

## Attorney News - February 2018



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*This newsletter is intended to inform and educate readers regarding activities and initiatives of the Disciplinary Board of the Supreme Court of Pennsylvania.*

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## Disciplinary Board Appointments, Re-Appointments, and Designations

The past month has brought several changes to the Disciplinary Board. At the end of January, the second term of Board Member [Lawrence M. Kelly](#) of Lawrence County expired and by [Order](#) dated December 26, 2017, the Court appointed [Jerry M. Lehocky](#) of Philadelphia, a former Hearing Committee member, to serve on the Board beginning February 1, 2018. The Board thanks Mr. Kelly for his service and dedication.

By [Order](#) dated February 2, 2018, two current Board members, [James C. Haggerty](#) of Philadelphia and [John F. Cordisco](#) of Bucks County, were re-appointed for a second term of three years, beginning April 1, 2018.

By separate [Order](#) dated February 2, 2018, the Supreme Court designated the incoming Chair of the Board as [Douglas W. Leonard](#) of Butler County, one of the two non-lawyer Board members, and the incoming Vice-Chair as [Brian J. Cali](#) of Lackawanna County. These designations will become effective April 1, 2018, following the expiration of the Chairmanship of David E. Schwager and the Vice-Chairmanship of Mr. Leonard.

The Board congratulates these members on their appointments, re-appointments, and designations.

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## Recent Rule Change Activity

### Rule Change on Mandatory Overdraft Notification

By [Order](#) dated December 1, 2017, the Supreme Court of Pennsylvania approved an amendment to [Rule 221 of the Pennsylvania Rules of Disciplinary Enforcement](#), regarding mandatory trust account overdraft notifications by financial institutions.

The rule previously required financial institutions eligible to hold IOLTA (Interest on Lawyer Trust Accounts) funds to enter into an agreement to make a report to the [Lawyers Fund for Client Security Board](#) when an overdraft occurs on a lawyer trust account. The amendment preserves this requirement, but also adds language to subsections (h) and (k) of the rule, requiring that the institution also agree to comply with all [IOLTA Board regulations](#). An institution's failure to make a required report or comply with the IOLTA Board regulations may provide cause for termination of its approval to handle funds. Conforming amendments were made to Disciplinary Board Rule §91.173. The rule change is published at [47 Pa.B. 7557](#) (December 16, 2017).

### Disciplinary Board Rule Amendment

Effective in March, the Board amended Disciplinary Board Rule §89.206, eliminating the requirement that the Board file a statement of taxable expenses with the Court at the time it transmits the record.

## Notice of Proposed Rulemaking

In other rules-related activity, the Board is considering amending Pa.R.D.E. 208(g) and 218(f) regarding administrative fees assessed in the imposition of discipline and filing fees assessed in reinstatements. A [Notice of Proposed Rulemaking](#) was published at 47 Pa.B. 7832, with comments due by March 6, 2018. Additionally, the Board is considering an amendment to Pa.R.D.E. 219(k) regarding the requirements for status changes. A Notice of Proposed Rulemaking will be published in the March 3, 2018 issue of the Pennsylvania Bulletin, with comments due by April 2, 2018.

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## Supreme Court Disbars Former Judge Following Cocaine Conviction

On January 18, 2018, the Supreme Court issued a [Judgment Opinion](#) and a [Concurring Opinion](#) in the disciplinary case of former judge Paul Michael Pozonsky, of Washington County.

Pozonsky served 13 years as a Magisterial District Judge followed by 14 years as a judge of the Court of Common Pleas. As a judge, he adjudicated criminal cases involving persons accused of drug crimes and juvenile delinquency cases, which often involved drug issues. In 2005, he took the lead in creating the Washington County Drug Court and subsequently presided over that court.

For a period between late 2010 and January of 2012, Pozonsky engaged in a pattern of diverting powdered cocaine from evidence to his personal use. He directed state troopers to deposit cocaine seized as evidence in a locker in his courtroom and surreptitiously removed quantities of the drug for his personal use, replacing the stolen drugs with substances such as baking powder.

After his actions were discovered, Pozonsky pleaded guilty to one count of theft by unlawful taking, obstructing the administration of law, and misapplication of entrusted property and the property of a government institution, all second-degree misdemeanors. He served one month of incarceration and completed 23½ months of probation.

