Cincinnati Bar ASSOCIATION

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11th Hour CLE

2018 Video Replay Series

Session I

Thursday, December 27, 2018

11th Hour CLE

2018 Video Replay Series

Session 1
December 27, 2018

9 a.m.	Go Ahead and Tattle . . . On Yourself Brian M. Spiess, Esq., *Montgomery Rennie & Jonson*	TAB A
10 a.m.	Pretrial & Trial Ethical Issues Thomas L. Eagen, Jr., *Eagen & Wykoff Co., LPA* and Louis F. Gilligan, Esq., *Keating Muething & Klekamp, PLL*	TAB B
11 a.m.	Break	
11:15 a.m.	Social Media: Common Sense and Caution Brian R. Redden, Esq. and Brett Renzenbrink, Esq., *Buechner Haffer Meyers & Koenig Co., LPA*	TAB C
11:45 a.m.	Substance Abuse and Mental Health Issues Patrick Garry, Esq., *OLAP*	TAB D
12:15 p.m.	Adjourn	

TAB
A

Brian M. Spiess, Esq.

Brian Spiess is an Assistant General Counsel at the University of Cincinnati. Prior to joining UC, Brian was an attorney with the Cincinnati firm of Montgomery, Rennie & Jonson, where his practice included employment law and representing judges and attorneys in disciplinary matters. Prior to law school, Brian worked as a journalist for 12 years, most recently with the Cincinnati Enquirer. He lives in Fort Thomas, Kentucky with his wife and three children.

Ethics CLE – June 7, 2017

1

NOBODY LIKES A TATTLETALE, DANNY … EXCEPT OF COURSE ME

2

Go ahead and tattle … *on yourself*

The importance of cooperating in the disciplinary process, even when it means admitting you were wrong.

- Brian M. Spiess

3

4

DISCIPLINARY PROCESS

See handout

5

DISCIPLINARY INVESTIGATION

- Grievance submitted to Disciplinary Counsel or Certified Grievance Committee ("Relator")
- Relator investigates the claims to determine whether the lawyer or judge ("Respondent") committed misconduct
- Relator may send letter of inquiry to Respondent, as well as follow up letters based on Respondent's response
- Relator may depose Respondent

6

AGGRAVATING FACTORS

- Prior disciplinary offenses
- Dishonest or selfish motive
- Pattern of misconduct and multiple offenses
- Lack of cooperation with disciplinary authorities
- Vulnerability of and resulting harm to clients or other victims
- Failure to make restitution

MITIGATING FACTORS

- Absence of prior disciplinary record
- Absence of dishonest or selfish motive
- Existence of a recognized and properly diagnosed disorder that contributed to the misconduct
- Cooperative attitude
- Good character or reputation
- Timely restitution to clients

7

SANCTIONS FOR MISCONDUCT

- Public reprimand
- Suspension from the practice of law for:
  - 6 months
  - 12 months
  - 18 months
  - 24 months

  (subject to a stay in whole or in part and any conditions of probation)
- An indefinite suspension precludes respondent for applying for reinstatement for minimum of two years
- Permanent disbarment, forever precluding respondent from returning to the practice of law in Ohio.

8

OHIO RULES OF PROFESSIONAL CONDUCT

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

(a) **knowingly make a false statement of material fact;**

(b) in response to a demand for information from an admissions or disciplinary authority, **fail to disclose a material fact or knowingly fail to respond,** except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

9

COOPERATING BY COMING CLEAN

- Self Report
- Acknowledge violations of the Rules of Professional Conduct in response to relator's Letter of Inquiry
- Be transparent and admit fault at deposition (or interview) if you have violated a Rule of Professional Conduct
- Be willing to stipulate to facts and violations if applicable
- Consent-to-discipline may be an option

10

https://www.youtube.com/watch?v=6m_DeR_n72E

11

Disciplinary Counsel v. Eichenberger, 2016-Ohio-3332

Initial issue: Respondent failed to hold client funds in a trust account separate from his own property.

Response to investigation: Claimed overdraft was the result of an unauthorized transaction on an old account that was not even being used. In response to subpoenas for bank records, he told relator it was "missing the point." Sought dismissal because relator did not notify him that a subpoena had been issued to his bank.

Aggravation: Selfish or dishonest motive, pattern of misconduct, multiple offenses, **showed a lack of cooperation in the disciplinary process, failed to acknowledge the wrongfulness of his conduct, provided false evidence and statements.**

Mitigation: "The only mitigating factor found by the panel was that Eichenberger did not have a prior disciplinary record."

12

Disciplinary Counsel v. Eichenberger, 2016-Ohio-3332

Initial issue: Respondent failed to hold client funds in a trust account separate from his own property.

Response to investigation: Claimed overdraft was the result of an unauthorized transaction on an old account that was not even being used. In response to subpoenas for bank records, he told relator it was "missing the point." Sought dismissal because relator did not notify him that a subpoena had been issued to his bank.

Aggravation: Selfish or dishonest motive, pattern of misconduct, multiple offenses, **showed a lack of cooperation in the disciplinary process, failed to acknowledge the wrongfulness of his conduct, provided false evidence and statements.**

Mitigation: "The only mitigating factor found by the panel was that Eichenberger did not have a prior disciplinary record."

SANCTION: 24-month suspension with 12 months stayed

13

Disciplinary Counsel v. Oberholtzer, 2013-Ohio-3706

Initial issue: Neglected client matters.

Response to investigation: Responded to some letters from relator, but ignored others.

Aggravation: Pattern of misconduct, committed multiple offenses, and **did not initially cooperate in the disciplinary process.**

Mitigation: No prior disciplinary record, lacked a selfish or dishonest motive, and **cooperated at later stages of the disciplinary proceedings by agreeing to stipulations, appearing at the hearing, and expressing remorse.**

14

Disciplinary Counsel v. Oberholtzer, 2013-Ohio-3706

Initial issue: Neglected client matters.

Response to investigation: Responded to some letters from relator, but ignored others.

Aggravation: Pattern of misconduct, committed multiple offenses, and **did not initially cooperate in the disciplinary process.**

Mitigation: No prior disciplinary record, lacked a selfish or dishonest motive, and **cooperated at later stages of the disciplinary proceedings by agreeing to stipulations, appearing at the hearing, and expressing remorse.**

SANCTION: 12-month suspension with all 12 months stayed

15

Disciplinary Counsel v. Hallquist, 2011-Ohio-1819

Initial issue: Neglected client matters.

Response to investigation: At deposition, he claimed he was unaware of any medical bills and had no documentation regarding terms of the settlement. In a second matter, he did not respond to relator's inquiry.

Aggravation: Pattern of misconduct involving multiple offenses, **failed to cooperate in the disciplinary process, refused to acknowledge the wrongful nature of his conduct,** caused harm to vulnerable clients, and failed to make restitution.

Mitigation: "The only mitigating factor is respondent's lack of prior disciplinary record**."**

16

Disciplinary Counsel v. Hallquist, 2011-Ohio-1819

Initial issue: Neglected client matters.

Response to investigation: At deposition, he claimed he was unaware of any medical bills and had no documentation regarding terms of the settlement. In a second matter, he did not respond to relator's inquiry.

Aggravation: Pattern of misconduct involving multiple offenses, **failed to cooperate in the disciplinary process, refused to acknowledge the wrongful nature of his conduct,** caused harm to vulnerable clients, and failed to make restitution.

Mitigation: "The only mitigating factor is respondent's lack of prior disciplinary record**."**

SANCTION: 24-month suspension with last six months stayed

17

Disciplinary Counsel v. Truax, 2016-Ohio-7334

Initial issue: Misuse of client funds.

Response to investigation: Informed the client that he had converted a portion of her money and offered to refund her money. Parties entered into a consent-to-discipline agreement.

Aggravation: None.

Mitigation: Absence of a prior disciplinary record, lack of a dishonest motive, timely and good-faith effort to make restitution, and **a cooperative attitude toward the disciplinary proceedings.**

18

Disciplinary Counsel v. Truax, 2016-Ohio-7334

Initial issue: Misuse of client funds.

Response to investigation: Informed the client that he had converted a portion of her money and offered to refund her money. Parties entered into a consent-to-discipline agreement.

Aggravation: None.

Mitigation: Absence of a prior disciplinary record, lack of a dishonest motive, timely and good-faith effort to make restitution, and **a cooperative attitude toward the disciplinary proceedings.**

SANCTION: 6-month suspension, all 6 months stayed

19

Disciplinary Counsel v. Geer, 2006-Ohio-6516

Initial issue: Failure to comply with child support order.

Response to investigation: Respondent failed to file an answer to the complaint, and relator moved for default.

Aggravation: Misconduct was motivated by selfishness, he **failed to cooperate in any of the disciplinary proceedings, that he refused to acknowledge the wrongful nature of his conduct,** that he caused great financial harm to vulnerable victims – his children, and that he failed to make restitution.

Mitigation: No disciplinary record other than his interim suspension for defaulting on child support.

20

Disciplinary Counsel v. Geer, 2006-Ohio-6516

Initial issue: Failure to comply with child support order.

Response to investigation: Respondent failed to file an answer to the complaint, and relator moved for default.

Aggravation: Misconduct was motivated by selfishness, he **failed to cooperate in any of the disciplinary proceedings, that he refused to acknowledge the wrongful nature of his conduct,** that he caused great financial harm to vulnerable victims – his children, and that he failed to make restitution.

Mitigation: No disciplinary record other than his interim suspension for defaulting on child support.

SANCTION: 12-month suspension

#

21

Disciplinary Counsel v. Gosling, 2007-Ohio-4267

Initial issue: Neglecting client affairs.

Response to investigation: Respondent did not respond to relator's letters. He later appeared for a deposition and admitted the facts and agreed to return the retainer. He referenced "experimenting" with alcohol, and agreed to contact OLAP. However, he failed to follow through, even though relator urged him to do so and indicated relator's file could not be closed until respondent made that contact.

Aggravation: Prior disciplinary record, **failed to cooperate fully in relator's latest investigation,** and his failure to follow through with OLAP.

Mitigation: Absence of a dishonest or selfish motive and his good-faith effort to make restitution.

22

Disciplinary Counsel v. Gosling, 2007-Ohio-4267

Initial issue: Neglecting client affairs.

Response to investigation: Respondent did not respond to relator's letters. He later appeared for a deposition and admitted the facts and agreed to return the retainer. He referenced "experimenting" with alcohol, and agreed to contact OLAP. However, he failed to follow through.

Aggravation: Prior disciplinary record, **failed to cooperate fully in relator's latest investigation,** and his failure to follow through with OLAP.

Mitigation: Absence of a dishonest or selfish motive and his good-faith effort to make restitution.

SANCTION: Indefinite suspension. "As we have routinely explained, neglect of legal matters and the failure to cooperate in the ensuing disciplinary investigation warrant an indefinite suspension from the practice of law."

23

Disciplinary Counsel v. Mathewson, 2007-Ohio-2076

Initial issue: Neglected five clients' cases and misuses trust account.

Response to investigation: Respondent appeared for deposition but later ignored relator's letter of inquiry. After relator explained the duty to reply, respondent promised to reply but never did.

Aggravation: Prior disciplinary record, acted out of self-interest, pattern of misconduct and multiple offenses, and no effort to make restitution.

Mitigation: Respondent went through a contentious divorce during the underlying events.

Aggravation/Mitigation: Respondent cooperated by attending his deposition, but this mitigating factor is offset by his subsequent indifference to the disciplinary process.

24

Disciplinary Counsel v. Mathewson, 2007-Ohio-2076

Initial issue: Neglected five clients' cases and misuses trust account.

Response to investigation: Respondent appeared for deposition but later ignored relator's letter of inquiry. After relator explained the duty to reply, respondent promised to reply but never did.

Aggravation: Prior disciplinary record, acted out of self-interest, pattern of misconduct and multiple offenses, and no effort to make restitution.

Aggravation/Mitigation: Respondent cooperated by attending his deposition, but this mitigating factor is offset by his subsequent indifference to the disciplinary process.

Mitigation: Respondent went through a contentious divorce during the underlying events.

SANCTION: Indefinite suspension, consistent with the rule that "neglect of legal matters and failure to cooperate in the ensuing disciplinary investigation warrant" this sanction.

25

Disciplinary Counsel v. Denslow, 2017-Ohio-1429

Initial issue: Neglected client matter by failing to file an appeal.

Response to investigation: Respondent acknowledged that his "lack of action was a serious error". The parties entered into a consent-to-discipline agreement.

Aggravation: Respondent's conduct harmed his client.

Mitigation: Respondent **cooperated in the disciplinary proceedings.** After committing the misconduct, respondent entered into a four-year OLAP contract related to substance abuse.

26

Disciplinary Counsel v. Denslow, 2017-Ohio-1429

Initial issue: Neglected client matter by failing to file an appeal.

Response to investigation: Respondent acknowledged that his "lack of action was a serious error". The parties entered into a consent-to-discipline agreement.

Aggravation: Respondent's conduct harmed his client.

Mitigation: Respondent **cooperated in the disciplinary proceedings.** After committing the misconduct, respondent entered into a four-year OLAP contract.

SANCTION: 6-month suspension, all 6 months stayed.

#

27

Disciplinary Counsel v. Watson, 2005-Ohio-6178

Initial issue: Repeatedly neglected his clients' interests, repeatedly misrepresenting events and lied to his clients and others. He ignored requests to return files.

Response to investigation: Lied to relator and did not cooperate with the investigation.

Aggravation: Respondent has been sanctioned twice before for unethical conduct and chastised for refusal to take responsibility for his actions. Prior cases, together with numerous violations here, establish a pattern of misconduct, multiple offenses, "and recidivism of a dimension rarely seen." **Acted deceptively during the disciplinary process.**

Mitigation: Respondent expressed remorse during the panel hearing. However, the board found respondent's expression of contrition to be "carefully worded and contrived" and marked by defiance.

28

Disciplinary Counsel v. Watson, 2005-Ohio-6178

Initial issue: Repeatedly neglected his clients' interests, repeatedly misrepresenting events and lied to his clients and others. He ignored requests to return files.

Response to investigation: Lied to relator and did not cooperate with the investigation.

Aggravation: Respondent has been sanctioned twice before for unethical conduct and chastised for refusal to take responsibility for his actions. Prior cases, together with numerous violations here, establish a pattern of misconduct, multiple offenses, "and recidivism of a dimension rarely seen." **Acted deceptively during the disciplinary process.**

Mitigation: Respondent expressed remorse during the panel hearing. However, the board found respondent's expression of contrition to be "carefully worded and contrived" and marked by defiance.

SANCTION: Permanent disbarment.

29

Disciplinary Counsel v. Peck, 2017-Ohio-2961

Initial issue: Neglected a client's legal matter, failing to respond to complaint on behalf of client and failing to respond to motion for default. Failed to provide information about liability carrier to client.

Response to investigation: The parties entered into stipulations of fact.

Aggravation: The sole aggravating factor was that respondent caused his client significant financial harm.

