

# Pennsylvania Rules of Disciplinary Enforcement

## CONSERVATORS FOR INTERESTS OF CLIENTS

Rule 321. **Appointment of conservator to protect interests of clients of absent attorney.**

(a) **Application.** Upon application of Disciplinary Counsel or any other interested person with the written concurrence of Disciplinary Counsel, the president judge of a court of common pleas shall have the power to appoint one or more eligible persons to act as conservators of the affairs of an attorney or formerly admitted attorney if:

(1) the attorney maintains or has maintained an office for the practice of law within the judicial district; and

(2) any of the following applies:

(i) the attorney is made the subject of an order under Enforcement Rule 208(f) (relating to emergency interim suspension orders and related matters); or

(ii) the president judge of the court of common pleas pursuant to Enforcement Rule 217(g) (relating to formerly admitted attorneys) by order directs Disciplinary Counsel to file an application under this rule; or

(iii) the attorney abandons his or her practice, disappears, dies or is transferred to disability inactive status; and

(3) no partner or other responsible successor to the practice of the attorney is known to exist.

(b) **Service.** A copy of the application for appointment of a conservator under this rule shall be personally served upon the absent attorney or the personal representative or guardian of the estate of a deceased or incompetent absent attorney. If personal service cannot be obtained, then a copy of the application shall be served in the manner prescribed by Enforcement Rule 212 (relating to substituted service).

(c) **Hearing.** The president judge of the court of common pleas shall conduct a hearing on the application no later than seven days after the filing of the application. At the hearing the applicant shall have both the burden of production and the burden of persuading the court by the preponderance of the credible evidence that grounds exist for appointment of a conservator.

(d) **Order.** Within three days after the conclusion of the hearing on the application, the president judge shall enter an order either granting or denying the application. The order shall contain findings of fact and a statement of the grounds upon which the order is based. **The appointing court may adopt, as its findings of fact and statement of grounds, some or all of the allegations of the application, in which case the appointing court must attach the application to the appointing order.** If no appearance has been entered on behalf of the absent attorney, a copy of the order shall be served upon the absent attorney in the manner prescribed by [S] subdivision (b) of this rule.

(e) **Qualifications of conservator.** The conservator or conservators shall be appointed by the president judge, from among members of the bar of this Commonwealth, subject to the following:

(1) non-disciplinary counsel conservators:

(i) shall not represent any party who is adverse to any known client of the absent attorney; and

(ii) shall have no adverse interest or **adverse** relationship with the absent attorney or his or her estate.

Note: Nothing in the Rules of Professional Conduct relating to conflict of interest, confidentiality, or any other provision, shall prevent the Office of Disciplinary Counsel from serving as conservator, and from subsequently pursuing an investigation, and disciplinary prosecution of the absent attorney, based upon information gathered during the course of Disciplinary Counsel's service as conservator.

(f) **Statutes of limitations and time for appeal.** The filing by Disciplinary Counsel or any other interested person of an application for the appointment of a conservator under these rules shall be deemed for the purposes of any statute of limitations or limitation on time for appeal as the filing in the court of common pleas or other proper court or magisterial district court of this Commonwealth on behalf of every client of the absent attorney of a complaint or other proper process commencing any action, proceeding, appeal or other matter arguably suggested by any information appearing in the files of the absent attorney if:

(1) the application for appointment of a conservator is granted, and

(2) substitute counsel actually files an appropriate document in a court or magisterial district court within 30 days after executing a receipt for the file relating to the matter.

Note: Under 42 Pa.C.S. § 5503(b) (relating to implementing court rules) the Supreme Court may define by rule the document which when filed constitutes the commencement of a matter for purposes of Chapter 55 of the Judicial Code (relating to limitation of time). Thus the application by Disciplinary Counsel under this rule is an omnibus pleading which stays the running of all statutes of limitations and appeal times pending a 30-day review of the files of the absent attorney.

(g) **Automatic stay.** The filing by Disciplinary Counsel or any other interested person of an application for the appointment of a conservator under these rules shall operate as an automatic stay of all pending legal or administrative proceedings in this Commonwealth where the absent attorney is counsel of record until the earliest of such time as:

- (1) the application for appointment of a conservator is denied;
- (2) the conservator is discharged;
- (3) the court, tribunal, magisterial district court or other government unit in which a matter is pending orders that the stay be lifted; or
- (4) 30 days after the court, tribunal, magisterial district court or other government unit in which a matter is pending is notified that substitute counsel has been retained.

