or
- That they are based on facts that are startling enough to warrant attention.

The Supreme Court of Pennsylvania publishes few opinions in disciplinary matters, so cases that result in opinions by the Court are always of particular interest. The Supreme Court delivered three such opinions this year.

### 1. Cynthia Baldwin, No. 151 DB 2017 and Frank G. Fina, No. 166 DB 2017

On February 19, 2020, the Supreme Court published a pair of opinions that arose out of the Jerry Sandusky sex scandal at Penn State University.

One of the opinions concerned Cynthia Baldwin, a former Supreme Court justice, and her conduct as General Counsel for the Pennsylvania State University. Baldwin chose to represent two officials of the University in grand jury proceedings arising out of the scandal. The Supreme Court found that her dual representation of these individuals violated Rules of Professional Conduct regarding competence, protecting confidences, conflicts of interest, and conduct prejudicial to the administration of justice. The Supreme Court ordered that Baldwin receive a <u>public reprimand</u>, which was administered on July 22, 2020.

On the same day, the Supreme Court entered a per curiam order suspending Frank G. Fina from the practice of law for one year and one day, accepting the report and recommendation of the Disciplinary Board. As Chief of Criminal Prosecutions in the Pennsylvania Office of the Attorney General, Fina led the criminal investigation into Sandusky's actions and those of University officials in addressing the scandal. During that investigation, Fina subpoenaed several University officials to testify before a grand jury. According to the opinion, Fina told the supervising judge who approved the subpoena that he would not question Baldwin in any way that would require her to violate attorney-client privilege between her and her clients. In reliance on these representations, the supervising judge allowed the subpoena without conducting a hearing or adjudicating claims of privilege made by successor counsel for the officials. Fina questioned Baldwin before the grand jury, and based in part on Baldwin's testimony, three University officials were indicted. The Hearing Committee and the Disciplinary Board found that Fina's statements of his intentions were misrepresentations because his questioning delved deeply into questions regarding confidential communications.

In the Fina matter, although the Court adopted the Board's opinion in a per curiam order, as is its custom, two justices filed concurring and dissenting statements. Justice Wecht, joined by Justice Donohue, filed a concurring statement writing at length of the special responsibilities of prosecutors. Justice Dougherty filed a concurring and dissenting statement, expressing the view that the sanction of suspension was excessive for the offenses found.

### 2. Jonathan F. Altman, No. 158 DB 2017

On April 22, 2020, the Supreme Court issued an opinion authored by Justice Mundy disbarring Jonathan F. Altman.

Altman represented a female client who had recently been widowed and who was undergoing severe financial problems in several matters. He became involved in a sexual relationship with the client, and extended to her financial assistance in the form of buying her items, hiring contractors to work on her home, and lending her his credit cards in the nature of a loan, in an effort to prevent his wife from finding out about the affair. He did not advise her to obtain independent counsel or make required disclosures in connection with this assistance. He subsequently deducted funds for attorney fees and loan repayments from her real estate settlement, and filed suit against her for additional funds. The Disciplinary Board recommended disbarment.

In the opinion, Justice Mundy considered Altman's arguments that disbarment was an excessive sanction because his sexual relations with the client were consensual. Justice Mundy cited the Explanatory Comment to Rule 1.8(j), which describes the inherent inequality and potential for abuse in sexual relations between a lawyer and a client. The Court found that the imbalance of power between the Respondent and the client outweighed Altman's defense that the actions were consensual.

The Court also agreed with the Board's findings that Altman's failure to explain the terms of his assistance and to advise the client to seek independent counsel were a basis for significant discipline. Altman's actions in the litigation against the client, including the submission of false affidavits, were meritless and prejudicial to the administration of justice.

As to discipline, the Court noted it was not adopting a per se disbarment rule, but given the number and severity of Altman's acts of misconduct, and his lack of remorse or recognition of wrongdoing, the sanction of disbarment was warranted under the facts.

### 3. Reinstatement Denial Cases

One can learn much about what a lawyer seeking reinstatement from suspension or disbarment needs to do by looking at cases where reinstatement is denied. Three reinstatement applications that were denied in 2020 shed light on the standards for reinstatement.