Mitigation: Absence of prior disciplinary record, the absence of dishonest or selfish motive, and **a cooperative attitude toward the disciplinary proceedings**.

30

Disciplinary Counsel v. Peck, 2017-Ohio-2961

Initial issue: Neglected a client's legal matter, failing to respond to complaint on behalf of client and failing to respknd to motion for default. Failed to provide information about liability carrier to client.

Response to investigation: The parties entered into stipulations of fact.

Aggravation: The sole aggravating factor was that respondent caused his client significant financial harm.

Mitigation: Absence of prior disciplinary record, the absence of dishonest or selfish motive, and **a cooperative attitude toward the disciplinary proceedings**.

SANCTION: 6-month suspension, all 6 months stayed.

31

Disciplinary Counsel v. Vivyan, 2010-Ohio-650

Initial issue: Respondent withdrew unearned funds from his client trust account.

Aggravation: None

Mitigation: Absence of prior disciplinary record, **honesty during the disciplinary process, timely restitution,** and good character and reputation apart from the underlying misconduct.

32

Disciplinary Counsel v. Vivyan, 2010-Ohio-650

Initial issue: Respondent withdrew unearned funds from his client trust account.

Aggravation: None

Mitigation: Absence of prior disciplinary record, **honesty during the disciplinary process, timely restitution,** and good character and reputation apart from the underlying misconduct.

SANCTION: 6-month suspension, all 6 months stayed.

33

Disciplinary Counsel v. Bunstine, 2015-Ohio-3729

Initial issue: Neglect of a client matter and dishonest conduct in the same criminal case. The Supreme Court later dismissed this underlying count as not proven by clear and convincing evidence.

Response to investigation: Responded to an initial letter from relator, but then failed to respond to two letters because he "didn't think it was relevant" and "didn't want to waste his time."

Aggravation: Two prior disciplinary offenses, a pattern of misconduct over a period of three years, his **failure to cooperate in the disciplinary proceedings, and his refusal to acknowledge the wrongful nature of his conduct.**

Mitigation: None.

34

Disciplinary Counsel v. Bunstine, 2015-Ohio-3729

Initial issue: Neglect of a client matter and dishonest conduct in the same criminal case. The Supreme Court later dismissed this underlying count as not proven by clear and convincing evidence.

Response to investigation: Responded to an initial letter from relator, but then failed to respond to two letters because he "didn't think it was relevant" and "didn't want to waste his time."

Aggravation: Two prior disciplinary offenses, a pattern of misconduct over a period of three years, his **failure to cooperate in the disciplinary proceedings, and his refusal to acknowledge the wrongful nature of his conduct.**

Mitigation: None.

SANCTION: 6-month suspension.

35

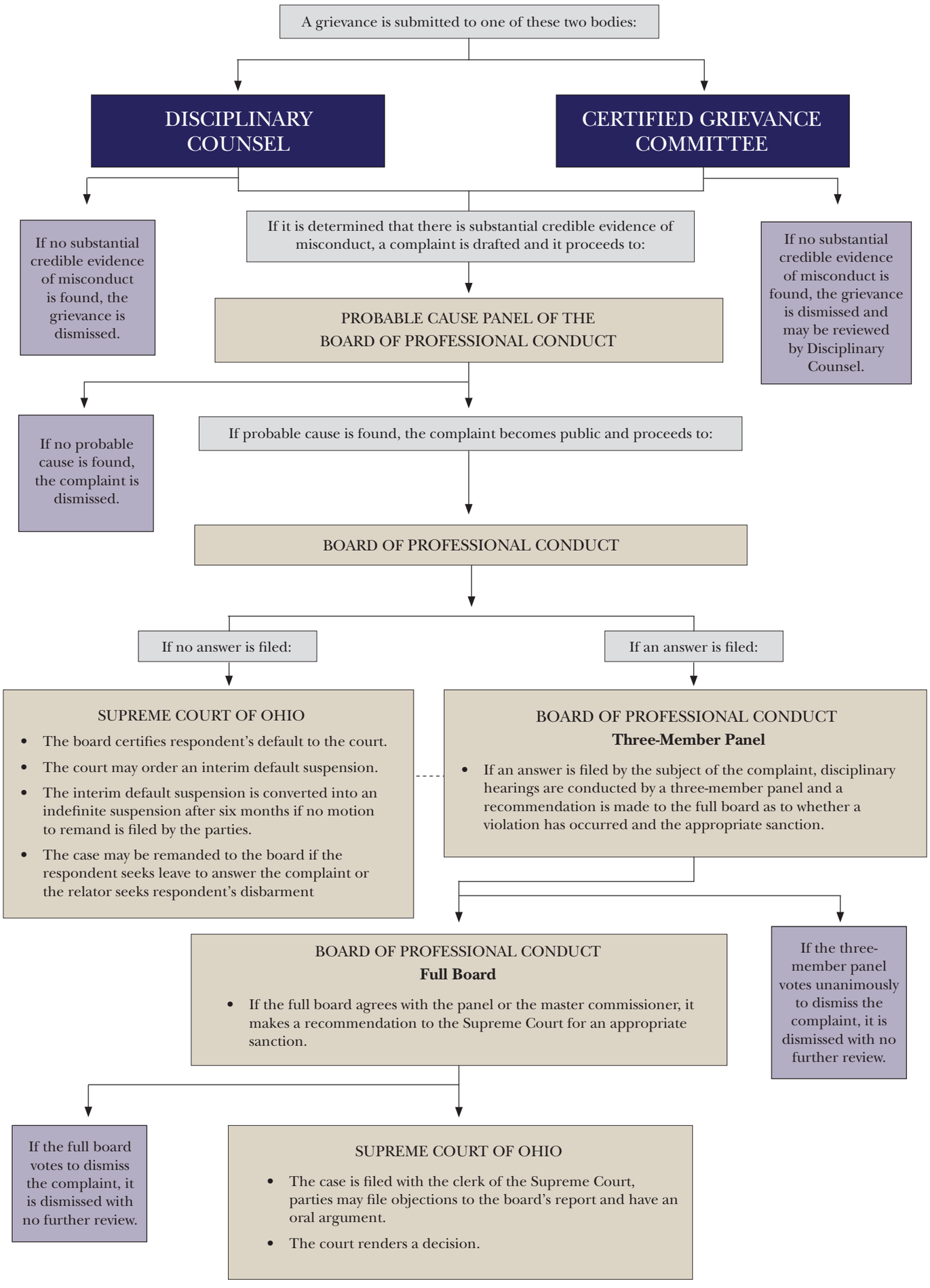
WAYS TO COOPERATE

- Communicate with client prior to and during the representation
- Self Report known violations before Relator is involved
- Respond to Relator's letters of inquiry
- Agree to waive probable cause
- Answer the complaint and admit any violations that are known
- Stipulate to facts and, when possible, stipulate to violations
- Consider consent-to-discipline
- Acknowledge any misconduct when testifying before the panel at hearing

36

DISCIPLINARY PROCESS

A grievance against a judge or attorney may be submitted to the Disciplinary Counsel or a certified grievance committee of a local bar association. If either of those bodies determines that tsubstantial credible evidence of professional misconduct exists, a formal complaint is drafted. It then moves to a probable cause panel of the Board of Professional Conduct, which determines if there is probable cause. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board of Professional Conduct. Hearings are then conducted by the board and if it finds a violation, a recommendation is made to the Supreme Court of Ohio. The Supreme Court of Ohio makes the final decision as to findings of misconduct, and issues an appropriate sanction.



TAB B

Curriculum Vitae

THOMAS L. EAGEN, JR.
teagen@eagenandwykoff.com
(513) 621-7600 ext. 14

EMPLOYMENT:

Eagen & Wykoff Co., L.P.A.
6928 Miami Ave., Suite 200
Cincinnati, Ohio 45243

EDUCATION:

St. Xavier High School
Cincinnati, Ohio 1962

University of Notre Dame
Notre Dame, Indiana 1966

University of Cincinnati Law School
Juris Doctorate 1969

PAST EMPLOYMENT:

Paxton & Seasongood Law Firm
1700 Central Trust Tower
Cincinnati, OH 45202
1970-1988
Partner - Trial Lawyer

Cash, Cash, Eagen & Kessel
432 Walnut Street
Cincinnati, OH 45202
1988-1998
Partner - Trial Lawyer

Eagen & Wykoff Co., L.P.A.
6928 Miami Ave., Suite 200
Cincinnati, Ohio 45243
1998-Present
Trial Lawyer and now Mediator

PROFESSIONAL MEMBERSHIPS:

American College of Trial Lawyers
Inducted as a Fellow in 1994

American Board of Trial Advocates since 2008

Ohio Super Lawyers 2006, 2007, 2008, 2009
2010, 2011, 2012, 2013, 2014, 2015,
2016, 2017, 2018

Cincinnati Bar Association
Member ADR Committee
Past Member of Judicial Committee
Past Member of Tort Committee
Past Member of Negligence Committee

Butler County Bar Association

Warren County Bar Association

PROFESSIONAL LICENSES:

State of Ohio 1970
United State District Court,
Southern District of Ohio

AV Peer Rating by Martindale Hubbell
since 1982

COMMUNITY ACTIVITY:

Past Board Member and President of Hamilton
County Council for Retarded Citizens
Past Board Member for Star Center
(Workshop for Retarded Citizens)
Past Board member Mt. Lookout Civil Club

MEDIATION HISTORY:

University of Cincinnati College of Law
"Making Mediators"
February-March 2010;

University of Cincinnati College of Law
"Shifting to Neutral"
November-December 2010;

Family Law Mediation, February 2011;

Preparing a Case for Mediation;

Preparing for a Resourceful Resolution

Cincinnati Bar Association ADR Committee

Served as a lawyer and Mediator in hundreds of Mediations in Butler County, Hamilton County, Clermont County, Warren County, Montgomery County and Clinton County

Have been serving as a Mediator for Butler County Court of Common Pleas, Warren County Court of Common Pleas as well as Hamilton County Court of Common Pleas and

Have also been serving as a Private Mediator

Was a speaker at the CLE Seminar "ETHICAL AND SUCCESSFUL MEDIATION" presented By the Cincinnati Bar Association on June 28, 2016

Nashville Song Writer

KMK | Law

Louis F. Gilligan

SENIOR PARTNER

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PRACTICE AREAS

Antitrust

False Claims Act & Qui Tam Litigation

Commercial & Securities Litigation

Class Action Litigation

Product Liability

Insurance Coverage

Personal Injury / Wrongful Death

Arbitration & Mediation

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. Supreme Court

U.S. Court of Appeals, Sixth Circuit

EDUCATION

J.D., University of Cincinnati College of Law, 1968

B.S., University of Scranton, 1965

Lou Gilligan focuses his practice in litigation and is a senior member of the Litigation Group. He has received professional distinctions in his litigation specialty by being named a Fellow of the American College of Trial Lawyers (1985) and Advocate in the American Board of Trial Advocates (1989). Lou has been involved in many arbitration and mediation matters both as an advocate for a party or as "Arbitrator or Mediator." He has served as Special Master and Mediator for the United States District Court for the Southern District of Ohio. He has also represented individual attorneys and law firms as an expert witness on legal malpractice and attorney fees application matters. Lou has lectured in many legal seminars on a variety of subjects.

Lou has acted as General Counsel for KMK for over 25 years. In this capacity, he has dealt with legal ethics and conflicts of law issues involving the law firm and its lawyers, which number is in excess of 100 individuals. He has dealt with loss prevention issues in conjunction with the law firm's malpractice insurance carrier. He has also handled malpractice claims asserted against the firm and participated in the firm's defense, individually and with outside legal counsel.

REPRESENTATIVE MATTERS

- Represented as the sole attorney a certified class in excess of 1,000 members in a product liability personal injury lawsuit involving a defective medical device resulting in a $60 million settlement
- Represents a large waste collection and landfill company in Ohio, Kentucky and Indiana in all litigation matters, including accident and environmental claims
- Represented defendant large public utility in environmental class action litigation
- Class counsel in Cincinnati Styrene class action litigation
- Represented defendant County and County officials in civil rights and negligence law violations class action litigation
- Represented defendant companies and subsidiaries in personal injury and nuisance class action litigation
- General defense counsel in multi-district litigation involving securities actions and bankruptcy proceedings

KMK | Law

Louis F. Gilligan (Continued)

- Represented partners of major accounting firm in a consolidated binding arbitration action
- Represented plaintiffs in personal injury/product liability class action litigation which successfully concluded in multi-million dollar judgment
- Represented approximately 1,000 plaintiffs in commercial consumer fraud class action litigation which resulted in a multi-million dollar settlement
- Represented plaintiffs in first mass disaster tort case proceeding as a class action litigation which resulted in various jury verdicts and a multi-million dollar settlement (Beverly Hills Supper Club Fire)

AWARDS & RECOGNITIONS

- John P. Kiely Professionalism Award, Cincinnati Bar Association, 2012
- Recipient of the Distinguished Alumni Award from the University of Cincinnati College of Law Alumni Association, 2011
- Listed in *The Best Lawyers in America*, 1989-2019
- Named the "Cincinnati *Best Lawyers'* Product Liability Litigation, Plaintiffs Lawyer of the Year," 2011
- Named the "Cincinnati *Best Lawyers'* Personal Injury Litigation-Defendants Lawyer of the Year," 2012
- Named to *Ohio Super Lawyers*, 2004-2018
- Named to *Cincy Leading Lawyers*
- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Cincinnati Bar Association
- Ohio State Bar Association
- Good Samaritan Foundation, Board of Trustees
- University of Cincinnati School of Law, Dean's Board of Visitors


American College of Trial Lawyers
Code of Pretrial and Trial Conduct
Teaching Syllabus
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Qualities of a Trial Lawyer

Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation.

A lawyer must in all professional conduct be honest, candid and fair….

A lawyer must possess and apply the legal knowledge, skill, thoroughness and preparation necessary for excellent representation.

A lawyer must diligently, punctually and efficiently discharge the duties required by the representation in a manner consistent with the legitimate interests of the client.


Problem 1

Model Rule 3.1 provides:

Meritorious Claims and Contentions

"A lawyer shall not bring *or defend* a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous…"

Model Rule 3.2 provides:

Expediting Litigation

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

The ABA comment for **Model Rule 3.2** can be viewed as expressing a near absolute tone. It condemns Conduct not "having some substantial purpose other than delay," prohibits delay "for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose," and offers no specific discussion of any circumstances in which is recognizes the interests of a client in delaying proceedings. Indeed, the ABA comment expressly states that "financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."

1 Hazard & Hodes, The Law of Lawyering, § 28.3 (3d ed.) expresses the view that a client's desire for delay is entitled to no weight in assessing the propriety of the lawyer's conduct.

Model Rule 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, …

This prohibition is also found in **Section 106 of the Restatement Third, The Law Governing Lawyers.**

In this problem the aspirational nature of the ACTL Code is apparent in its call for "**prompt, efficient, ethical, fair and just disposition of litigation."** The legitimate interests of the client to buy time to get his affairs in order may conflict with this goal.