Pozonsky pleaded guilty on March 20, 2015, and was sentenced on June 13, 2015. Thereafter, the Court temporarily suspended his license to practice on August 19, 2015. The Office of Disciplinary Counsel initiated formal proceedings and at his disciplinary hearing, Pozonsky submitted evidence of his community service activities along with 68 character letters. He submitted written reports from three substance abuse counselors on his recovery, but no medical evidence. Both the Hearing Committee and the Disciplinary Board recommended his disbarment.

On review, the Supreme Court, in the Judgment Opinion written by Justice Debra Todd, found that the magnitude of Pozonsky's breach of his duty as a public officer outweighed the mitigating evidence he provided. The Court found Pozonsky's adjudication of drug cases while illegally stealing and using drugs himself to be a significant aggravating factor.

The Court declined Pozonsky's argument that the evidence showed a causal connection

between his drug addiction and his actions. Pozonsky pointed to statements in his character letters that attributed his actions to his drug use, and to evidence from counselors who confirmed his addiction. The Court found that this evidence did not meet the mitigation standard set in [Office of Disciplinary Counsel v. Braun](#), 553 A.2d 894 (Pa. 1989), which requires an attorney seeking mitigation to offer expert psychiatric testimony showing that a medical condition was a causal factor in the misconduct. The Court stated:

Our Court has never held that lay opinions alone, are sufficient to establish that an addiction or mental illness was the cause of an attorney's misconduct. Indeed, recent decisions of our Court have emphasized the critical role of expert testimony in establishing such a causal link. [Opinion at 26]

Justice Max Baer filed the Concurring Opinion, joined by Justice Christine Donohue, in which he stated, among other things, that there is no per se rule requiring disbarment in a case where a judge is convicted of a crime. In addition, he wrote that greater weight should be given to the evidence of Pozonsky's addiction. He agreed with the principle that evidence in mitigation must take the form of expert testimony, and concluded that the failure to offer such evidence compelled him to concur with the majority's decision to disbar Pozonsky. He expressed the view that if such evidence had been offered, the outcome may have been different. He stated:

I find it ironic that the therapeutic justice that Respondent dispensed to the numerous drug-addicted criminal defendants that came before him, many of whom he led to the path of recovery, is not so readily available to him in this disciplinary matter .... [Concurring Opinion at 4]

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## Competence and E-Discovery: New Duties, New Expectations

As further evidence that times are changing, lawyers today must keep up with a constantly evolving technological environment. Comment 8 to [Rule 1.1](#) of the Pennsylvania Rules of Professional Conduct, addressing competence, states:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. [emphasis added]

The need to keep up with the pace of technology is particularly advisable in the area of electronic discovery. Attorneys John A. Greenhall, Anthony L. Beyer, and Kathleen M. Morley have written an article, [Attorney Ethical Duties in E-Discovery: It's Important to Stay Current](#), in the Legal Intelligencer, analyzing ethical requirements in the law for acquiring and exercising competence in dealing with e-discovery.

A leading source of guidance as to attorneys' duties in responding to e-discovery is [Formal Opinion No. 2015-193](#), published by the State Bar of California Standing Committee on Professional Responsibility and Conduct in 2015. That opinion identifies nine essential duties a lawyer handling discovery of electronically stored information (ESI) must be able to perform:

- Initially assess e-discovery needs and issues;

- Implement or cause to implement appropriate electronically stored information (ESI) preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;
- Identify custodians of potentially relevant ESI;
- Engage in a competent and meaningful meet-and-confer with opposing counsel concerning an e-discovery plan;
- Perform data searches;
- Collect responsive ESI in a manner that preserves the integrity of that ESI; and
- Produce responsive nonprivileged ESI in a recognized and appropriate manner.

If a lawyer is not currently competent to discharge these duties, the opinion states, he or she must take one of three courses: 1) acquire the necessary competence; 2) associate or consult with someone who has necessary competence; or 3) decline the representation.

The article also discusses preservation issues, such as the need to issue hold letters and monitor the preservation of electronic evidence. Counsel cannot merely send the letter and assume the client will comply; oversight is necessary.

