

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

Proposed Amendments to Pennsylvania Rule of Disciplinary Enforcement 214 to
Require an Attorney to Self-Report a Conviction of Any Crime, to Authorize Disciplinary
Counsel to Request a Rule to Show Cause Why an Attorney Should Not Be Temporarily
Suspended Based On a Conviction For Any Crime, and to Authorize Disciplinary
Counsel to Commence an Informal or Formal Proceeding Under Enforcement Rule 208
Immediately After Filing the Certificate of Conviction With the Supreme Court

Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania (“Board”) is considering recommending to the Pennsylvania Supreme Court that the Court amend Pennsylvania Rule of Disciplinary Enforcement 214 as set forth in Annex A. The primary intent of the revisions is twofold: first, to provide uniformity between those crimes that an attorney must report to the Board, and those crimes that the Board must report to the Supreme Court; and second, to streamline the process of prosecuting conviction matters by eliminating the procedural stage in which the Supreme Court refers a conviction matter to the Board.

Courts and criminal prosecutors do not always report a Pennsylvania attorney’s conviction to the Board. Consequently, the reporting requirement of subdivision (a) of Rule 214, which imposes upon attorneys a duty to self-report a criminal conviction to the Board, is integral to an effective system of attorney discipline.

Under current subdivision (a), however, only some attorneys are obligated to self-report a conviction. A self-report is required only if the conviction is for a “serious crime,” which is defined in subdivision (i) as “a crime that is punishable by imprisonment for one year or upward in this or any other jurisdiction.”

This limited duty to self-report is not compatible with subdivisions (c) and (g) of Rule 214. Under the provisions of those subdivisions, Disciplinary Counsel must notify the Court of **any** conviction that comes to Disciplinary Counsel’s attention, and the Court is obligated to review **all** conviction matters to determine whether or not disciplinary action is warranted.

The limited duty to self-report also means that **only some** attorneys who are convicted of a non-“serious” crime are subjected to the disciplinary process, namely, those attorneys who report their conviction to the Board even though they are not required to do so, and those attorneys whose conviction otherwise comes to the attention of Disciplinary Counsel. It is not uncommon for Disciplinary Counsel to learn of an attorney’s conviction for a non-“serious” crime years after the fact, when the salutary effect of discipline is diminished.

The disparity between reportable crimes (i.e., serious crimes) and actionable crimes (i.e., serious crimes and non-“serious” crimes) can also lead to reporting anomalies when the legislature makes changes in the criminal law. Under prior Pennsylvania law, for example, the maximum term of imprisonment for the crime of driving under the influence of alcohol or controlled substance (DUI) was not less than two years, 75 Pa.C.S. § 3731(e) (repealed), and therefore all DUI offenses satisfied the definition of a “serious crime” and were reportable under Rule 214. Effective February 1, 2004, the General Assembly replaced 75 Pa.C.S. § 3731 with 75 Pa.C.S. § 3802, which created new substantive definitions for DUI, and with § 3803, which classified or reclassified some DUI offenses as an ungraded misdemeanor carrying a term of imprisonment of not more than six months. Consequently, not all DUI offenses are currently reportable, even though all DUI offenses remain actionable under Rule 214 and typically result in discipline.

In summary, abolishing the distinction between “serious” and non-“serious” crimes, and expanding the self-reporting requirement to require attorneys to report when convicted of any crime, will enhance Rule 214’s effectiveness, make the Rule more evenhanded in its application, and eliminate reporting anomalies that result from legislative action. The practical effect of the proposed Rule is that attorneys would be obligated to report to Disciplinary Counsel those crimes that Disciplinary Counsel is obligated to report to the Court.

Under proposed subdivision (d)(1), Disciplinary Counsel would have the discretion to ask the Court to issue a rule to show cause based upon a conviction for any crime. While the Board anticipates that such a request in a non-felony matter will be rare, it may be appropriate for Disciplinary Counsel to request a rule to show cause, for example, when the respondent-attorney is taken into custody or remains incarcerated at the time of the conviction or sentence, or where the conviction is part of a pattern of criminality or disciplinary violations. The amendments to the Note after subdivision (d)(5) would eliminate any question that the Court has the discretion to consider mitigating or aggravating circumstances.