The key determination is whether the lawyer is really pursuing legitimate interests of the client or simply frustrating the fair and prompt disposition of justice.

The thoughtful resolution of this question is what the drafters of the ACTL Code are seeking from each trial lawyer.


Problem 2

Can the lawyer represent both brothers?

Model Rule 1.7(a) prohibits a lawyer from representing a client if the representation of the client will be directly adverse to another client, unless (a) the lawyer reasonably believes the representation will not adversely affect the relationship with the client and (b) each client consents after consultation. Here, because the brothers are in agreement as to the proper course, their interests do not appear to be directly adverse.

However……

A lawyer who considers seeking a client's waiver must make a judgment whether a reasonable lawyer would do so. Here, a reasonable lawyer would not seek a waiver but rather would try to convince Frank not to plead guilty to a charge of which he is factually innocent. If one lawyer represented both brothers, their desire to have Frank take the rap would materially conflict with the lawyer's responsibility to Frank and thus run afoul of **Model Rule 1.7(b).**

Because Frank is innocent and could prove that by implicating Craig, it would be unreasonable to believe that his representation of Frank would not be adversely affected by his also representing Craig.

Model Rule 1.7(b)

A reasonable lawyer would conclude that the brothers should not agree to a joint representation under the circumstances, and the laywer therefore cannot properly solicit their consent under **Model Rule 1.7(b)(2).** Criminal cases in which a lawyer may properly represent codefendants are rare.

Under **Model Rule3.3(a)**, a lawyer cannot offer evidence that the lawyer knows to be false. If the lawyer learns of the falsity later, but before the conclusion of the proceedings, the lawyer must take reasonable remedial measures including disclosure to the tribunal.

Section 120 Restatement (Third) The Law Governing Lawyers has similar language. Under **Model Rule 3.3(b)**, a lawyer who knows a person intends to engage, is engaging or has engaged in fraudulent conduct in a proceeding has a duty to take remedial measures, including disclosure.

The key is whether the lawyer knows that the testimony is false. Many criminal defense lawyers will take the easy way out and claim they do not know that the testimony is false. This problem takes that claim away from the lawyer.

Some jurisdictions permit the lawyer merely to present his client for narrative testimony, without asking questions, thereby implying that he believes the testimony to be false.

In a typical plea, questions come from the Court, but the lawyer is still participating in presenting false testimony.

In several jurisdictions, the lawyer is required to communicate to the Court his non-participation in his client's answers to the Court's questions. A lawyer must also refuse to sign a statement acknowledging the truth of facts that are known to be false, such as a factual resume incident to a plea that contains false statements.

Model Rule 1.2 requires a lawyer to abide by the client's decision as to whether to plead guilty and whether to testify in a criminal case.

In **ABA Formal opinion 98-412 (1998)**, the ABA Committee on Ethics and Professional Responsibility concluded that a lawyer who knows his or her client will present false information must withdraw or disclose the falsity to the court. The potential obligation to disclose prospective perjury is a sufficient reason not to go forward when one knows that the client intends to lie.

Under **Model Rule 2.1**, the lawyer must exercise independent professional judgment and render candid advice, for which he may refer to legal as well as moral and social factors. Through the exercise of this duty, the lawyer may succeed in dissuading his client from participating in the false confession.

The ACTL Code asks lawyers to be "**honest, candid and fair" (ACTL Code, p. 3)** in all professional conduct. Although all clients are entitled to representation of their legitimate interests there are no such interests at stake in the problem. Craig committed the crime and Frank wants to take the blame. Helping them to accomplish this would not be acting honestly and would be contrary to the "fair and just disposition" of the case.

The goal of the lawyer here should be to convince the brothers to abandon this plan to defraud the court. Declining representation without attempting to dissuade the brothers might simply transfer the problem to another lawyer.

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer's learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of a client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest.

ACTL Code, p. 3.

A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

ACTL Code, p. 3.

You undertake the representation of Peter in a divorce action. During the representation Peter acquires information suggesting that the couple's teen-aged daughter was fathered by someone else. Peter demands a paternity test. Your jurisdiction permits a husband to challenge parentage of a child born during the marriage if non-paternity can be established by clear and convincing evidence, including genetic testing….

….Your wife is outraged that Peter is seeking to challenge his relationship with the child and your partners fear the position being asserted will damage the firm's reputation. Your daughter goes to the same school as Peter's daughter and they are friends. You are personally conflicted over Peter's position….

Questions

Should you withdraw from the representation?

Does it make any difference if you learned of the paternity issue before agreeing to undertake the representation?

Model Rule 1.16(b)(4) provides that a lawyer may withdraw from representing a client "if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

The ACTL Code provides that it is not only the lawyer's right but also the lawyer's duty to employ **"all appropriate means within the law to protect and enforce legitimate interests of a client;"** to **"never be influenced directly or indirectly by any consideration of self-interest;"** and to **"undertake unpopular causes if necessary to ensure justice."**

ACTL Code, p.3.

If the attorney learned of the paternity issue before undertaking the representation, the ACTL Code is less clear.

The ACTL Code recognizes that **"(i)t is the right of a lawyer to accept employment in a civil case . . ."** and provides that **"the lawyer should not decline employment in a case on the basis of the unpopularity of the client's cause or position."**

ACTL Code, p.3.

On the other hand, the ACTL Code imposes an **"obligation to undertake unpopular causes"** where **necessary to "ensure justice."** Query whether vindicating the client's position in this case is **"necessary to ensure justice."**

A lawyer should be straightforward and courteous with colleagues. A lawyer should be cooperative with other counsel while zealously representing the client. A lawyer must be scrupulous in observing agreements with other lawyers.

ACTL Code, p.4.

Questions

You have the requested information. Do you provide it? What if the witness' testimony would seriously damage your client's case?

Should you discuss the request with your client before responding to opposing counsel?

Model Rule 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence." The annotation to **Model Rule 3.4(a)** indicates, however, that the rule "does not impose a duty to volunteer all relevant information."

The ACTL Code instructs that a "**a lawyer should be cooperative with other counsel while zealously representing the client**."

The ACTL Code, at sub-paragraph (d), also provides that "**the lawyer, not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights**."

ACTL Code, p. 4.

A defensible answer under the ACTL Code would be to refuse to provide the information on the basis that to do so would prejudice the client's rights.

The answer, however, may be affected by other considerations including the degree of cooperation of opposing counsel in sharing information without formal discovery requests during this or other proceedings.

The greater the likelihood the testimony would seriously damage the client's case, the stronger the case can be made for placing a higher priority on the obligations to the client than the obligation to be cooperative with other counsel.

With respect to consulting with the client before responding to opposing counsel, the Model Rules provide that an attorney must "abide by a client's decisions concerning the objectives of representation" and "consult with the client as to the means by which they are to be pursued." **Model Rules 1.2(a) and 1.4(a)(2).**

The annotation to **Model Rule 1.2** acknowledges that the scope of the client's authority regarding "means" is "not entirely clear."

The ACTL Code requires "**undivided allegiance, good counsel and candor**" be afforded a client. **ACTL Code, p. 3.** Whether to discuss the matter in advance with the client will likely be decided on a case by case basis involving many factors including the client's past degree of involvement in the conduct of the litigation.

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

ACTL Code, p. 4.

Questions

Query whether the same conclusion would apply if the judge reimbursed the attorney for the guest fees or for the guest fees, food and drink?

Would the same concern exist if you had no active cases pending before the judge?

What if the judge was a long time personal or family friend or former colleague?

Model Rule 3.5 prohibits a lawyer from seeking to influence a judge "by means prohibited by law." The annotation to **Model Rule 3.5** indicates that gifts that constitute "ordinary social hospitality" are generally permissible although gifts intended to influence the judge are not permitted.

The ACTL Code provides that **"(i)n social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety." ACTL Code, p. 4.**

In situations where an action is ongoing, and particularly if a decision on motions or a judgment is pending, extending an invitation under the circumstances in the hypothetical would likely create an appearance of impropriety.

If active cases were pending before the judge, the appearance of impropriety would remain even when the judge reimburses the costs. Where no active cases are pending with the judge, the appearance of impropriety would be minimal.

The existence of a long-standing personal relationship with the judge would lessen concerns about the invitation being intended to influence the judge but, depending upon the status of the litigation, concerns about an appearance of impropriety must be considered.

In considering this problem, reference should also be made to multiple provisions in the Model Code of Judicial Conduct. For example, **Model Code Rule 1.2** provides:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Similarly, **Model Code Rule 3.1(c)** admonishes judges not to participate "in activities that would appear to a reasonable person to undermine the judge's independence, integrity or impartiality" and **Model Code Rule 3.13(a)** provides that a judge should not accept gifts "or other things of value, if acceptance . . . would appear to a reasonable person to undermine the judge's independence, integrity or impartiality."

Model Code Rule 3.13(b)(3), however, permits acceptance of "ordinary social hospitality." As noted in the comments to **Model Code Rule 3.13**, the rules focus on the risk that the benefit "might be viewed as intended to influence the judge's decision in a case." The prohibition against accepting, or under **Model Code Rule 3.13(c)** the obligation to report, the benefit is a function of the degree of that risk.

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy, and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve the system of justice and to maintain and to develop in others the highest standards of professional behavior.

ACTL Code, p. 8.

You represent a defendant in complex litigation which has just begun. For internal budgeting purposes, you have advised your management committee to anticipate that the litigation will require the services of multiple attorneys and will likely generate six figure fees over each of the next few years. Your client believes that an aggressive defense will cause the plaintiff to abandon its claims and has instructed you not to pursue settlement discussions…..

….Based upon your initial analysis of the case and prior experience with opposing counsel, you believe an early mediation or neutral case evaluation would likely result in a settlement.

Should you encourage and seek permission from your client to propose early alternative dispute resolution procedures? What if the opposing party initiates a request for mediation? What if the Court requests that the parties mediate?


Discussion of
Problem 6

The Model Rules do not address a lawyer's obligation to encourage use of alternative dispute resolution. The ACTL Code, while recognizing that a lawyer should never be reluctant to take a case to trial, directs lawyers to **"educate clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation."**

ACTL Code, pp. 5-6.

While the decision is ultimately up to the client, under the facts of the hypothetical, an early ADR effort would appear to be in the client's best interest. The spirit, if not the letter of the ACTL Code, would suggest that an effort should be made to encourage the client to authorize pursuit of ADR. The impact of an early settlement on the firm's revenues should never be a factor in advising the client on his or her options. **Obligations to Clients – Fidelity to the Client's Interests. ACTL Code, p. 3; Model Rule 1.7, Comment 10 –** "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."

If the opposing party initiates the request for mediation, the Model Rules and the ACTL Code would require that the client be advised of the request. If mediation appeared to be in the client's best interest, the ACTL Code would counsel in favor of encouraging the client to agree.

If the Court requests (rather than orders) that the parties mediate, in most cases the client's best interest would likely be served by encouraging compliance, although the decision remains with the client.

AMERICAN COLLEGE OF TRIAL LAWYERS CODE OF PRETRIAL AND TRIAL CONDUCT TEACHING SYLLABUS

QUALITIES OF A TRIAL LAWYER

Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation.

A lawyer must in all professional conduct be honest, candid and fair.

A lawyer must possess and apply the legal knowledge, skill, thoroughness and preparation necessary for excellent representation.

A lawyer must diligently, punctually and efficiently discharge the duties required by the representation in a manner consistent with the legitimate interests of the client.

ACTL Code, p. 3.

Problem 1

A significant client of the law firm of which you are senior partner, who is also a friend, is served with a complaint in which the plaintiff seeks money owed. The client tells you he owes the money and has no defense to the action but needs to delay for as long as possible because an immediate judgment would cause personal and financial ruin and extreme embarrassment. He expresses hope that other pending business deals will enable him to pay his creditors in due course, and he asks you to do everything you can to stall and to delay judgment until he can get his affairs in order.

Discussion of Problem 1

Model Rule 3.1 provides: Meritorious Claims and Contentions

"A lawyer shall not bring *or defend* a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, . . ." (emphasis added)

Model Rule 3.2 provides: Expediting Litigation

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

The ABA comment for **Model Rule 3.2** can be viewed as expressing a near absolute tone. It condemns conduct not "having some substantial purpose other than delay," prohibits delay "for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose," and

offers no specific discussion of any circumstances in which it recognizes the interests of a client in delaying proceedings. Indeed, the ABA comment expressly states that "financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."

1 Hazard & Hodes, The Law of Lawyering, § 28.3 (3d ed.) expresses the view that a client's desire for delay is entitled to no weight in assessing the propriety of the lawyer's conduct.

Model Rule 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, . . .

This prohibition is also found in **Section 106 of the Restatement (Third), The Law Governing Lawyers.**

In this problem, the aspirational nature of the ACTL Code is apparent in its call for **"prompt, efficient, ethical, fair and just disposition of litigation."** The legitimate interests of the client to buy time to get his affairs in order may conflict with this goal. The key determination is whether the lawyer is really pursuing legitimate interests of the client or simply frustrating the fair and prompt disposition of justice. The thoughtful resolution of this question is what the drafters of the ACTL Code are seeking from each trial lawyer.

Problem 2

You are consulted by two brothers, ages 23 and 24, who look very much alike. They were at a club recently and were repeatedly harassed by a drunken stranger. Craig, a third year law student with a federal clerkship pending, threw an empty beer bottle at the man just before closing. It struck him on the temple and caused him to fall against a chair. He died from his injuries five days later and the police charged Craig with manslaughter. The bar was dimly lit and identification of the person who threw the beer bottle will be an issue. Craig's brother Frank, who has bounced around from job to job, is currently unemployed. He has a record for a youthful indiscretion and wants to plead guilty to the crime so that the charge against his brother will be dismissed.

How do you advise the brothers? Can you represent either?

Discussion of Problem 2

This problem implicates a number of provisions in the ABA Model Rules. The first question is whether the lawyer can represent both brothers. At first blush, **Model Rule 1.7(a)** seems applicable. It prohibits a lawyer from representing a client if the representation of the client will be directly adverse to another client, unless (a) the lawyer reasonably believes the representation will not adversely affect the relationship with the client and (b) each client consents after consultation. Here, because the brothers are in agreement as to the proper course, their interests do not appear to be directly adverse. The real issue for the lawyer is raised by **Model Rule 1.7(b).** A lawyer who considers seeking a client's waiver must make a judgment whether a reasonable lawyer would do

so. Here, a reasonable lawyer would not seek a waiver but rather would try to convince Frank not to plead guilty to a charge of which he is factually innocent. If one lawyer represented both brothers, their desire to have Frank take the rap would materially conflict with the lawyer's responsibility to Frank and thus run afoul of **Model Rule 1.7(b)**. Because Frank is innocent and could prove that by implicating Craig, it would be unreasonable for his lawyer to believe that his representation of Frank would not be adversely affected by his also representing Craig. **Model Rule 1.7(b)**. A reasonable lawyer would conclude that the brothers should not agree to a joint representation under the circumstances, and the lawyer therefore cannot properly solicit their consent under **Model Rule 1.7(b)(2)**. Criminal cases in which a lawyer may properly represent codefendants are rare.