(h) As used in this rule, the term “government unit” has the meaning set forth in 42 Pa.C.S. § 102 (relating to definitions).

Note: Under 42 Pa.C.S. § 5503(b) (relating to implementing court rules) the Supreme Court may define by rule the document which when filed constitutes the commencement of a matter for purposes of Chapter 55 of the Judicial Code (relating to limitation of time). Thus the application by Disciplinary Counsel under this rule is an omnibus pleading which stays the running of all statutes of limitations and appeal times pending a 30-day review of the files of the absent attorney.

#### Rule 322. **Duties of conservator.**

(a) **Possession of files; warrants.** The conservator shall take immediate possession of all files of the absent attorney. If such possession cannot be obtained peaceably, the conservator shall apply to the appointing court for issuance of a warrant authorizing seizure of the files. Probable cause for issuance of such a warrant shall be an

affidavit executed by the conservator reciting the existence of the conservatorship and the fact that the persons in control of the premises where the files are or may be located will not consent to a search for them or their removal or other facts showing that the files cannot be obtained without the use of the process of the court.

(b) **Inventory.** The conservator shall make a written inventory of all files taken into his or her possession.

(c)(1) **Identification of clients.** The conservator shall make a reasonable effort to identify all clients of the absent attorney whose files were opened within five (5) years of the appointment of the conservator, regardless of whether the case is active or not, and a reasonable effort to identify all clients whose cases are active, regardless of the age of the file. The conservator shall send all such clients, and former clients, written notice of the appointment of a conservator, the grounds which required such appointment, and the possible need of the clients to obtain substitute counsel. All such notices shall include the name, address and telephone number of any lawyer referral service or similar agency available to assist in the location of substitute counsel. The conservator shall, if necessary, send a second written notice to all clients of the absent attorney whose files appear to be active.

(2) **Notice to clients.** All clients whose files are identified by the conservator as both inactive and older than five (5) years shall be given notice by publication of the appointment of a conservator, the grounds which required such appointment, and the possible need of the clients to obtain substitute counsel. All such notices shall include the name, address and telephone number of any lawyer referral service or similar agency available to assist in the location of substitute counsel. The specific method of publication shall be approved by the appointing court, as to both the method, and duration, of publication, **although at minimum a notice shall appear on one day in each of a newspaper of general circulation and the legal journal in the county in which the absent attorney maintained a principal office.** The conservator shall deliver proofs of publication to the appointing court at the time of filing the application for discharge.

(3) **Return and destruction of files.** A file may be returned to a client upon the execution of a written receipt, or released to substitute counsel upon the request of the client and execution of a written receipt by such counsel. The conservator shall **deliver all such receipts to the appointing court at the time of filing the application for discharge]****maintain an electronic record of all receipts.** On approval by the appointing court of the application for discharge, all files remaining in the possession of the conservator shall be destroyed by the conservator in a secure manner which protects the confidentiality of the files.

(d) **Representation prohibited during conservatorship.** **Until the conservatorship is terminated, [N]**neither the conservator nor any partner, associate or other lawyer practicing in association with the conservator shall **represent any of the absent attorney's clients[:]**

(1) **Make any recommendation of counsel to any client identified as a result of the conservatorship in connection with any matter identified during the conservatorship.**

(2) **Represent such a client]** in connection with[:

(i)] any matter identified during the conservatorship[:]; **[or**

(ii) any other matter during or for a period of three years after the conclusion of the conservatorship.] **With the consent of the client, the conservator may refer a client's matter to a lawyer other than a lawyer disqualified from providing representation under this subdivision (d); the conservator shall not be eligible to receive a referral fee.**

(e) **Reports.** The conservator shall file a written report with the appointing court and the Board no later than 30 days after the date of appointment covering the matters specified in **[S]** subdivisions (a) through (c) of this rule. If those duties have not been accomplished, then the conservator shall state what progress has been made in that regard. Thereafter, the conservator shall file a similar written report every 60 days until discharge.