Sabrina L. Spetz, No. 31 DB 2011, sought reinstatement from disbarment in 2011, arising from a criminal conviction for mail and wire fraud emerging from financial improprieties in a closing company. Her application was denied on the grounds that she omitted or downplayed information on her misconduct and prior discipline; failed to list judgments on her application; failed to show she had taken CLE courses, read legal journals, or otherwise kept current on the law; did not do any community or charitable service; and did not call any witnesses to testify as to her reputation and rehabilitation. The Board found that none these failures were disqualifying in themselves, but that collectively they led to a conclusion that Spetz failed to meet her burden of proof for reinstatement.

James D. Hayward, Jr., No. 123 DB 2009, was suspended for misconduct in bankruptcy proceedings in three separate cases in 2011. He applied for reinstatement in 2018. He testified as to his remorse and as to personal problems that led him to seek treatment with a psychologist. However, the Board found that he had not met his burden to show present fitness to practice. The Board cited the testimony of his therapist, who noted that he had no contact from Hayward for a period of three to four months, and declined to testify to a medical certainty that Hayward had overcome the problems that led to his misconduct. The Board also noted that Hayward had not

held law-related employment, that he had large amounts of debt with no apparent plan to repay it, and that he intended to return to the same kind of practice that had led to his previous issues with no plans for coping with those issues.

James Daniel Harrison, No. 54 DB 2000, was disbarred in 2000 on a reciprocal basis with New Jersey for having misappropriated funds and forged client signatures. His testimony showed that he had taken the minimum number of CLE hours and had worked extensively to overcome his alcoholism, living in sober houses for much of the past twenty years. While noting his efforts to obtain sobriety, the Board expressed concern that he had no employment history during this time, and had no reasonable prospects for legal employment, and had shown no initiative to keep current with legal events or seek resources that might help him reestablish a place in the legal community. The case illustrates that the lawyer seeking reinstatement cannot merely rely on good intentions, but must show progress toward demonstrating the skills to practice upon reinstatement.

#### The following cases also presented interesting issues of practice:

#### 4. William Craig Penglase, No. 77 DB 2020

While representing a client in a criminal case, Penglase met with a representative of the media and released incriminating tapes his client had made in compliance with a negotiated plea agreement, without the client's knowledge or consent. The client decided to withdraw from the plea agreement and go to trial, but the released information was broadcast by the media, to the client's prejudice. Penglase attempted to divert blame for the release of the information to others before admitting he was responsible for it. Penglase entered into a Joint Petition for Discipline on Consent, and received a public reprimand.

#### 5. Keith Michael McWhirk, No. 28 DB 2016

McWhirk suffered a loss of consciousness and collapsed due to a medical event. While he was hospitalized, members of his firm went through his cases and found numerous instances of him failing to pursue cases, then misrepresenting to clients that he had filed documents and obtained settlements when he had not. He paid several clients money purported to be settlement proceeds from his own funds. McWhirk entered into a Joint Petition for Discipline on Consent, under which he received a four-year suspension retroactive to his temporary suspension in 2016.

#### 6. Albert M. Sardella, No. 132 DB 2019

The Sardella matter illustrates multiple issues. Sardella was charged with three counts of misconduct. One concerned the maintenance of his Interest on Lawyers' Trust Accounts (IOLTA) account. Sardella maintained an IOLTA-qualified account, but he failed to use it. Instead, he deposited qualified funds into his own accounts. He also failed to keep adequate records on those accounts.

Sardella ran into more serious problems when he agreed to serve as both personal representative and estate attorney for the estate of an uncle. He did not execute a fee agreement with the estate, and did not advise the unrepresented beneficiaries of the option of independent counsel when making at-risk distributions and releases. He charged high fees to the estate, and hired a law firm where his son was employed. He deducted sums from the estate representing legal fees he claimed from representation of the decedent before his death.

The Board found that the estate matter was the most serious of the misconduct, and that Sardella violated nine Rules of Professional Conduct in his handling of the estate. The Disciplinary Board recommended that Sardella be suspended for two years, and the Supreme Court imposed a suspension for that period.

### **PBA Ethics Opinion Addresses COVID Waivers**

The Legal Ethics and Professional Responsibility Committee of the Pennsylvania Bar Association has issued <u>Formal Opinion 2020-600</u>, discussing ethical issues with COVID-19 waivers.

COVID waivers are contractual provisions by which one party agrees to relinquish the right to receive compensation for injuries resulting from exposure to the COVID-19 virus. The question presented is whether any ethical issues would arise from a lawyer asking a client for such a waiver.