Another procedural change, which is set forth in subdivision (f)(1) of the proposed Rule, would allow Disciplinary Counsel to commence an informal or formal proceeding under Enforcement Rule 208 immediately after filing the certificate of conviction with the Court. By eliminating the Rule’s current requirement, as set forth in subdivision (f)(1) and the Note to subdivision (g), that Disciplinary Counsel take no action unless and until the Court refers the matter to the Board or to the Office of Disciplinary Counsel, the proposed change will accelerate the time from conviction to disciplinary disposition primarily in matters involving the less serious and minor offenses. In those cases where Disciplinary Counsel requests a rule to show cause because removal from practice is indicated by the nature of the criminal offense or surrounding circumstances, no disposition will occur prior to the Court’s issuing a rule or entering an order declining to do so.

Consistent with the restriction in the current Rule, new subdivision (f)(1) provides that in those instances in which Disciplinary Counsel files a petition for discipline, a hearing on the petition shall be deferred until sentencing and all appeals from the conviction have been concluded. Consistent with precedent, new subdivision (f)(1) limits the deferral to the conclusion of the “direct” appeal process. See *In re Anonymous No. 69 DB 1985*, 50 Pa. D.&C.3d 297, 306-307 (1988).

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 12, 2011.

By The Disciplinary Board of the
Supreme Court of Pennsylvania

Elaine M. Bixler
Secretary of the Board

Note: Material to be added is underlined.
Material to be deleted is bolded and bracketed.

Rule 214. Attorneys convicted of crimes.

(a) An attorney convicted of **[a serious]** any crime shall report the fact of such conviction within 20 days to the **[Secretary of the Board]** Office of Disciplinary Counsel. The responsibility of the attorney to make such report shall not be abated because the conviction is under appeal or the clerk of the court has transmitted a certificate to Disciplinary Counsel pursuant to subdivision (b).

(b) The clerk of any court within the Commonwealth in which an attorney is convicted of any crime, or in which any such conviction is reversed, shall within 20 days after such disposition transmit a certificate thereof to Disciplinary Counsel, who shall file such certificate with the Supreme Court.

(c) Upon being advised that an attorney has been convicted of a crime **[within this Commonwealth]**, Disciplinary Counsel shall secure and file **[a certificate in accordance with the provisions of subdivision (b). If the conviction occurred in another jurisdiction, it shall be the responsibility of Disciplinary Counsel to secure and file]** a certificate of such conviction with the Supreme Court.

(d) (1) Upon the filing with the Supreme Court of a certified copy of an order demonstrating that an attorney has been convicted of a **[serious]** crime, the Court may enter a rule directing the respondent-attorney to show cause why the respondent-attorney should not be placed on temporary suspension, which rule shall be returnable within ten days.

(2) If a rule to show cause has been issued under paragraph (1), and the period for response has passed without a response having been filed, or after consideration of any response, the Court may enter an order requiring temporary suspension of the practice of law by the respondent-attorney pending further definitive action under these rules.

(3) Any order of temporary suspension issued under this rule shall preclude the respondent-attorney from accepting any new cases or other client matters, but shall not preclude the respondent-attorney from continuing to represent existing clients or existing matters during the 30 days following entry of the order of temporary suspension.

(4) The respondent-attorney may at any time petition the Court for dissolution or amendment of an order of temporary suspension. A copy of the petition shall be served upon Disciplinary Counsel and the Secretary of the Board. A hearing on the petition before a member of the Board designated by the Chair of the Board shall be held within ten business days after service of the petition on the Secretary of the Board. The

designated Board member shall hear the petition and submit a transcript of the hearing and a recommendation to the Court within five business days after the conclusion of the hearing. Upon receipt of the recommendation of the designated Board member and the record relating thereto, the Court shall dissolve or modify its order, if appropriate.

(5) At any time before a plea or verdict or after a guilty plea or verdict of guilt in the criminal proceeding, Disciplinary Counsel and the respondent-attorney may file with the Court a joint petition for temporary suspension of the respondent-attorney on the ground that the respondent-attorney's temporary suspension is in the best interest of the respondent and the legal system.