Counsel must also assure that appropriate procedures for searching electronic data are chosen and applied. Keyword searches alone may not be enough; computer-assisted review, or predictive coding, may also be required, and the attorney must have the necessary competence to select an appropriate review system and implement it.

Finally, the article notes that [Rule 5.3](#) of the Rules of Professional Conduct requires that counsel exercise a reasonable degree of supervision of nonlawyers enlisted in compliance with e-discovery requirements. Once a qualified outside vendor is chosen, the attorney has an obligation to make reasonable efforts to exercise oversight and quality control to assure the accuracy of the vendor's work. Comments 3 and 4 to the Rule discuss the use of outside vendors at some length.

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## Alexa, What Happened Next?

The blizzard of technological innovation that is modern life has opened up a new field of inquiry for electronic discovery: intelligent assistants.<sup>1</sup> Devices such as the Amazon Echo, Google Assistant and Home, Microsoft Cortana, and Apple Siri are often awake and listening throughout the day,<sup>2</sup> and may often capture information important in litigation. Are they the next gold mine for electronic discovery?

Attorneys Robert D. Lang and Lenore E. Benessere, of D'Amato & Lynch, LLP in New York City, have written [Alexa, Siri, Bixby, Google's Assistant, and Cortana Testifying in Court](#). The article identifies several discovery issues which the use of digital assistants may pose. Many devices, such as the Amazon Echo, record information and stream it to the Cloud, where a history may be available. The authors cite examples where this stored information may be relevant, such as casting light on a litigant's daily activities, search history, timers and alarms, and interests.<sup>3</sup> Another implication of discovery of intelligent devices is the possibility they could allow individuals to plant fabricated evidence, such as ordering specific items or documenting activities that did not actually occur.

Some of these devices permit users to delete history, which creates a need to identify devices

used and demand preservation of evidence at an early stage of litigation.

The law regarding disclosure of information from intelligent assistants is in its infancy, but there is no reason to believe they will be any more immune from discovery than computers or cell phones. Important questions are yet to be answered, but the reach of discovery law to intelligent devices will, no doubt, develop in the coming years.

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<sup>1</sup> With all due respect to the intelligence of legal assistants, that is not what we mean.

<sup>2</sup> Even when [she loses her voice](#).

<sup>3</sup> [Whatever one's daily activities and interests may be](#).

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## Hear Ye, Hear Ye: Cease and Desist

If you have been living in a cave or a monastery high in the mountains for the last few months, you might have missed the popular "[Dilly Dilly](#)" [advertisements](#) for Anheuser-Busch InBev's Bud Light. When Modist Brewery of Minneapolis launched a new brew, "Dilly Dilly" Mosaic Double IPA, AB InBev had to protect its trademark. In keeping with the theme of the advertising campaign, they did so with a humorous, Medieval-sounding notice, delivered by a [town crier](#). One must admit, there are not too many cease-and-desist letters that threaten "a private tour of the pit of misery." Modist was allowed to use the name for a limited run in its own taproom. Better that than a tour of the pit of misery.

The Pittsburgh Steelers were "a true friend of the crown" in an audible play call this season, "Dilly Dilly," and the Philadelphia Eagles were "an even truer friend of the crown" in Super Bowl preparation and celebration, proclaiming "Philly Philly."

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## Disciplinary Board Introduces New Website

If you have not visited the Disciplinary Board's [website](#) since January 1, you should check out the new look. The website has been completely redesigned to feature a clear, readable front page with rapid access to the information most often sought by users. A steady stream of news items will keep users up to date on the latest developments in Pennsylvania related to attorney registration, discipline, and professional responsibility.

This website not only has a new look and feel, but, among other things, new features:

- [Filing a complaint online](#)
- Interactive Rules
  - [Rules of Professional Conduct](#)
  - [Rules of Disciplinary Enforcement](#)
  - [Disciplinary Board Rules and Procedures](#)

- [Public Proceedings](#) (found on the Home page)
- [Court Opinions on Disciplinary Matters](#)
- [Meet the Board](#)

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## Coming Soon: An All-New Disciplinary Board Newsletter

Stay tuned for the first edition of our re-designed newsletter,  
coming in April!

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## Let Us Know

If you have a correction, a question, a comment, an observation, or a clarification, please email us at [DBoard.News@pacourts.us](mailto:DBoard.News@pacourts.us).

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