If Frank makes a false statement to the tribunal in connection with his guilty plea, which of course the lawyer will know is false given the facts here, **Model Rule 3.3** is implicated. Under **Model Rule 3.3(a)**, a lawyer cannot offer evidence that the lawyer knows to be false. If the lawyer learns of the falsity later, but before the conclusion of the proceedings, the lawyer must take reasonable remedial measures including disclosure to the tribunal. **Section 120 Restatement (Third), The Law Governing Lawyers** has similar language. Under **Model Rule 3.3(b)**, a lawyer who knows a person intends to engage, is engaging or has engaged in fraudulent conduct in a proceeding has a duty to take remedial measures, including disclosure.

Since a client has the absolute right to testify in a criminal proceeding, Rule 3.3 presents a dilemma for the lawyer. He can't present false testimony but his client has a right to testify. The key is whether the lawyer knows that the testimony is false. Many criminal defense lawyers will take the easy way out and claim they do not know that the testimony is false. This problem takes that claim away from the lawyer. This is handled in some jurisdictions by having the lawyer merely present his client for narrative testimony, without asking questions, thereby implying that he believes the testimony to be false. In a typical plea, questions come from the Court, but the lawyer is still participating in presenting false testimony. In several jurisdictions, the lawyer is required to communicate to the Court his non-participation in his client's answers to the Court's questions. A lawyer must also refuse to sign a statement acknowledging the truth of facts that are known to be false, such as a factual resume incident to a plea that contains false statements.

Model Rule 1.2 requires a lawyer to abide by the client's decision as to whether to plead guilty and whether to testify in a criminal case. In ABA Formal opinion 98-412 (1998), the ABA Committee on Ethics and Professional Responsibility concluded that a lawyer who knows his or her client will present false information must withdraw or disclose the falsity to the court. The potential obligation to disclose prospective perjury is a sufficient reason not to go forward when one knows that the client intends to lie.

Under **Model Rule 2.1**, the lawyer must exercise independent professional judgment and render candid advice, for which he may refer to legal as well as moral and social factors. Through the exercise of this duty, the lawyer may succeed in dissuading his client from participating in the false confession.

The ACTL Code asks lawyers to be **"honest, candid and fair" (ACTL Code, p. 3)** in all professional conduct. Although all clients are entitled to representation of their legitimate interests there are no such interests at stake in the problem. Craig committed the crime and Frank wants to

take the blame. Helping them to accomplish this would not be acting honestly and would be contrary to the "fair and just disposition" of the case. The goal of the lawyer here should be to convince the brothers to abandon this plan to defraud the court. Declining representation without attempting to dissuade the brothers might simply transfer the problem to another lawyer.

OBLIGATIONS TO CLIENTS

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer's learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of a client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest. A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

ACTL Code, p. 3.

Problem 3

You undertake the representation of Peter in a divorce action. During the representation Peter acquires information suggesting that the couple's teen-aged daughter was fathered by someone else. Peter demands a paternity test. Your jurisdiction permits a husband to challenge parentage of a child born during the marriage if non-paternity can be established by clear and convincing evidence, including genetic testing. Your wife is outraged that Peter is seeking to challenge his relationship with the child and your partners fear the position being asserted will damage the firm's reputation. Your daughter goes to the same school as Peter's daughter and they are friends. You are personally conflicted over Peter's position. Should you withdraw from the representation? Does it make any difference if you learned of the paternity issue before agreeing to undertake the representation?

Discussion of Problem 3

Model Rule 1.16(b)(4) provides that a lawyer may withdraw from representing a client "if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

The ACTL Code provides that it is not only the lawyer's right but also the lawyer's duty to employ **"all appropriate means within the law to protect and enforce legitimate interests of a client;"** to **"never be influenced directly or indirectly by any consideration of self-interest;"** and to **"undertake unpopular causes if necessary to ensure justice." ACTL Code, p. 3.**

Under the Model Rules, an attorney would likely not create an ethical problem by withdrawing. The ACTL Code would suggest that unless the attorney could not effectively represent Peter because of the personal conflict the representation should continue.

If the attorney learned of the paternity issue before undertaking the representation, the ACTL Code is less clear. The ACTL Code recognizes that **"(i)t is the right of a lawyer to accept**

employment in a civil case . . ." and provides that "the lawyer should not decline employment in a case on the basis of the unpopularity of the client's cause or position." ACTL Code, p. 3. On the other hand, the ACTL Code imposes an **"obligation to undertake unpopular causes,"** where necessary to **"ensure justice."** Query whether vindicating the client's position in this case is **"necessary to ensure justice."**

OBLIGATIONS TO COLLEAGUES

A lawyer should be straightforward and courteous with colleagues. A lawyer should be cooperative with other counsel while zealously representing the client. A lawyer must be scrupulous in observing agreements with other lawyers.

ACTL Code, p. 4.

Problem 4

Days before trial is to begin, opposing counsel calls to ask if you have the telephone number or address of a third-party witness who has moved since his deposition. The witness' deposition testimony was unfavorable but not fatal to your client's case. Opposing counsel is concerned the Court may not permit use of the deposition at trial. You have the requested information. Do you provide it? What if the witness' testimony would seriously damage your client's case? Should you discuss the request with your client before responding to opposing counsel?

Discussion of Problem 4

Model Rule 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence." The annotation to **Model Rule 3.4(a)** indicates, however, that the rule "does not impose a duty to volunteer all relevant information."

The ACTL Code instructs that a **"a lawyer should be cooperative with other counsel while zealously representing the client."** The ACTL Code, at sub-paragraph (d), also provides that **"the lawyer, not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights." ACTL Code, p. 4.**

A defensible answer under the ACTL Code would be to refuse to provide the information on the basis that to do so would prejudice the client's rights. The answer, however, may be affected by other considerations including the degree of cooperation of opposing counsel in sharing information without formal discovery requests during this or other proceedings.

The greater the likelihood the testimony would seriously damage the client's case, the stronger the case can be made for placing a higher priority on the obligations to the client than the obligation to be cooperative with other counsel.

With respect to consulting with the client before responding to opposing counsel, the Model Rules provide that an attorney must "abide by a client's decisions concerning the objectives of

representation" and "consult with the client as to the means by which they are to be pursued." **Model Rules 1.2(a)** and **1.4(a)(2)**. The annotation to **Model Rule 1.2** acknowledges that the scope of the client's authority regarding "means" is "not entirely clear."

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OBLIGATIONS TO THE COURT

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

ACTL Code, p. 4.

Problem 5

You are a member of an exclusive golf club with a highly rated golf course. A judge before whom you regularly appear and with whom you have a case currently pending is an avid golfer but lacks the financial means to join a private club and primarily plays public courses. The judge has commented in passing that he would enjoy the opportunity to play your course. Should you invite him? Query whether the same conclusion would apply if the judge reimbursed the attorney for the guest fees or for the guest fees, food and drink? Would the same concern exist if you had no active cases pending before the judge? What if the judge was a long time personal or family friend or former colleague?

Discussion of Problem 5

Model Rule 3.5 prohibits a lawyer from seeking to influence a judge "by means prohibited by law." The annotation to **Model Rule 3.5** indicates that gifts that constitute "ordinary social hospitality" are generally permissible although gifts intended to influence the judge are not permitted.

The ACTL Code provides that **"(i)n social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety." ACTL Code, p. 4.** In situations where an action is ongoing, and particularly if a decision on motions or a judgment is pending, extending an invitation under the circumstances in the hypothetical would likely create an appearance of impropriety.

If active cases were pending before the judge, the appearance of impropriety would remain even when the judge reimburses the costs. Where no active cases are pending with the judge, the appearance of impropriety would be minimal. The existence of a long-standing personal relationship with the judge would lessen concerns about the invitation being intended to influence the judge but, depending upon

the status of the litigation, concerns about an appearance of impropriety must be considered.

In considering this problem, reference should also be made to multiple provisions in the Model Code of Judicial Conduct. For example, **Model Code Rule 1.2** provides:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Similarly, **Model Code Rule 3.1(c)** admonishes judges not to participate "in activities that would appear to a reasonable person to undermine the judge's independence, integrity or impartiality" and **Model Code Rule 3.13(a)** provides that a judge should not accept gifts "or other things of value, if acceptance . . . would appear to a reasonable person to undermine the judge's independence, integrity or impartiality." **Model Code Rule 3.13(b)(3)**, however, permits acceptance of "ordinary social hospitality." As noted in the comments to Model Code Rule 3.13, the rules focus on the risk that the benefit "might be viewed as intended to influence the judge's decision in a case." The prohibition against accepting, or under **Model Code Rule 3.13(c)** the obligation to report, the benefit is a function of the degree of that risk.

OBLIGATIONS TO THE SYSTEM OF JUSTICE

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy, and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve the system of justice and to maintain and to develop in others the highest standards of professional behavior.

Problem 6

You represent a defendant in a complex litigation which has just begun. For internal budgeting purposes, you have advised your management committee to anticipate that the litigation will require the services of multiple attorneys and will likely generate six figure fees over each of the next few years. Your client believes that an aggressive defense will cause the plaintiff to abandon its claims and has instructed you not to pursue settlement discussions. Based upon your initial analysis of the case and prior experience with opposing counsel, you believe an early mediation or neutral case evaluation would likely result in a settlement. Should you encourage and seek permission from your client to propose early alternative dispute resolution procedures? What if the opposing party initiates a request for mediation? What if the Court requests that the parties mediate?

Discussion of Problem 6

The Model Rules do not address a lawyer's obligation to encourage use of alternative dispute resolution. The ACTL Code, while recognizing that a lawyer should never be reluctant to take a case to trial, directs lawyers to **"educate clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation." ACTL Code, pp. 5-6.**

While the decision is ultimately up to the client, under the facts of the hypothetical an early ADR effort would appear to be in the client's best interest. The spirit, if not the letter of the ACTL Code, would suggest that an effort should be made to encourage the client to authorize pursuit of ADR.

The impact of an early settlement on the firm's revenues should never be a factor in advising the client on his or her options. **Obligations to Clients – Fidelity to the Client's Interests. ACTL Code, p. 3; Model Rule 1.7, Comment 10** – "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."

If the opposing party initiates the request for mediation, the Model Rules and the ACTL Code would require that the client be advised of the request. If mediation appeared to be in the client's best interest, the ACTL Code would counsel in favor of encouraging the client to agree. If the Court requests (rather than orders) that the parties mediate, in most cases the client's best interest would likely be served by encouraging compliance, although the decision remains with the client.

MOTIONS AND PRETRIAL PROCEDURE

A lawyer has an obligation to cooperate with opposing counsel as a colleague in the preparation of the case for trial. Zealous representation of the client is not inconsistent with a collegial relationship with opposing counsel in service to the court. Motions and pretrial practice are often sources of friction among lawyers, which contributes to unnecessary cost and lack of collegiality in litigation. The absence of respect, cooperation, and collegiality displayed by one lawyer toward another too often breeds more of the same in a downward spiral. Lawyers have an obligation to avoid such conduct and to promote a respectful, collegial relationship with opposing counsel.

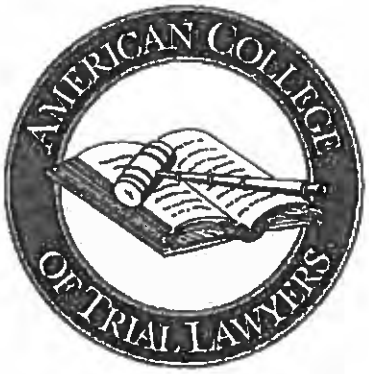
ACTL Code, p. 6.

Problem 7

You represent Bill who is being sued by Joe, a former partner, over the break up of their partnership – Bill and Joe's Famous Hot Dogs. There is a vast amount of personal hostility between the former partners. Additionally, the opposing lawyer, Alan Sims, is not one of your favorite opponents--he is quick tempered and has a reputation for not always telling the truth. In past litigation with Alan, he has misrepresented to the court "agreements" reached during phone conversations with you.

The trial has been scheduled by Judge Jolly. Judge Jolly has a practice of postponing trial settings only if all parties consent to the continuance. Alan has requested your consent to continue the trial. Bill has made it clear that he does not want you to voluntarily agree to any procedural requests made on behalf of Joe. Bill also insists on attending all hearings and knows of the current trial setting. Under which of the following situations should you consent to the continuance?

1) Alan is requesting the continuance for personal reasons related to an illness in the family. He is a solo practitioner. A continuance will not adversely affect your ability to defend the case.



CODE OF PRETRIAL AND TRIAL CONDUCT

Please accept this copy of the Code of Pretrial and Trial Conduct published by the American College of Trial Lawyers. The development of this Code by the Fellows of the College and its distribution to persons and institutions engaged in all aspects of the administration of justice represents an important part of the execution of the College's mandate to improve and elevate standards of trial practice, the administration of justice and the ethics of the profession.

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice.

The College is confident that utilization of this Code in the course of legal proceedings in the courts and as a teaching aid at the Bar and in the nation's law schools will represent a positive contribution to improving and elevating standards of trial practice, the administration of justice and the ethics of the profession.

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Message from the Chief Justice of the United States

For more than fifty years, the American College of Trial Lawyers has promoted professionalism in the conduct of trial litigation. Its authoritative Code of Trial Conduct, first published in 1956, has served as an enduring landmark in the development of professional standards for advocates.

The College continues those efforts through the publication of its revised and enlarged Code of Pretrial and Trial Conduct. This comprehensive resource sets out aspirational principles to guide litigators in all aspects of their work as advocates of client interests. The Code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.

As Justice Frankfurter noted, "An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." I encourage lawyers who engage in trial work to observe and advance the principles that the College has set forth in this volume.

I commend the American College of Trial Lawyers for its leadership in defining and refining the standards of professionalism that are vital to our system of justice.

John G. Roberts, Jr.
Chief Justice of the United States

Forward

The Legal Ethics and Professionalism Committee of the American College of Trial Lawyers (the "College") is charged with the following mandate:

> To advance, improve, and promote ethical standards and professionalism in the trial bar in all its aspects in both the United States and Canada as well as to engage in such other activities as may be directed by the Board of Regents.

All jurisdictions have codes of conduct that prescribe minimum standards for disciplinary purposes. There is no need here to duplicate such standards. This ACTL Code represents an attempt by the College to set down aspirational, rather than minimal, guidelines for trial lawyers and judges. The problem in trial practice today is not that lawyers violate the ethical rules, although some lawyers do. Most lawyers know the rules and try to comply. The real problem is the gradual corrosion of the profession's traditional aspirations, which are:

- Honor for values such as honesty, respect and courtesy toward litigants, opposing advocates and the court;
- A distaste for meanness, sharp practice, and unnecessarily aggressive behavior;
- Engagement in public service;
- A focus on the efficient, fair preparation and trial of cases; and
- A role as agent for counseling and for the resolution of disputes.