The Committee concluded that  $\underline{\text{Rule 1.7(a)(2)}}$  applies to a lawyer seeking a COVID waiver from a client. This rule states that "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ...there is a significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer." The Committee states that the lawyer must comply with Rule 1.7(b), including assurance that the client has given informed consent to the representation. "Informed consent" as defined by <u>Rule 1.0(e)</u> means that the lawyer must communicate adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The Committee expresses no opinion on whether seeking a COVID waiver from a client is a "business transaction" within the meaning of <u>Rule 1.8(a)</u>, which would require written advice to seek independent counsel and informed consent in writing signed by the client. However, the Committee states that "it would be prudent practice to follow the dictates of Rule 1.8(a) in seeking such a waiver."

The opinion adds that enforceability of such a waiver is a legal rather than an ethical question, and expresses no opinion on that issue.

#### District Court Enjoins RPC 8.4(g) Enforcement; Order Stayed on Appeal

On June 8, 2020, the Supreme Court of Pennsylvania amended Rule 8.4 of the Rules of Professional Conduct, Misconduct, to add a new Subsection (g), which states:

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

The rule took effect in six months, on December 8, 2020.

Attorney Zachary Greenberg filed a lawsuit in the U.S. District Court for the Eastern District of Pennsylvania against James C. Haggerty in his role as Chairman of the Disciplinary Board and others, challenging the constitutionality of the rule. On December 7, 2020, <u>Judge Chad Kenney entered a preliminary injunction</u> barring enforcement of the rule, finding that the rule and the comments explaining it constituted viewpoint-based discrimination in violation of the First Amendment.

On December 22, 2020, the Board Defendants filed a Notice of Appeal to the Third Circuit Court

of Appeals, and the parties filed a joint motion for a stay pending appeal. On December 23, 2020, Judge Kenney granted the joint motion for a stay pending appeal.

The case numbers are 2:20-cv-03822-CFK at the District Court and 20-3602 at the Court of Appeals.

### ABA Commission Recognized for Work on Homeless Courts

The U.S. Interagency Council on Homelessness <u>honored the American Bar Association's</u> <u>Commission on Homelessness and Poverty</u> for its work in promoting, training, and technical assistance for <u>special courts dedicated to the homeless</u> across the country.

Such courts provide an opportunity for homeless people to resolve low-level misdemeanor offenses, traffic fines, and warrants in exchange for working toward stability.

During the federal agency's annual Extra Mile Recognitions ceremony, which was hosted virtually via the National Press Club, Barbara Duffield, the Executive Director of SchoolHouse Connection in Washington, D.C., praised the Commission for its work "to prevent and end homelessness by advocating for alternatives to the criminal justice system through diversion, housing and other community-based services."

#### Lawyer Wins \$1 Damages and \$1 Attorney Fees in Snatched Pen Case

New York attorney Jeffrey Rothman was mightily aggrieved. While he was attempting to serve legal papers at police headquarters, two officers informed him the center was closed and refused to accept service. Rothman pulled out a pen to write down the officers' names and shield numbers, but one of them snatched the pen out of his hand and the other threw the papers back at him.

Rothman filed suit in Federal court, alleging constitutional violations, assault, battery, conversion of property, unreasonable detention and excessive force. The case went to a jury trial, where Rothman sought a damages award of \$1, stating that his case was about "principle, not principal." The jury awarded him the \$1 verdict he requested.

Rothman filed a petition seeking attorney fees of \$44,800. In an <u>order entered November 30</u>, 2020, Chief Judge Colin McMahon granted Rothman an attorney fee award of \$1, matching his verdict, along with his costs of \$862. Judge McMahon's opinion began, "Once upon a time, we urged people not to make too much of real but petty grievances by saying, 'Don't make a federal case out of that.' This lawsuit was a violation of that principle writ large." He concluded, "The facts of this case that gave rise to the verdict – a pen seized by a police officer in a fit of pique, then returned within moments to its rightful owner – are just too trivial."

### "Do You Love Me?" Ask the Dancing Robots

Finally, although we are unable to make any connection between them and the law, we can't help but share this video by Boston Dynamics. After the year we had, who doesn't need robots dancing to the Contours?<sup>1</sup>

<sup>1</sup> Music trivia: when Berry Gordy, Jr. wrote "Do You Love Me?", he knew he had a hit single, and planned to have the Temptations record it. However, when he went to find the Temptations, they were nowhere to be found – they had left for a gospel music showcase. The Contours, however, were in the building, and Gordy enlisted them to record the song on the spot. It peaked at No. 3 on the *Billboard* charts and became their biggest hit.