Note: The subject of the summary proceedings authorized by subdivision (d) **[is]** will ordinarily be limited to whether the condition**[s]** triggering the application of subdivision (d) exists, i.e., proof that the respondent-attorney is the same person as the individual convicted of the offense charged **[and that the offense is a serious crime], [and will not include]** although the Court has the discretion to consider such subjects as mitigating or aggravating circumstances. The provision of subdivision (d)(3) permitting the respondent-attorney to continue representing existing clients for 30 days is intended to avoid undue hardship to clients and to permit a winding down of matters being handled by the respondent-attorney, and the permissible activities of the respondent-attorney are intended to be limited to only those necessary to accomplish those purposes.

(e) A certificate of conviction of an attorney for a crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.

(f)(1) Upon the **[receipt]** filing of a certificate of conviction of an attorney for a **[serious]** crime, **[the Court shall, in addition to any order of suspension it may enter in accordance with the provisions of subdivision (d), also refer the matter to the Board for the institution of a formal proceeding before a hearing committee in the appropriate disciplinary district in which the sole issue to be determined shall be the extent of the final discipline to be imposed, except that a disciplinary proceeding so instituted shall not be brought to hearing until sentencing and all appeals from the conviction are concluded]** Disciplinary Counsel may commence either an informal or formal proceeding under Enforcement Rule 208, except that Disciplinary Counsel may institute a formal proceeding before a hearing committee or special master by filing a petition for discipline with the Board without seeking approval for the prosecution of formal charges under Enforcement Rule 208(a)(3). If a petition for discipline is filed, a hearing on the petition shall be deferred until sentencing and all direct appeals from the conviction have been concluded. The sole issue at the hearing shall be the extent of the discipline or, where the Court has temporarily suspended the attorney under subdivision (d) of this rule, the final discipline to be imposed.

Note: Subdivision (f)(1) authorizes Disciplinary Counsel to proceed under Rule 208 concurrently with the Court's exercise of jurisdiction under subdivision (d) of this Rule.

(2) Notwithstanding the provision of paragraph (1) that a hearing shall not be held until sentencing and all appeals from a conviction have been concluded, a respondent-attorney who has been temporarily suspended pursuant to this rule shall have the right to request an accelerated disposition of the charges which form the basis for the temporary suspension by filing a notice with the Secretary of the Board and Disciplinary Counsel requesting accelerated disposition. Within 30 days after filing of such a notice, Disciplinary Counsel shall file a petition for discipline, if such a petition has not already been filed, and the matter shall be assigned to a hearing committee for accelerated disposition. The assignment to a hearing committee shall take place within seven (7) days after the filing of such a notice or the filing of a petition for discipline, whichever occurs later. Thereafter the matter shall proceed and be concluded by the hearing committee, the Board and the Court without appreciable delay. If a petition for discipline is not timely filed or assigned to a hearing committee for accelerated disposition under this paragraph, the order of temporary suspension shall be automatically dissolved, but without prejudice to any pending or further proceedings under this rule.

Note: The "without appreciable delay" standard of subdivision (f)(2) of the rule is derived from *Barry v. Barchi*, 443 U.S. 55, 66 (1979). Appropriate steps should be taken to satisfy this requirement, such as continuous hearing sessions, procurement of daily transcript, fixing of truncated briefing schedules, conducting special sessions of the Board, etc.

[(g) Upon receipt of a certificate of conviction of any attorney for a crime other than a serious crime, the Court shall take such action as it deems warranted. The Court may in its discretion take no action with respect to convictions for minor offenses.

Note: The actions the Court may take under subdivision (g) include reference of the matter to the Office of Disciplinary Counsel for investigation and possible commencement of either a formal or informal proceeding, or reference of the matter to the Board with direction that it institute a formal proceeding.]

[(h) g An attorney suspended under the provisions of subdivision (d) may be reinstated immediately upon the filing by the Board with the Court of a certificate demonstrating that the underlying conviction has been reversed, but the reinstatement will not terminate any formal proceeding then pending against the attorney.

[(i) As used in this rule, the term "serious crime" means a crime that is punishable by imprisonment for one year or upward in this or any other jurisdiction.]

[(j) h For the purposes of this rule, Enforcement Rule 203(b)(1) and Enforcement Rule 402, "conviction" means any guilty verdict, whether after trial by judge or jury, or finding of guilt, and any plea of guilty or *nolo contendere* that has been accepted by the court, whether or not sentence has been imposed.