Despite what the profession says, the profession often acts as if these values are inconsistent with effective advocacy in an adversary system of justice. The College is uniquely positioned to lead the way in changing these attitudes because it strives to offer Fellowship only to those lawyers who embody the skill and values to which they and the profession should aspire. The College cannot lead by focusing on the lowest floor of acceptable behavior.

The College sees the new code as one that can be endorsed by courts, that can be profitably used in training programs by law schools and bar organizations, and that describes the values that the Fellows of the American College of Trial Lawyers endorse and practice daily.

The new Code of Pretrial and Trial Conduct is a product that the College believes can be endorsed by courts and the profession as articulating the level of conduct to which all members of our profession should aspire. If trial lawyers practice these principles the profession will begin a process of change that benefits lawyers, litigants, and our system of justice.

Preamble

Admission to the Bar is a high honor, and those lawyers who devote their lives to presenting cases in the courts are truly privileged. Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society necessary to democracy. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American College of Trial Lawyers believes that, as officers of the court, trial lawyers must conduct themselves in a manner that reflects the dignity, fairness, and seriousness of purpose of the system of justice they serve. They must be role models of skill, honesty, respect, courtesy, and fairness consistent with their obligations to the client and the court.

Trial lawyers have a duty to conduct themselves so as to preserve the right to a fair trial, one of the most basic of all constitutional guarantees, while courageously, vigorously and diligently representing their clients and applying the relevant legal principles to the facts as found. Without courtesy, fairness, candor, and order in the pretrial process and in the courtroom, reason cannot prevail and constitutional rights to justice, liberty, freedom and equality under law will be jeopardized. The dignity, decorum and courtesy that have traditionally characterized the courts are not empty formalities. They are essential to an atmosphere in which justice can be done.

No client, corporate or individual, however powerful, nor any cause, civil, criminal or political, however important, is entitled to receive, nor should any lawyer render, any service or advice encouraging or inviting disrespect of the law or of the judicial office. No lawyer may sanction or invite corruption of any person exercising a public office or private trust. No lawyer may condone in any way deception or betrayal of the court, fellow members of the Bar, or the public. A lawyer advances the honor of the profession and the best interests of the client when a lawyer embodies and encourages an honest and proper respect for the law, its institutions and officers. Above all, a lawyer finds the highest honor in a deserved reputation as an officer for justice, faithful to private trust and to public duty, and as an honest person.

This Code of Pretrial and Trial Conduct ("the Code") is not intended to supplant any local rules, procedural rules, or rules of professional conduct. This Code aims to provide aspirational guidance for trial lawyers. It sets forth a standard above the ethical minimum – a standard of conduct worthy of the privileges and responsibilities conferred on those who have sworn to serve our system of justice.

This Code is intended to provide guidance for a lawyer's professional conduct except insofar as the applicable law, code or rules of professional conduct in a particular jurisdiction require otherwise. It is an aspirational guide for trial lawyers and should not give rise to a cause of action or sanction, create a presumption that a legal duty has been breached or form the basis for disciplinary proceedings not created under the applicable law, court rules or rules of professional conduct.

Qualities of a Trial Lawyer

Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation.

Honesty, Competence and Diligence

(a) A lawyer must in all professional conduct be honest, candid and fair.

(b) A lawyer must possess and apply the legal knowledge, skill, thoroughness and preparation necessary for excellent representation.

(c) A lawyer must diligently, punctually and efficiently discharge the duties required by the representation in a manner consistent with the legitimate interests of the client.

Obligations to Clients

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer's learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of a client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest. A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

Employment and Withdrawal

(a) It is the right of a lawyer to accept employment in any civil case unless such employment is or would likely result in a violation of the rules of professional responsibility, a rule of court or applicable law. It is the lawyer's right and duty to take all proper actions and steps to preserve and protect the legal merits of the client's position and claims, and the lawyer should not decline employment in a case on the basis of the unpopularity of the client's cause or position.

(b) The right of a person accused of a crime to be represented by competent counsel is essential to our system of justice. A lawyer should not decline such representation because of the lawyer's personal or the community's opinion of the guilt of the accused or heinousness of the crime. A lawyer must raise all defenses and arguments that should be asserted on the client's behalf.

Fidelity to the Client's Interests

A lawyer must not permit considerations of personal or organizational advancement, financial gain, favor with other persons, or other improper considerations to influence the representation of the client.

Obligations to Colleagues

A lawyer should be straightforward and courteous with colleagues. A lawyer should be cooperative with other counsel while zealously representing the client. A lawyer must be scrupulous in observing agreements with other lawyers.

Relations with Other Counsel

(a) A lawyer must be courteous and honest when dealing with opposing counsel.

(b) A lawyer should not make disparaging personal remarks or display acrimony toward opposing counsel, and must avoid demeaning or humiliating words in written and oral communication with adversaries.

(c) When practicable and consistent with the client's legitimate interests and local custom, lawyers should agree to reasonable requests to waive procedural formalities.

(d) The lawyer, and not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights.

(e) A lawyer must adhere strictly to all written or oral promises to and agreements with opposing counsel, and should adhere in good faith to all agreements implied by the circumstances or by appropriate local custom.

(f) Written communications with opposing counsel may record and confirm agreements and understandings, but must not be written to ascribe to any person a position that he or she has not taken or to create a record of events that have not occurred.

Obligations to the Court

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

Communication with the Court

(a) A lawyer must always show courtesy to and respect for a presiding judge. While a lawyer may be cordial in communicating with a presiding judge in court or in chambers, the lawyer should never exhibit inappropriate familiarity. In social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety. In making any communication about a judge, a lawyer should not express or imply that the lawyer has a special relationship or influence with the judge.

(b) A lawyer should never make any attempt to obtain an advantage through improper ex parte communication with a judge or the staff in the judge's chambers. A lawyer must make every effort to avoid such communication on any substantive matter and any matter that could reasonably

be perceived as substantive, except as addressed in subpart (c) below. When a lawyer informally communicates with a court, the highest degree of professionalism is required.

(c) If ex parte communication with the court is permitted by applicable rules of ethics and procedure, a lawyer must diligently attempt to notify opposing parties, through their counsel if known, unless genuine circumstances exist that would likely prejudice the client's rights if notice were given. When giving such notice, the lawyer should advise the opponent of the basis for seeking immediate relief and should make reasonable efforts to accommodate the opponent's schedule so that the party affected may be represented.

(d) When possible, a lawyer's communications with the court related to a pending case should be in writing, and copies should be provided promptly to opposing counsel. When circumstances require oral communication with the court, a lawyer must notify opposing counsel of all such communications promptly.

Independence and Impartiality of Judicial Officers and Neutrals

(a) Judges, arbitrators, mediators and other neutrals must maintain their independence and impartiality. They must not allow professional or personal relationships, employment prospects or other improper considerations to influence or appear to influence the discharge of their duties.

(b) A judge must promote the dignity and proper discharge of the duties of the lawyer, who is also an officer of the court entitled to respect and courtesy.

Obligations to the System Of Justice

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy, and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve the system of justice and to maintain and to develop in others the highest standards of professional behavior.

Devotion to the System of Public Justice

A lawyer must strive at all times to uphold the honor and dignity of the profession. Every lawyer should contribute to the improvement of the system of justice and support those measures that enhance the efficiency, fairness and quality of justice dispensed by the courts. A lawyer should never manifest, or act upon, bias or prejudice toward any person based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

Pro Bono Publico

A lawyer should personally render public interest legal service and support organizations that provide legal services to persons of limited means by contributing time and resources.

Settlement and Alternative Dispute Resolution

A lawyer must never be reluctant to take a meritorious case to trial if the dispute cannot otherwise be satisfactorily resolved. However, a lawyer must provide the client with alternatives to trial when to do so would be consistent with the client's best interests. A lawyer should educate clients early in the legal

process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation.

Motions and Pretrial Procedure

A lawyer has an obligation to cooperate with opposing counsel as a colleague in the preparation of the case for trial. Zealous representation of the client is not inconsistent with a collegial relationship with opposing counsel in service to the court. Motions and pretrial practice are often sources of friction among lawyers, which contributes to unnecessary cost and lack of collegiality in litigation. The absence of respect, cooperation, and collegiality displayed by one lawyer toward another too often breeds more of the same in a downward spiral. Lawyers have an obligation to avoid such conduct and to promote a respectful, collegial relationship with opposing counsel.

Scheduling and Granting Extensions for Pretrial Events

(a) A lawyer should schedule pretrial events cooperatively with other counsel as soon as the event can reasonably be anticipated. Lawyers scheduling an event should respect the legitimate obligations of colleagues and avoid disputes about the timing, location and manner of conducting the event.

(b) A lawyer should seek to reschedule an event only if there is a legitimate reason for doing so and not for improper tactical reasons. A lawyer receiving a reasonable request to reschedule an event should make a sincere effort to accommodate the request unless the client's legitimate interests would be adversely affected.

(c) Scheduling pretrial events and granting requests for extensions of time are properly within the discretion of the lawyer unless the client's interests would be adversely affected. A lawyer should counsel the client that cooperation among lawyers on scheduling is an important part of the pretrial process and expected by the court. A lawyer should not use the client's decision on scheduling as justification for the lawyer's position unless the client's legitimate interests are affected.

Service of Process, Pleadings and Proposed Orders

(a) The timing, manner, and place of filing, electronic filing or serving papers should never be calculated to delay, embarrass or improperly disadvantage the party being served.

(b) Unless exigent circumstances require otherwise, papers filed in a court must be promptly served upon or made available to opposing parties or counsel.

(c) Papers should not be served in a manner deliberately designed to unfairly shorten an opponent's time for response or to take other unfair advantage of an opponent.

(d) Service must be made in a manner that affords an opposing party a fair and timely opportunity to respond, unless exigent circumstances legitimately require or applicable rules permit an ex parte application to the court or an abbreviated time for response.

Motion Practice and Other Written Submissions to the Court

(a) Before filing pretrial motions, lawyers should work together to resolve issues and to

identify matters not in dispute. When motions are necessary, lawyers should cooperate to facilitate the filing, service, and hearing of the motion. Orders submitted to the court must fairly and accurately reflect the requested or actual ruling of the court.

(b) In written submissions and oral presentations, a lawyer should neither engage in ridicule nor sarcasm. Neither should a lawyer ever disparage the integrity, intelligence, morals, ethics, or personal behavior of an opposing party or counsel unless such matters are directly relevant under controlling law.

(c) When documents or data are presented to the court, they must be furnished to opposing counsel in exactly the same format, including identical highlighting or other emphasis.

Pretrial Conferences

(a) A lawyer should seek to reach agreement with opposing counsel to limit the issues to be addressed before and during trial.

(b) A lawyer should determine in advance of a pretrial conference the trial judge's custom and practices in conducting such conferences.

(c) A lawyer should satisfy all directives of the court set forth in the order setting a pretrial conference and should consult and comply with all local rules and with any specific requirements of the trial judge unless properly challenged when based upon a belief of unfair prejudice to the client.

(d) Before a pretrial conference, a lawyer should ascertain the willingness of the client (and the carrier if an insurer is involved) to participate in alternative dispute resolution.

(e) Unless unavoidable circumstances prevent it, a lawyer representing a party at a pretrial conference must be thoroughly familiar with each aspect of the case, including the pleadings, the evidence, and all potential procedural and evidentiary issues.

(f) A lawyer should alert the court as soon as practicable to scheduling conflicts of clients, experts, and witnesses.

(g) If stipulations are possible for uncontested matters, a lawyer should propose specific stipulations and work with opposing counsel to obtain an agreement in advance of the pretrial conference.

(h) In advance of a final pretrial conference, discovery should be completed, discovery responses should be supplemented, evidentiary depositions should be concluded, and settlement should be explored.

(i) Unless unavoidable circumstances prevent it, the final pretrial conference should be attended by a lawyer who will actually try the case, and, in any event, by a lawyer who is familiar with the case.

(j) At or before a final pretrial conference, a lawyer should alert the court to the need for any pretrial rulings, hearings on motions or other matters requiring action by the court in advance of trial.

(k) At the final pretrial conference, a lawyer should be prepared to advise the court of the status of settlement negotiations and the likelihood of settlement before trial.

Discovery

A lawyer must conduct discovery as a focused, efficient, and principled procedure to gather and preserve evidence in the pursuit of justice. Discourtesy, obfuscation, and gamesmanship have no proper place in this process.

Discovery Practice

(a) In discovery, as in all other professional matters, a lawyer's conduct must be honest, courteous, and fair.

(1) A lawyer should conduct discovery efficiently to elicit relevant facts and evidence and not for an improper purpose, such as to harass, intimidate, unduly burden another party or a witness or to introduce unnecessary delay. Overly broad document requests should be avoided by focusing on clear materiality and a sense of cost/benefit.

(2) A lawyer should respond to written discovery in a reasonable manner and should not interpret requests in a strained or unduly restrictive way in an effort to avoid responding or to conceal relevant, nonprivileged information.

(3) Objections to interrogatories, requests for production, and requests for admissions must be made in good faith and must be adequately explained and limited in a manner that fairly apprises the adversary of the material in dispute and the bona fide grounds on which it is being withheld.

(4) When a discovery dispute arises, opposing lawyers must attempt to resolve the dispute by working cooperatively together. Lawyers should refrain from filing motions to compel or for court intervention unless they have genuinely tried, but failed, to resolve the dispute through all reasonable avenues of compromise and resolution.

(5) Lawyers should claim a privilege only in appropriate circumstances. They must not assert a privilege in an effort to withhold or to suppress unprivileged information or to limit or delay a response.

(6) Requests for additional time to respond to discovery should be made as far in advance of the due date as reasonably possible and should not be used for tactical or strategic reasons.

(7) Unless there are compelling reasons to deny a request for additional time to respond to discovery, an opposing lawyer should grant the request without necessitating court intervention. Compelling reasons to deny such a request exist only if the client's legitimate interests would be materially prejudiced by the proposed delay.

(b) Depositions should be dignified, respectful proceedings for the discovery and preservation of evidence.

(1) A lawyer should limit depositions to those that are necessary to develop the claims or defenses in the pending case or to perpetuate relevant testimony.

(2) A lawyer should conduct a deposition with courtesy and decorum and must

never verbally abuse or harass the witness, engage in extended or discourteous colloquies with opposing counsel or unnecessarily prolong the deposition.

(3) During a deposition, a lawyer must assert an objection only for a legitimate purpose. Objections must never be used to obstruct questioning, to communicate improperly with the witness, to intimidate, to harass the questioner or to disrupt the search for facts or evidence germane to the case.

Relationships with Witnesses and Litigants

A lawyer must treat all persons involved in a case with candor, courtesy and respect for their role and rights in the legal process.

