

THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA  
[204 PA. CODE]

Amendments to the Pennsylvania Rules  
of Disciplinary Enforcement Relating to  
Proceedings Where an Attorney is Declared to be Incapacitated or  
Severely Mentally Disabled.

Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it amend subsection (e) of Pennsylvania Rules of Disciplinary Enforcement 301 as set forth in Annex A.

The purpose of the proposed amendments is to provide the Court with reasonable assurance that a respondent-attorney who applies for transfer to disability inactive status meets the standard for “incapacity to defend” as set forth in the Rule—that is, that the respondent-attorney has a disabling condition and that the disabling condition makes it impossible for the respondent-attorney to prepare an adequate defense to the pending disciplinary charges.

Current subsection (e) of Rule 301 is largely procedural in nature with no verified substantive component. Thus, a respondent-attorney who desires to be transferred to disability inactive status in lieu of defending a disciplinary prosecution and possible discipline need only “contend” generally “that the respondent-attorney is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent to prepare an adequate defense.” The current Rule does not require the respondent-attorney to identify the disabling condition or provide proof of a causal connection between the disabling condition and the respondent-attorney’s ability to adequately defend against the charges in the pending disciplinary proceeding. Procedurally, the respondent-attorney need only sign his or her name to a certificate of admission of disability and file the certificate with the Supreme Court. Subsection (e) provides that upon receipt of the certificate, the Court shall enter an order immediately transferring the respondent-attorney to disability inactive status. All pending disciplinary proceedings are held in abeyance indefinitely.

The current rule’s lack of substantive and procedural safeguards offers the potential for abuse. Under the current rule, a respondent-attorney, although capable of preparing a defense, might choose to file a certificate of admission of disability alleging a physical or mental impairment as a preferable alternative to defending the charges, as the filing of the certificate defers the disciplinary proceedings, and the imposition of a disciplinary sanction, indefinitely.

New subsection (e) would require that in submitting the certificate of admission of disability, the respondent-attorney identify the disability, identify the specific or approximate date of the onset or initial diagnosis of the disabling condition, explain the manner in which the disabling condition makes it impossible for the respondent-attorney to prepare an adequate defense, attach at least one medical expert report verifying the respondent-attorney's contention of disability, and attach a signed statement verifying upon knowledge or information and belief the truth of all averments of material fact contained in the certificate. The amount of information that the respondent-attorney must provide is no greater than the amount of information that an employee claiming a disability would be required to provide to an employer. The new Rule would give the respondent-attorney the discretion to submit additional records and documents in support of the existence of the disabling condition or the respondent's contention of lack of physical or mental capacity to prepare an adequate defense.

Consistent with the purpose of providing the Court with reasonable assurance that a respondent-attorney qualifies for transfer to disability inactive status, the new Rule would provide a mechanism for Disciplinary Counsel to challenge the respondent-attorney's request. Upon application by Disciplinary Counsel and for good cause shown, the Court may take or direct such action as the Court deems necessary or proper to a determination of whether the respondent-attorney qualifies for transfer to disability inactive status, including ordering the respondent-attorney to be examined by a medical expert designated by the Court. If the court-designated expert were to arrive at a conclusion contrary to the respondent-attorney's contention of incapacitation and the respondent-attorney were to dispute that conclusion, the Court would have the discretion to remand the matter to the Disciplinary Board for a hearing to determine the respondent-attorney's competency.

Although the Court will decide the presence or absence of "good cause" on a case-by-case basis, the Board anticipates that the term will include the circumstance where the respondent-attorney's application and supporting papers do not clearly support a finding that the respondent-attorney meets the standard for "incapacity to defend," or where Disciplinary Counsel learns of extraneous facts and circumstances suggesting that the respondent-attorney has the capacity to defend.

Finally, the new Rule would articulate the prior practice of treating as confidential the certificate of admission of disability and any supporting documentation, with three exceptions: upon order of the Supreme Court; pursuant to an express written waiver by the attorney; and upon a request by the Pennsylvania Lawyers Fund for Client Security Board, which agency would have the duty under Enforcement Rule 521(a) to preserve the confidential nature of the certificate and supporting documentation. The order of the Court transferring the attorney to disability inactive status would be the only public record.

Interested persons are invited to submit written comments by mail or facsimile regarding the proposed amendments to the 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, Facsimile number (717-231-3382) on or before October 1, 2010.

By The Disciplinary Board of the  
Supreme Court of Pennsylvania

Elaine M. Bixler  
Secretary of the Board

Note: Material to be added is underlined.

## Annex A

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(e) If, during the course of a disciplinary proceeding, the respondent contends that the respondent is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent to prepare an adequate defense, the respondent shall complete and file with the Court a certificate of admission of disability available to the bar through the Office of the Secretary to the Board. The respondent shall serve a copy of the certificate on the Board and disciplinary counsel. The certificate shall:

(1) identify the precise nature of the disability and the specific or approximate date of the onset or initial diagnosis of the disabling condition;

(2) contain an explanation of the manner in which the disabling condition makes it impossible for the respondent to prepare an adequate defense;

(3) have appended thereto the opinion of at least one medical expert that the respondent is unable to prepare an adequate defense and a statement containing the basis for the medical expert's opinion; and

(4) contain a statement, signed by the respondent, that all averments of material fact contained in the certificate and attachments are true upon the respondent's knowledge or information and belief and made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

The respondent may attach to the certificate affidavits, medical records, additional medical expert reports, official records, or other documents in support of the existence of the disabling condition or the respondent's contention of lack of physical or mental capacity to prepare an adequate defense.

Upon receipt of the certificate, the Court thereupon shall enter an order immediately transferring the respondent to inactive status until a determination is made of the respondent's capacity to aid effectively in the preparation of a defense or to continue to practice law in a proceeding instituted in accordance with the provisions of subdivision (d) of this rule[.] unless the Court finds that the certificate does not comply with the requirements of this subdivision, in which case the Court may deny the request for transfer to disability inactive status or enter any other appropriate order. Before or after the entry of the order transferring the respondent to inactive status under this subdivision, the Court may, upon application by disciplinary counsel and for good cause shown, take or

direct such action as the Court deems necessary or proper to a determination of whether it is impossible for the respondent to prepare an adequate defense, including a direction for an examination of the respondent by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the respondent.

The order transferring the attorney to disability inactive status under this subdivision shall be a matter of public record. The certificate of admission of disability and attachments to the certificate shall not be publicly disclosed or made available for use in any proceeding other than a subsequent reinstatement or disciplinary proceeding except:

- (i) upon order of the Supreme Court;
- (ii) pursuant to an express written waiver by the attorney; or
- (iii) upon a request by the Pennsylvania Lawyers Fund for Client Security Board pursuant to Enforcement Rule 521(a) (relating to cooperation with Disciplinary Board).

If the Court shall determine at any time that the respondent is able to aid effectively in the preparation of a defense or is not incapacitated from practicing law, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

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