(f) **Notification of estate about costs.** In the case of a deceased attorney, the conservator shall notify the executor of the estate of the Disciplinary Board's need to be reimbursed by the estate for the costs and expenses incurred in accordance with Rule 328(b) (relating to compensation and expenses of conservator).

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#### **Rule 324. Bank and other accounts.**

(a) **Notice of appointment and service of order.** A conservator shall notify all banks and financial institutions in which the absent attorney maintained either professional or trustee accounts of the appointment of a conservator under these rules. Service on a bank or financial institution of a certified copy of the order of appointment of the conservator shall operate as a modification of any agreement or deposit among such bank or financial institution, the absent attorney and any other party to the account so as to make the conservator a necessary signatory on any professional or trustee account maintained by the absent attorney with such bank or financial institution. The appointing court on application may by order direct that the conservator shall be sole signatory on any such account to the extent necessary for the purposes of these rules and may direct the disposition and distribution of client and other funds.

(b) **Prompt distribution of funds.** The conservator shall cause all funds of clients in the custody of the absent attorney to be returned to the clients as soon as possible,

allowing for deduction of expenses or other proper charges owed by the clients to the absent attorney.

(c) **Retention of CPA.** The conservator may engage the services of a certified public accountant when considered necessary to assist in the bookkeeping and auditing of the financial accounts and records of the absent attorney.

(1) If the state of the financial accounts and records of the absent attorney, or other relevant circumstances, render a determination as to ownership of purported client funds unreasonable and impractical, the conservator shall petition the appointing court for permission to pay all funds held by the absent attorney in any trust, escrow, or IOLTA account, to the Pennsylvania Lawyers Fund **[F]**for Client Security. Any petition filed under this subsection shall be served by publication, the specific method and duration of which shall be approved by the appointing court.

(d) **Distribution of remaining funds.** Whenever it appears that sufficient funds are in the possession of the conservatorship to permit the return of all client funds in the custody of the absent attorney, and otherwise to complete the conservatorship and pay its expenses authorized under Enforcement Rule 328 (relating to compensation and expenses of conservator), the conservator shall permit the absent attorney or his or her estate to take full possession of any remaining funds.

#### Rule 325. **Duration of conservatorship.**

Appointment of a conservator pursuant to these rules shall be for a period of no longer than **[six] nine** months. The appointing court shall have the power, upon application of the conservator and for good cause, to **[extend the appointment for an additional three months] grant one or more extensions of the appointment, each extension not to exceed six months.** Any order granting **[such]** an extension shall include findings of fact in support of the extension. **[No additional extensions shall be granted absent a showing of extraordinary circumstances.]**

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#### Rule 327. **Liability of conservator.**

(a) A conservator appointed under these rules shall:

(1) Not be regarded as having an attorney-client relationship with clients of the absent attorney, except that the conservator shall be bound by the obligation of confidentiality imposed by the Rules of Professional Conduct with respect to information acquired as conservator.

(2) Have no liability to the clients of the absent attorney except for injury to such clients caused by intentional, wilful, or grossly negligent breach of duties as a conservator.

(3) Be immune **[to separate] from civil** suit brought by or on behalf of the absent attorney. Any objections by or on behalf of the absent attorney or any other person to the conduct of the conservator shall be raised in the appointing court during the pendency of the conservatorship.

**Rule 328. Compensation and expenses of conservator.**

(a) **Compensation.** A conservator not associated with the Office of Disciplinary Counsel shall be compensated at an hourly rate identical to that received by court-appointed counsel at the non-court appearance rate in the judicial district where the conservator was appointed. When the conservator believes that extraordinary circumstances justify an enhanced hourly rate, the conservator may apply to the Board Chair for enhanced compensation. Such an application shall be granted only in those situations in which extraordinary circumstances are shown to justify enhanced compensation.

(b) **Expenses.** The necessary expenses (including, but not limited to, the fees and expenses of certified public accountant engaged pursuant to Enforcement Rule 324(c)) and any compensation of a conservator or any attendant staff shall, if possible, be paid by the absent attorney or his or her estate. Any expenses and any compensation of the conservator that are not reimbursed to the Board shall be paid as a cost of disciplinary administration and enforcement. Payment of any costs incurred by the Board pursuant to this rule that have not been reimbursed to the Board may be made a condition of reinstatement of a formerly admitted attorney or may be ordered in a disciplinary proceeding brought against the absent attorney.