Communicating with Nonparty Fact Witnesses

(a) A lawyer must carefully comply with all laws and rules of professional responsibility governing communications with persons and organizations with whom the lawyer does not have an attorney-client relationship. A lawyer must be especially circumspect in communications with nonparty fact witnesses who have a relationship to another party.

(b) In dealing with a nonparty who is a fact witness or a potential fact witness, a lawyer must:

(1) disclose the lawyer's interest or role in the pending matter and avoid misleading the witness about the lawyer's purpose or interest in the communication;

(2) be truthful about the material facts and the applicable law;

(3) if the nonparty has no counsel, correct any misunderstanding expressed by the nonparty;

(4) treat the nonparty courteously; and

(5) avoid unnecessarily embarrassing, inconveniencing or burdening the nonparty.

(c) If a lawyer is informed that a nonparty fact witness is represented by counsel in the pending matter, the lawyer must not communicate with the witness concerning the pending litigation without permission from that counsel.

(d) If communicating with a nonparty fact witness, the lawyer should be careful to avoid fostering any impression that the lawyer also represents that witness unless the lawyer does, in fact, represent the witness in compliance with the applicable rules of professional responsibility.

(e) A lawyer should not obstruct another party's access to a nonparty fact witness or induce a nonparty fact witness to evade or ignore process.

(f) A lawyer should not issue a subpoena to a nonparty fact witness except to compel, for a proper purpose, the witness's appearance at a deposition, hearing, or trial or to obtain necessary documents in the witness's possession.

Access to Fact Witnesses and Evidence

(a) Subject to the applicable law and ethical principles, and to constitutional requirements in criminal matters, a lawyer may properly interview any person who is not a retained expert, because a fact witness does not "belong" to any party. A lawyer should avoid any suggestion calculated to induce any witness to suppress evidence or to deviate from the truth. However, without counseling the witness to refrain from cooperating with opposing counsel, a lawyer may advise any witness that he or she does not have a legal duty to submit to an interview or to answer questions propounded by opposing counsel, unless required to do so by judicial or legal process.

(b) A lawyer may never suppress any evidence that the lawyer or the client has a legal obligation to reveal or to produce. In the absence of such an obligation, however, it is not a lawyer's duty to disclose any work product, evidence or the identity of any witness.

(c) A lawyer must not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.

(d) Except as provided in subparagraphs (1) and (2) below, a lawyer should not pay, offer to pay or acquiesce in the payment of compensation to a fact witness and may never offer or give any witness anything of value contingent upon the content of the witnesses' testimony or the outcome of the case. To the extent permitted by the applicable rules of professional responsibility, a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying; and

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying;

(e) A lawyer may solicit witnesses to a particular event or transaction but not to testify to a particular version of the facts.

Relations with Consultants and Expert Witnesses

(a) In retaining an expert witness, a lawyer should respect the integrity, professional practices and procedures in the expert's field and must never ask or encourage the expert to compromise the integrity of those practices and procedures for purposes of the particular matter for which the expert has been retained.

(b) A retained expert should be fairly and promptly compensated for all work on behalf of the client. A lawyer must never make compensation contingent in any way upon the substance of the expert's opinions or written report or upon the outcome of the matter for which the expert has been retained.

c) Other than as expressly permitted by governing law, a lawyer should not communicate with, or seek to communicate with, an expert witness concerning the pending litigation whom the lawyer knows to have been retained by another party, unless express permission is granted by counsel for the retaining party.

Trial

A lawyer must conduct himself or herself in trial so as to promote respect for the court and preserve the right to a fair trial. A lawyer should avoid any conduct that would undermine the fairness and impartiality of the administration of justice, and seek to preserve the dignity, decorum, justness and courtesy of the trial process.

Relations with Jurors

Lawyers and judges should be respectful of the privacy of jurors during voir dire and after a verdict. A lawyer should abstain from all acts, comments and attitudes calculated to inappropriately curry favor with any juror, such as fawning, flattery, solicitude for the juror's comfort or convenience or the like.

Courtroom Decorum

(a) Proper decorum in the courtroom is not an empty formality. It is indispensable to the pursuit of justice at trial.

(b) In court, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding and should promote respect for and confidence in the judicial office. The judge should be courteous and respectful to the lawyer, who is also an officer of the court.

(c) A lawyer should never engage in discourteous or acrimonious comments or exchanges with opposing counsel. Objections, requests and observations must be addressed to the court.

(d) A lawyer should advise the client and witnesses appearing in the courtroom of the kind of behavior expected and counsel them against engaging in any disrespectful, discourteous or disruptive behavior in the courtroom.

Trial Conduct

(a) A lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses. The conduct of a lawyer before the court and with other lawyers should at all times be characterized by civility. A lawyer should present all proper arguments against rulings the lawyer deems erroneous or prejudicial and ensure that a complete and accurate case record is made. In doing so, the lawyer should not be deterred by any fear of judicial displeasure.

(b) In appearing in a professional capacity before a tribunal, a lawyer must not:

(1) improperly obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; nor should a lawyer counsel, permit or assist another person to do any such act;

(2) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; or

(3) allude to any matter that the lawyer does not reasonably believe is relevant or will not be supported by admissible evidence, assert personal knowledge of facts in issue except when

testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(c) A lawyer should not interrupt or interfere with an examination or argument by opposing counsel, except to present a proper objection to the court.

(d) When a court has made an evidentiary ruling, a lawyer should not improperly circumvent that ruling, although a lawyer may seek to make a record of the excluded evidence or a review of the ruling.

(e) A lawyer must not attempt to introduce evidence or to make any argument that the lawyer knows is improper. If a lawyer has doubt about the propriety or prejudicial effect of any disclosure to the jury, the lawyer should request a ruling out of the jury's hearing.

(f) A lawyer should never engage in acrimonious conversations or exchanges with opposing counsel in the presence of the judge or jury.

(g) Examination of jurors and of witnesses should be conducted from a suitable distance, except when handling evidence or circumstances otherwise require.

(h) Unless local custom dictates otherwise, a lawyer should rise when addressing or being addressed by the judge, except when making brief objections or incidental comments. A lawyer should be attired in a proper and dignified manner in the courtroom.

(i) A lawyer should not in argument assert as a fact any matter that is not supported by evidence.

(j) A lawyer must never knowingly misquote or mischaracterize the contents of documentary evidence, the testimony of a witness, the statements or argument of opposing counsel, or the language of a judicial decision.

(k) A lawyer should not propose a stipulation in the jury's presence unless the lawyer knows or has reason to believe the opposing lawyer will accept it.

(l) A lawyer who receives information clearly establishing that the client has, during the representation, perpetrated a fraud on the court should immediately take the actions required by the appropriate procedural and ethical rules.

Public Statements about Pending Litigation

A case should be tried in the courtroom and not in the media. A lawyer should follow all rules and orders of the court concerning publicity. In the absence of a specific rule or order, a lawyer should not make any extrajudicial statement that may prejudice an adjudicative proceeding.

OHIO RULES OF PROFESSIONAL CONDUCT

(Effective February 1, 2007; as amended effective May 2, 2017)

TABLE OF CONTENTS

	Preamble: A Lawyer's Responsibilities; Scope	1
1.0	Terminology	5
	Client-Lawyer Relationship	
1.1	Competence	11
1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer	14
1.3	Diligence	18
1.4	Communication	20
1.5	Fees and Expenses	24
1.6	Confidentiality of Information	31
1.7	Conflict of Interest: Current Clients	39
1.8	Conflict of Interest: Current Clients: Specific Rules	50
1.9	Duties to Former Clients	61
1.10	Imputation of Conflicts of Interest: General Rule	65
1.11	Special Conflicts of Interest for Former and Current Government Officers and Employees	70
1.12	Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral	74
1.13	Organization as Client	77
1.14	Client with Diminished Capacity	82
1.15	Safekeeping Funds and Property	86
1.16	Declining or Terminating Representation	92
1.17	Sale of Law Practice	96
1.18	Duties to Prospective Client	102
	Counselor	
2.1	Advisor	105
2.2	[Reserved for future use; no corresponding ABA Model Rule]	
2.3	Evaluation for Use by Third Persons	107
2.4	Lawyer Serving as Arbitrator, Mediator, or Third-Party Neutral	110
	Advocate	
3.1	Meritorious Claims and Contentions	112
3.2	Expediting Litigation [Not Adopted; See Note]	113
3.3	Candor toward the Tribunal	114
3.4	Fairness to Opposing Party and Counsel	119
3.5	Impartiality and Decorum of the Tribunal	121
3.6	Trial Publicity	124

3.7	Lawyer as Witness	127
3.8	Special Responsibilities of a Prosecutor	130
3.9	Advocate in Nonadjudicative Proceedings	132
	Transactions with Persons Other Than Clients	
4.1	Truthfulness in Statements to Others	133
4.2	Communication with Person Represented by Counsel	135
4.3	Dealing with Unrepresented Person	137
4.4	Respect for Rights of Third Persons	139
	Law Firms and Associations	
5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers	141
5.2	Responsibilities of a Subordinate Lawyer	143
5.3	Responsibilities Regarding Nonlawyer Assistants	144
5.4	Professional Independence of a Lawyer	146
5.5	Unauthorized Practice of Law; Multijurisdictional Practice of Law	148
5.6	Restrictions on Right to Practice	154
5.7	Responsibilities Regarding Law-Related Services	155
	Public Service	
6.1	Voluntary Pro Bono Publico Service [Action Deferred; See Note]	159
6.2	Accepting Appointments	160
6.3	Membership in Legal Services Organization [Not Adopted; See Note]	161
6.4	Law Reform Activities Affecting Client Interests [Not Adopted; See Note]	162
6.5	Nonprofit and Court-Annexed Limited Legal Services Programs	163
	Information About Legal Services	
7.1	Communications Concerning a Lawyer's Services	165
7.2	Advertising and Recommendation of Professional Employment	167
7.3	Solicitation of Clients	170
7.4	Communication of Fields of Practice and Specialization	176
7.5	Firm Names and Letterheads	178
7.6	Political Contributions to Obtain Government Legal Engagements or Appointments by Judges [Not Adopted; See Note]	180
	Maintaining the Integrity of the Profession	
8.1	Bar Admission and Disciplinary Matters	181
8.2	Judicial Officials	183
8.3	Reporting Professional Misconduct	185
8.4	Misconduct	187
8.5	Disciplinary Authority; Choice of Law	189
	Form of Citation, Effective Date, and Application	192

III. ADVOCATE

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

Comparison to former Ohio Code of Professional Responsibility

DR 7-102(A)(2) and EC 7-25 address the scope of Rule 3.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.1 is identical to Model Rule 3.1.

RULE 3.2: EXPEDITING LITIGATION

Note

ABA Model Rule 3.2 is not adopted in Ohio. The substance of Model Rule 3.2 is addressed by other provisions of the Ohio Rules of Professional Conduct, including Rules 1.3 [Diligence], 3.1 [Meritorious Claims and Contentions], and 4.4(a) [Respect for Rights of Third Persons].

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no *substantial* purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Division (b) recognizes that lawyers sometimes receive a document or electronically stored information that was inadvertently sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this rule requires the lawyer to promptly notify the sender. For purposes of this rule, "document or electronically stored information" includes paper and electronic documents, electronic communications, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this rule only if the receiving lawyer knows or reasonably should know that the metadata was sent inadvertently to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was sent inadvertently. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer, subject to applicable law that may govern deletion. See Rules 1.2 and 1.4.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.4(a) incorporates elements addressed by several provisions of the Ohio Code of Professional Responsibility. Specifically, it contains elements of: (1) DR 7-102(A)(1), which, in part, prohibits a lawyer from taking action on behalf of a client that serves merely to harass another; (2) DR 7-106(C)(2), which, in part, prohibits a lawyer from asking any question that the

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent and diligent representation to each affected client;

(2) each affected client gives *informed consent, confirmed in writing*;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Comment

General Principles

[1] The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. All potential conflicts of interest involving a new or current client must be analyzed under this rule. In addition, a lawyer must consider whether any of the specific rules in Rule 1.8, regarding certain conflicts of interest involving current clients, applies. For former clients, see Rule 1.9; for conflicts involving those who have consulted a lawyer about representation but did not retain that lawyer, see Rule 1.18. [analogous to Model Rule Comment 1]

No change in the substance of the referenced Ohio rules on conflicts and conflict waivers is intended, except the requirement that conflict waivers be confirmed in writing. Specifically, the current "obviousness" test for the representation of multiple clients and the tests of Rule 1.7(b) and (c) are the same. In both instances, a lawyer must consider whether the lawyer can adequately represent all affected clients, whether there are countervailing public policy considerations against the representation, and whether the lawyer must obtain informed consent. Unlike DR 5-101(A)(1), Rule 1.7 makes clear that this same analysis must be applied when a lawyer's personal interests create a conflict with a client's interests.

Client consent is not required for every conceivable or remote conflict, as stated in Comment [14]. On the other hand, practicing lawyers recognize that many situations require the lawyer to evaluate the adequacy of representation and request client consent, not only those in which an adverse effect on the lawyer's judgment is patent or inevitable, as DR 5-105(B) can be interpreted to state. Rule 1.7 will more effectively guide lawyers in practice than DR 5-105(B) and anticipates that a lawyer will be subject to discipline for assuming or continuing a representation burdened by a conflict of interest only when a lawyer has failed to recognize a clear present or probable conflict and has not obtained informed consent, or where the conflict is not consentable. Nonconsentable conflicts include: (1) those where a lawyer could not possibly provide competent and diligent representation to the affected clients; (2) those where a lawyer cannot, because of conflicting duties, fully inform one or more affected clients of the implications of representation burdened by a conflict; and (3) representations prohibited under Rule 1.7(c).

Comparison to ABA Model Rules of Professional Conduct

Model Rule 1.7 is revised for clarity. Division (a) states the two broad circumstances in which a conflict of interest exists between the interests of two clients or the interest of a lawyer and a client. Division (b) prohibits a lawyer from accepting or continuing a representation that creates a conflict of interest unless certain conditions are satisfied. Division (c) defines certain conflicts of interest that are not waivable as a matter of public policy, even if clients consent. Lawyers are reminded that a conflict of interest may exist at the time that a representation begins or may arise later. The term "concurrent conflict," which was introduced in the most recent ABA revisions of Model Rule 1.7, is stricken as unnecessary. Division (a)(2) uses phrases borrowed from Model Rule 1.7, Comment [8] and DR 5-101 to explain the nature of a "material limitation" conflict and substitutes the defined term "substantial" in place of "significant."

Rule 1.7 differs in substance from the Ohio Code in its requirement that a client's consent to a conflict be confirmed in writing. Although the rule requires only the client's consent, and not the lawyer's disclosure to be confirmed in writing, the writing requirement will remind the lawyer to communicate to the client the information necessary to make an informed decision about this material aspect of the representation.