Lawyers Concerned for Lawyers (LCL) is a confidential and safe resource for Pennsylvania attorneys and their family members who may be struggling with their mental health or substance use. An astounding one in three legal professionals will face these issues at some point in their career. Over the past 32 years, LCL has confidentially assisted and supported thousands of individuals who have faced a myriad of challenges (including grief, stress, anxiety, depression, eating disorders, gambling problems, problematic alcohol or prescription drug use, etc.), helping them navigate through dark and difficult times. Members of our profession are dying because they are afraid or unable to ask for help. If you or someone you know is struggling, please call us. You may save a life. There is help and there is hope.

## Resource Guide for the Legal Profession During COVID-19

## Confidential 24/7 Helpline: 1-888-999-1941

Lawyers-only support meetings Peer and staff support & resource coordination LCL resources are free, voluntary, & confidential Free CLE, resources, and information at <u>www.lclpa.org</u> Assessment by a healthcare professional to determine a customized treatment plan, if indicated

## Around the Court



### Court Administrator Geoff Moulton receives the PBA Quality of Life Award

The Pennsylvania Bar Association last month recognized state Court Administrator Geoff Moulton as the 2020 recipient of the C. Dale McClain Quality of Life/Balance Award.

Although the award would typically have been presented during the PBA's annual luncheon, this year's ceremony was held via Zoom – where PBA President David Schwager and Immediate Past President Anne John presented the awards virtually.

Granted by the PBA Quality of Life/Balance Committee, the annual C. Dale McClain Award recognizes the substantial contribution made by a Pennsylvania attorney in identifying issues relevant to balancing the professional and personal lives of their peers, as well as the progress made in assisting attorneys in maintaining and improving their overall quality of life.

The committee's message of recognition read as follows:

Hon. H. Geoffrey Moulton Jr. has contributed in many ways to help improve the quality of life for lawyers, particularly during the pandemic. In leading the Administrative Office of Pennsylvania Courts, he has taken steps to assure the safety, well-being, and quality of life of lawyers and particularly those appearing in the courts at hearings, arguments, trials, and conferences. He has responded with actions needed to overcome obstacles presented by the courts being closed due to COVID-19.

Chief Justice Thomas G. Saylor extended congratulations on behalf of the Pennsylvania Supreme Court: "This well-deserved award honors Geoff's contributions in navigating both the changing circumstances of the pandemic itself and the evolving health guidance affecting lawyers and court proceedings throughout the state."

# CONGRATULATIONS

Pennsylvania Bar Association

2020 Recipient of the C. Dale McClain Quality of Life/Balance Award

HON. H. GEOFFREY MOULTON, JR.

## From the Pennsylvania Bar Association



We have all experienced the unexpected during the COVID-19 pandemic. In the legal profession, the notable unexpected events included the closing of courthouses and office buildings, and the abrupt shift to remote work. Other unexpected scenarios such as a family emergency or a serious medical event may keep you from being able to serve your clients, complete your work, and meet deadlines. As such, it is <u>critical</u> for all attorneys to have an up-to-date succession plan in place that addresses, in a comprehensive way, the issues to be considered for the protection of clients and the practice. The Pennsylvania Bar Association (PBA) urges Pennsylvania attorneys to take the necessary steps to implement a succession plan. The PBA offers <u>many resources</u> on the topic of succession planning, including an exceptional on-demand CLE program and a toolkit to help attorneys build a comprehensive succession plan. Additionally, PBA provides invaluable resources on other topics that are important to the legal profession. To learn more about the benefits of PBA membership, please <u>visit their website</u>.

Please note that the Disciplinary Board of the Supreme Court of Pennsylvania and the Pennsylvania Bar Association (PBA) are separate organizations. For more information about PBA, visit their <u>website</u>.

## We Want To Hear From You...

We are always on the lookout for stories of interest relating to legal ethics, new issues in the practice of law, lawyer wellness, and funny or just plain weird stories about the legal profession. If you come across something you think might be enlightening, educational, or entertaining to our readers or social media followers, <u>pass it along</u>. If you're our original source, there may be a hat tip in it for you.



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