Division (c) has no parallel in the Code or Ohio law, except to the extent that it would be "obvious," under DR 5-105(C), that a lawyer could not engage in a representation prohibited by law or represent two parties in the same proceeding whose interests are directly adverse. The principles of division (c), which are drawn from Model Rule 1.7(b)(2) and (3), are

unexceptional, and their inclusion in the rule is appropriate. Note, however, that unlike Rule 1.7(c)(2), corresponding Model Rule 1.7(b)(3) was drafted to permit a lawyer to represent two parties with directly opposing interests in a mediation, although simultaneous representation of such parties in a related proceeding is prohibited. (See Model Rule 1.7, Comment [17]). Such a distinction is unacceptable.

The comments to Model Rule 1.7 are rewritten for clarity and are reordered to help practitioners find relevant comments. Portions of Comments [28] and [34] have been deleted because they appear to state conclusions of law for which we have found no precedent in Ohio law or advisory opinions of the Board of Commissioners on Grievances and Discipline.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not *knowingly* do any of the following:

(1) make a false statement of fact or law to a *tribunal* or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer;

(2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person, including the client, intends to engage, is engaging, or has engaged in criminal or *fraudulent* conduct related to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the *tribunal* of all material facts *known* to the lawyer that will enable the *tribunal* to make an informed decision, whether or not the facts are adverse.

Comment

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(o) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, division (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with

persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in division (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Division (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] [RESERVED]

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

(b) [RESERVED]

(c) A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing.*

(d)(1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is *illegal* or *fraudulent.* A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

Comment

Allocation of Authority between Client and Lawyer

[1] Division (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in division (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the

II. COUNSELOR

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if any of the following applies:

(1) the representation will result in violation of the Ohio Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged.

(b) Subject to divisions (c), (d), and (e) of this rule, a lawyer may withdraw from the representation of a client if any of the following applies:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is *illegal* or *fraudulent*;

(3) the client has used the lawyer's services to perpetrate a crime or *fraud*;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails *substantially* to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given *reasonable* warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

(7) the client gives *informed consent* to termination of the representation;

(8) the lawyer sells the law practice in accordance with Rule 1.17;

(9) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a *tribunal*, a lawyer shall not withdraw from employment in a proceeding before that *tribunal* without its permission.

Rule 1.16(a)(1) corresponds to DR 2-110(B)(1) and (2), Rule 1.16(a)(2) corresponds to DR 2-110(B)(3), and Rule 1.16(a)(3) corresponds to DR 2-110(B)(4).

Rule 1.16(b)(1) generally corresponds to DR 2-110(A)(2).

Rule 1.16(b)(2) corresponds to DR 2-110(C)(1)(b).

Rule 1.16(b)(3) corresponds to DR 2-110 (C)(1)(c).

Rule 1.16(b)(4) corresponds to DR 2-110(C)(1)(c) and (d).

Rule 1.16(b)(5) corresponds to DR 2-110(C)(1)(f).

Rule 1.16(b)(6) corresponds to DR 2-110(C)(1)(d).

Rule 1.16(b)(7) corresponds to DR 2-110(C)(5).

Rule 1.16(b)(8) corresponds to DR 2-110(C)(7).

Rule 1.16(b)(9) corresponds to DR 2-110(C)(6).

Rule 1.16(c) is identical to DR 2-110(A)(1).

Rule 1.16(d) corresponds to DR 2-110(A)(2) and also requires the withdrawing lawyer to promptly return client papers and property to the client. "Client papers and property" are defined as including correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.

Rule 1.16(e) is identical to DR 2-110(A)(3) except that the reference to the sale of a law practice rule is appropriately designated as Rule 1.17.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.16(b)(2) is revised to change "criminal" to "illegal." This allows the lawyer to withdraw when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal. This would include violations of statutes or administrative regulations for which there are no criminal penalties.

Rules 1.16(b)(7) and (8) are added to recognize additional circumstances in which withdrawal may be permitted.

Rule 1.16(d) is revised to include a list of items typically included in "client papers and property." This provision is further modified to require that a withdrawing lawyer must afford the client a reasonable time to secure new counsel. Comment [8A] is added to elaborate on the duties of a lawyer who is contemplating or effectuating withdrawal from representation.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not *reasonably believe* is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal *knowledge* of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming unavailable as a witness.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. However, a lawyer representing an organization, in accordance with law, may request an employee of the client to refrain from giving information to another party. See Rule 4.2, Comment [7].

[2] Division (a) applies to all evidence, whether testimonial, physical, or documentary. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed, or if the testimony of a person with knowledge is unavailable, incomplete, or false. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying

evidence is also generally a criminal offense. A lawyer is permitted to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, the lawyer is required to turn the evidence over to the police or other prosecuting authority, depending on the circumstances. Applicable law also prohibits the use of force, intimidation, or deception to delay, hinder, or prevent a person from attending or testifying in a proceeding.

[3] With regard to division (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay an occurrence witness any fee for testifying and it is improper to pay an expert witness a contingent fee.

[3A] Division (e) does not prohibit a lawyer from arguing, based on the lawyer's analysis of the evidence, for any position or conclusion with respect to matters referenced in that division.

[4] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

DR 7-102, DR 7-106(C), DR 7-109, and EC 7-24, 7-25, 7-26, 7-27 and 7-28 address the scope of Rule 3.4.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.4 is revised to add a "good-faith belief" provision consistent with the holding in *State v. Gillard* (1988), 40 Ohio St.3d 226. Model Rule 3.4(f) is deleted because its provisions are inconsistent with a lawyer's obligations under Ohio law, and the corresponding Comment [4] also is removed. Division (g) is inserted to incorporate Ohio DR 7-109(B).

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;

(2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client *reasonably* informed about the status of the matter;

(4) comply as soon as practicable with *reasonable* requests for information from the client;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.4(a) states the minimum required communication between attorney and client. This is a change from the aspirational nature of EC 7-8. Rule 1.4(a)(1) corresponds to several sentences in EC 7-8 and EC 9-2. Rules 1.4(a)(2) and (3) correspond to several sentences in EC 7-8. Rule 1.4(a)(4) explicitly states what is implied in EC 7-8 and EC 9-2. Rule 1.4(a)(5) states a new requirement that does not correspond to any DR or EC.

Rule 1.4(b) corresponds to several sentences in EC 7-8 and EC 9-2.

Rule 1.4(c) adopts the existing language in DR 1-104.

Comparison to ABA Model Rules of Professional Conduct

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for division (a)(4), which is altered to require compliance with client requests "as soon as practicable" rather than "promptly."

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not do any of the following:

(1) seek to influence a judicial officer, juror, prospective juror, or other official by means prohibited by law;

(2) lend anything of value or give anything of more than *de minimis* value to a judicial officer, official, or employee of a *tribunal*;

(3) communicate *ex parte* with either of the following:

(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order;

(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.

(4) communicate with a juror or prospective juror after discharge of the jury if any of the following applies:

(i) the communication is prohibited by law or court order;

(ii) the juror has made *known* to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress, or harassment;

(5) engage in conduct intended to disrupt a *tribunal*;

(6) engage in undignified or discourteous conduct that is degrading to a *tribunal*.

(b) A lawyer shall reveal promptly to the *tribunal* improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has *knowledge*.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Ohio Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. As used in division (a)(2), "*de minimis*" means an insignificant item or interest that could not raise a reasonable question as to the impartiality of a judicial officer, official, or employee of a tribunal.

[2] During a proceeding a lawyer may not communicate *ex parte* with persons serving in an official capacity in the proceeding, such as judges, masters, magistrates, or jurors, unless authorized to do so by law, court order, or these rules.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive, undignified, or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(o).

Comparison to former Ohio Code of Professional Responsibility

Rule 3.5 corresponds to DR 7-108 (communication with or investigation of jurors) and DR 7-110 (contact with officials).

Rule 3.5(a)(1) prohibits an attorney from seeking to "influence a judicial officer, juror, prospective juror, or other official." This provision generally corresponds to DR 7-108(A) and (B) and DR 7-110, which contain express prohibitions against improper conduct toward court officials and jurors, both seated and prospective.

Rule 3.5(a)(2) restates the prohibition contained in DR 7-110(A), and Rule 3.5(a)(3) incorporates the prohibitions on improper *ex parte* communications contained in DR 7-108(A) and 7-110(B). Rule 3.5(a)(4) corresponds to DR 7-108(D) and prohibits certain communications with a juror or prospective juror following the juror's discharge from a case. Rule 3.5(a)(5) has no analogue in the Code of Professional Responsibility. Rule 3.5(a)(6) corresponds to DR 7-106(C)(6).

Rule 3.5(b) is revised to add the provisions of DR 7-108(G).

Comparison to ABA Model Rules of Professional Conduct

Rule 3.5 differs from the Model Rule in four respects. First, a new division (a)(2) is added that incorporates the language of DR 7-110(A). The change makes clear the Ohio rule that a lawyer can never give or loan anything of more than *de minimis* value to a judicial officer, juror, prospective juror, or other official. "*De minimis*" is defined in Comment [1] to incorporate the definition contained in the Ohio Code of Judicial Conduct.

The second revision is to division (a)(3), which has been divided into two parts to treat separately communications with judicial officers and jurors. Division (a)(3)(i) follows DR 7-110(B) by prohibiting *ex parte* communications with judicial officers only with regard to the merits of the case. This language states that *ex parte* communications with judicial officers concerning matters not involving the merits of the case are excluded from the rule. In contrast, division (a)(3)(ii) prohibits any communication with a juror or prospective juror, except as permitted by law or court order.

The third change in the rule is a new division (a)(6) that incorporates DR 7-106(C)(6). Rule 3.5(a)(5) addresses a wide range of conduct that, although disruptive to a pending proceeding, may not be directed to the tribunal itself, such as comments directed toward opposing counsel or a litigant before the jury. Rule 3.5(a)(6) speaks to conduct that is degrading to a tribunal, without regard to whether the conduct is disruptive to a pending matter. See *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048 and *Disciplinary Counsel v. LoDico*, 106 Ohio St.3d 229, 2005-Ohio-4630.

The fourth change in the rule is a new division (b) that incorporates DR 7-108(G). The rule mandates that a lawyer must reveal promptly to a court improper conduct by a juror or prospective juror or the conduct of another toward a juror, prospective juror, or member of the family of a juror or prospective juror.

Comment [1] is revised to explain that, with regard to Rule 3.5(a)(2), the impartiality of a public servant may be impaired by the receipt of gifts or loans and, therefore, it is never justified for a lawyer to make a gift or loan to a judge, hearing officer, magistrate, official, or employee of a tribunal.

TAB
C

Brian R. Redden, Esq.
Buechner Haffer Meyers & Koenig Co. LPA

Brian's primary work is helping privately-owned businesses avoid and, if necessary, defend against employment practices violations and lawsuits, and protect the competitive edge those businesses have gained through hard work and sacrifice. Brian handles the whole spectrum of employment and trade secret law: employment agreements, non-compete agreements, trade secret protection, employment policies, employee handbooks, executive compensation, employee recruiting and job placement, employee counseling, negotiation of severance agreements, non-litigated resolution of employment disputes, and trials and appeals of employment and trade secret disputes.

Brian also handles disputes involving business transactions, business ownership, personal injury, construction (particularly mechanic's liens, lien enforcement, and general contractor and subcontractor issues), and environmental matters.

Lastly, Brian represents amateur (high school and college age) and professional athletes in negotiating and enforcing player and endorsement contracts. Brian has assisted a number of professional athletes in creating and operating charitable foundations and non-profit organizations.

Education

- J.D., Salmon P. Chase College of Law, Northern Kentucky University (Highland Heights, KY), 1998
- B.A., Xavier University (Cincinnati, OH), 1994 (University Scholar)

Memberships and Affiliations

- Cincinnati, Ohio State and American Bar Associations
- Sports Lawyers Association

Community Activities

- Trustee, Teen Response, Inc.
- Trustee, JJS3 Foundation, Cincinnati
- Football Coordinator, St. Gertrude School, Cincinnati
- Youth football coach, St. Gertrude School
- Trustee, Greater Cincinnati Sports Corporation
- Adjunct Professor, Sports Business Law, Xavier University, Cincinnati (2006 to 2009)
- Adjunct Professor, Environmental, Miami University, Oxford, Ohio (1999 to 2006)

Brett M. Renzenbrink

Shareholder
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Cincinnati, Ohio
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Brett acts as "Outside CLO" (Chief Legal Officer) for a number of start-ups, emerging, and established Cincinnati/Northern Kentucky organizations of all sizes (from single member LLC start-ups to companies with nine-figure annual revenue and hundreds of employees). In this role, Brett adds accretive value to his client-partner's growth, while forecasting blind spots and mitigating risk.
In particular, Brett enjoys:

1. Working with entrepreneurs/investors/business-owners to design corporate strategy, and build out plans for growth/protection;
2. Analyzing property/leasing issues;
3. Developing and implementing best practices for compliance with employees and independent contractors;
4. Negotiating with vendors and customers to create maximum net-benefit business relationships;
5. Instituting pro-active/preventative litigation strategy and defending/enforcing corporate rights when suit is initiated (including internal partner disputes);

Brett also has extensive experience working with transportation/logistics companies (in particular 3PLs) on architecting motor carrier/customer strategy, handling unique employee or compliance issues, and pursuing commercial collections.

Brett has a track record of implementing creative techniques to assist clients (including architecting the "shared services platform" for Non-Profits, which dovetails with the "Outside CLO" platform) and go over and above to establish extreme, results/deliverable-oriented service without forcing clients into unreasonable big firm fee structures.

Areas of Practice

- Outside CLO
- Emerging Business/Venture Capital/Private Equity/Entrepreneurial
- Commercial/Business Litigation
- Transportation and Logistics
- Employment Law
- Non-Profits and Charitable Giving

Bar Admissions

- Ohio
- Kentucky
- U.S. District Court Southern District of Ohio

Education

- **Northern Kentucky University, Salmon P. Chase College of Law, Highland Heights, Kentucky**
  - J.D. *cum laude* - 2010
- **Ohio State University**
  - B.A. *cum laude* - 2007
  - Honors: With Honors
  - Major: Sociology and Honors Interpersonal Communication/Writing

Published Works

- 4L, What They Don’t Teach You About Law in Law School

Honors and Awards

- Peer-rated Ohio Super Lawyer – Rising Star, 2013, 2014, 2015, 2016, 2017, 2018
- Selected as Global Board Member for Meritas Law Firms

Professional Associations and Memberships

- Cincinnati Bar Association
- Columbus Bar Association
- Ohio State Bar Association
- Kentucky Bar Association

Social Media: Common Sense and Caution

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- 3 billion people use social media in some form – 42% of global population
  - 1.4 billion active Facebook accounts, visits from 76% daily
- 11 new users per second
- Site placement – 1) Facebook, 2)Instagram, 3)Snapchat…. 6) LinkedIn, 7)Twitter

- Average American uses 3 social media platforms, over half are on 2
- 80% of social media time is on mobile

www.skyword.com/contentstandard.marketing/marketing/10-social-media-usage-statistics-you-should-know-and-what-they-mean-for-your-marketing-strategy/ ; http://www.pewinternet.org/2018/03/01/social-media-use-2018-acknowledgments/ ; http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/

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Poses more significant threat in a regulated environment like a law practice – danger of imputed responsibility to lawyer for actions of staff / paralegals

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1. Social Media Profiles/Posts May Constitute Legal Advertising

- In Ohio, lawyer and law firm websites are deemed to be advertisements. Because social media profiles (including blogs, Facebook pages, and LinkedIn profiles) are by their nature websites, they too may constitute advertisements. Safest to assume that they do.
- Florida – Specifically changed ethics rules to include lawyer websites, profiles, and on-line advertising to require advertising disclaimers
- California - Ethics Opinion 2012-186 concluded that the lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.

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2. Avoid Making False or Misleading Statements

- Ohio Ethics Rules 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), 7.1 (Communication Concerning a Lawyer's Services), 7.4 (Communication of Fields of Practice and Specialization), and 8.4 (Misconduct).
- ABA Formal Opinion 10-457 concluded that lawyer websites must comply with the ABA Model Rules that prohibit false or misleading statements. The same obligation extends to social media websites.
- Beware claims of “expertise” or “specalization”

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3. Avoid Making Prohibited Solicitations

- Solicitations by a lawyer or a law firm offering to provide legal services and motivated by pecuniary gain are restricted under Ohio Ethics Rule 7.3. Ohio, but not all states, recognizes limited exceptions for communications to other lawyers, family members, close personal friends, persons with whom the lawyer has a prior professional relationship, and/or persons who have specifically requested information from the lawyer.
- Beware automatic connection requests and open solicitations. Beware LinkedIn automatic connection request renewals.

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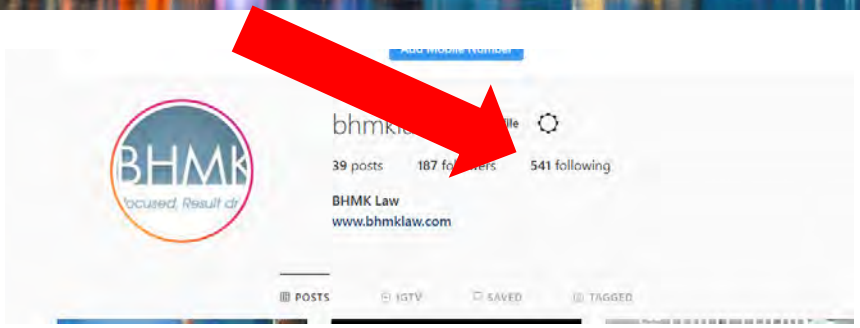

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4. Avoid Disclosing Privileged or Confidential Information

- Duty to protect privileged and confidential client information extends to current clients (ORPC 1.6), former clients (ORPC 1.9), and prospective clients (ORPC 1.18).
- ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients on websites. Could include the casual use of geo-tagging in social media posts or photos that may inadvertently reveal your geographic location when traveling on confidential client business.
- In re Skinner, 740 S.E.2d 171 (Ga. 2013), the Georgia Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under that state's rules) where a lawyer admitted to disclosing information online about a former client in response to negative reviews on consumer websites.

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4. Avoid Disclosing Privileged or Confidential Information

- Illinois Supreme Court in In re Peshek, M.R. 23794 (Ill. May 18, 2010) suspended an assistant public defender from practice for 60 days for, among other things, blogging about clients and implying in at least one post that a client may have committed perjury. The Wisconsin Supreme Court imposed reciprocal discipline on the same attorney for the same misconduct. In re Disciplinary Proceedings Against Peshek, 798 N.W.2d 879 (Wis. 2011)

- Virginia Supreme Court held in Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013), that confidentiality obligations have limits when weighed against a lawyer's First Amendment protections. Held that although a lawyer's blog posts were commercial speech, the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients' consent where (1) the information related to closed cases and (2) the information was publicly available from court records

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5. Do Not Assume You Can "Friend" Judges

- ABA Formal Opinion 462 concluded that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct. Several states have adopted similar views, including Connecticut (Op. 2013-06), Kentucky (Op. JE-119), Maryland (Op. 2012-07), New York (Op. 13-39, 08-176), *Ohio (Op. 2010-7)*, South Carolina (Op. 17-2009), and Tennessee (Op. 12-01).

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5. Do Not Assume You Can "Friend" Judges

- California (Op. 66), Florida, Massachusetts (Op. 2011-6), and Oklahoma (Op. 2011-3) have adopted a more restrictive view.
- Florida Ethics Opinion 2009-20 concluded that a judge cannot friend lawyers on Facebook who may appear before the judge because doing so suggests that the lawyer is in a special position to influence the judge. Florida Ethics Opinion 2012-12 extended the same rationale to judges using LinkedIn and the more recent Opinion 2013-14 further cautioned judges about the risks of using Twitter. Consistent with these ethics opinions, a Florida court held that a trial judge presiding over a criminal case was required to recuse himself because the judge was Facebook friends with the prosecutor. See Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012).

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6. Avoid Communications with Represented Parties

- Under ORPC 4.2, a lawyer is forbidden from communicating with a person whom the lawyer knows to be represented by counsel without first obtaining consent from the represented person's lawyer. Under ORPC 8.4(a), prohibition extends to any agents (secretaries, paralegals, private investigators, etc.) who may act on the lawyer's behalf.
- Effectively prohibit lawyers and their agents from engaging in social media communications with persons whom the lawyer knows to be represented by counsel. Means no Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content.
- Viewing publicly accessible social media content that does not precipitate communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game.

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7. Be Cautious When Communicating with Unrepresented Third Parties

- ORPC 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct) protects third parties against abusive conduct.
- In a social media, these rules require lawyers and their staff to be cautious in online interactions with unrepresented third parties. Publicly viewable social media content is generally fair game. If the information sought is behind the third party's privacy settings, ethical constraints may limit the options for obtaining it.
- Consensus appears to be that a lawyer may not attempt to gain access to non-public content by using subterfuge, trickery, dishonesty, deception, or an alias. Kentucky (Op. KBA E-434) has concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to circumvent social media users' privacy settings to reach non-public information.

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8. Avoid Inadvertently Creating Attorney-Client Relationships

- ABA Formal Opinion 10-457 recognized that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under RPC 1.18.
- The interactive nature of social media creates a risk of inadvertently forming attorney-client relationships with non-lawyers, especially when the objective purpose of the communication from the consumer's perspective is to consult with the lawyer about forming a lawyer-client relationship regarding a specific matter or legal need. If an attorney-client relationship attaches, so do obligations to maintain the confidentiality of client information and to avoid conflicts of interest.
- Use of clear, obvious disclaimers can avoid the problem.

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Jane Doe: "Actually we are! My lease is "triple net" – what does that mean?"

9. Avoid UPL Allegations and be aware of jurisdictional boundaries

- Social media knows no geographic boundaries!!

- Under RPC 8.5 and analogous state rules, a lawyer may be disciplined in any jurisdiction where he or she is admitted to practice (regardless of where the conduct takes place) or in any jurisdiction where he or she provides or offers to provide legal services.

10. Caution with Testimonials, Endorsements, and Ratings

- LinkedIn and Avvo promote the use of testimonials, endorsements, and ratings (either by peers or consumers). But, there is little or no attention given to ethics rules.
- Some jurisdictions prohibit or severely restrict lawyers' use of testimonials and endorsements or may require those to be accompanied by disclaimers.
- South Carolina Ethics Opinion 09-10 provides that (1) lawyers cannot solicit or allow publication of testimonials on websites and (2) lawyers cannot solicit or allow publication of endorsements unless presented in a way that would be misleading or likely to create unjustified expectations. Also concluded that lawyers who claim their profiles on social media sites are responsible for conforming the information on their profiles to the ethics rules.

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ONLINE MARKETING –

KY vs. OH

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- **Kentucky**
- Advertising in Kentucky is governed by:
  - Supreme Court Rules 3.130-7.01 – 7.60
  - Attorneys' Advertising Commission Regulations
- SCR 3.130(7.25) Identification of Advertisements
  - "The words 'THIS IS AN ADVERTISEMENT' must be prominently displayed on every page of any advertisement in writing, and displayed without scrolling on the first screen of every page of a website."
- SCR 3.130-7.02(1) defines the word advertise: "to furnish any information or communication concerning a lawyer's name or other identifying information."
  - Numerous exceptions – see rule
  - Also see AAC Regulation No. 13
- The following information is available at: http://www.kybar.org/general/custom.asp?page=attorneyadvertising

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- The definition of advertise does not include information provided by a lawyer "in public speaking forms, radio, television broadcasts, or **postings on the Internet that permit real-time communication** and exchanges on topics of general interest in legal issues, provided there is no reference to an offer by the lawyer to render legal services." SCR 3.130-7.02(1)(j)

- Advertisements, including websites, must be submitted to the AAC.
  - All websites qualifying as advertisement in Kentucky must be submitted to the Kentucky Bar Association.
  - Most websites (those that include more than "bare bones" information) must be submitted with a filing fee of $75. An additional fee of $100 may be imposed for those submissions received after the publication of the advertisement.
  - See SCR 3.130(7.05) for additional details regarding number of copies and other requirements.

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- Website Updates
  - Whenever "substantive changes" are made to a web site, the updates must be submitted to the AAC.
  - These do not include typographical changes, changes in links to sources, or any item listed in SCR 3.130-7.05(1)(a) or AAC Regulation 2.
- Social Media
  - If communication meets the definition of an advertisement under SCR 3.130-7.02(1), it must be submitted to the AAC.
- Generally, a lawyer ***cannot*** use real-time electronic means to initiate contact with potential clients. SCR 3.130-7.09(1). However, this is appropriate with existing clients, as this communication is not an advertisement. SCR 3.130-7.02(1)(h).
- KBA Frequently Asked Questions: http://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/Advertising/AAC_FAQs_w-Links_-_Eff_07011.pdf

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- **Ohio**

- Lawyers in Ohio are free to advertise through any medium, so long as they comply with the advertising standards established by the Supreme Court of Ohio.
    - Prof. Cond. Rule 7.1: Cannot contain any false, deceptive, or misleading statements.
    - Comment 3: Client testimonials can be tricky. They can be misleading if they create an expectation that the same results would be obtained by a client in a similar situation.
    - Comment 4: Use of the terms “special, lowest, below cost, giveaway, cut-rate, or discount” are considered misleading.

BHMK

TAB D

Patrick J. Garry, J.D.
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St. Xavier High School, 1982; B.A. History, Boston College, 1986; J.D., University of Cincinnati, 1991. Admitted to practice in Ohio, 1991; U.S. District Court, S.D. Ohio, 1992.

Professional Memberships: American Bar Association; Ohio State Bar Association; Cincinnati Bar Association (Mental Health and Wellness Committee).

Mr. Garry is an Associate Director of the Ohio Lawyers Assistance Program, Inc. (OLAP), and he maintains a law practice at 1019 Main Street, Cincinnati, Ohio, concentrating primarily on criminal defense.

Mr. Garry serves on the Hamilton County Mental Heath and Recovery Services Board and the Board of Directors of The Gateway House, a sober living facility on Vine Street.

Patrick is married to Catharin Taylor, Esq., and they have two children, Ray and Joe. Ray is a first year student at Wright State, and Joe is a junior at Walnut Hills High School.

Brain Disorders and the Impaired Attorney: Problems and Solutions

Patrick J. Garry
Associate Director, Ohio Lawyers Assistance Program

“Houston, we’ve had a problem.”

“Houston, we [still] have a problem.”

Prevalence of Substance Use and Other Mental Concerns Among American Attorneys

The American Bar Association Commission on Lawyer Assistance Program and Hazelden Betty Ford Foundation released their study in the Journal of Addiction Medicine that, thus far, is the most comprehensive of its kind in February, 2016.

So, here are the new numbers…

… the old number were, well, old… from 1990. A few of the new numbers…

- Random sample of **12,825** licensed, employed attorneys completed surveys, assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.
- **20.6%** licensed, employed attorneys screen positive for hazardous, harmful and potentially alcohol-dependent drinking.
- **28%** struggle with some level of depression.
- **19%** demonstrate symptoms of anxiety.

… of note:

- "Younger attorneys – those in their first 10 years of practice – exhibit the highest incidence of these problems.
- Men had a higher proportion of positive screens.
- **The most common barriers for attorneys seeking help were fears of others finding out and general concerns about confidentiality.**
- Attorneys, compared with other professionals, are leaders in alcohol use disorders and mental health disease.
- Attorney impairment poses a variety of risks: to individuals, to organization [firms], to communities, to government, to the economy, and to families.

… of further note:

Brain disorders – and accompanying disordered thoughts – occur without regard to age, race, sexual preference, economic standing, religious views, political affiliation, etc. You get the idea, right?

Genetic predisposition may play a role, but recent studies reveal that behavior has a significant impact upon gene expression.

… no one wants a health problem… especially a "mental health" problem…

Stigma. Stigma. Stigma.

- a mark of disgrace associated with a particular circumstance, quality or person.
- "the stigma of mental disorder"
- synonyms: shame, disgrace, dishonor, ignominy, opprobrium, humiliation, (bad) reputation

… but these conditions are often chronic, fatal, and progressive…

… and, most importantly, treatable.

There is a solution.

… but, self-diagnosis is difficult

A few signs of disorders:

- Behavioral changes as simple as coming in late or leaving early.
- Decrease in production and quality of work product.
- Increased isolation. Few appearance at work-related functions.
- Discernable mood changes that may include irritability and apathy.
- When confronted, many plausible explanations, avoidance, and/or insistence that there is no problem.
- The odor of alcohol is "on or about" the person…at work.

"If you want something done right, do it yourself…right?"

…some exception, absent appropriate experience:

- Plumbing, electrical, HVAC
- Automobile repair, including body work.
- Roofing, house paining, chimney work.
- Blacktopping, concrete work.
- Severe lacerations.
- Treating broken bones, including vertebrae.
- Heart disease.
- Mental health problems, including alcohol use disorders.

Solutions

- Personally, prepare like a champion: rest, nutrition, physical activity, hobby, nuture healthy relationships, serve others, etc.
- Personally, seek services, if possible. This is note probable.
- On behalf of others, take action…

Take Action

- Contact OLAP for any reason. The communications are confidential.
- Educate yourself by speaking to those with experience and knowledge.
- Open your mind to the possibility that an intervention of some sort may be necessary and life saving… and career saving.
- Gather the undisputed facts.
- Assess the risk to the organization. The risk to the individual is their life.
- Assess organization's willingness to exercise leverage.
- Confidentiality, dignity, respect, support, and empathy are required.

The Good News

Attorneys recover from brain disorders and impairments at a remarkable rate… once they begin the process.

The challenge remains: On a case-by-case basis, just how do we – collectively and individually – create an environment that allows an impaired person to begin the process?

Let's talk about that. Do not hesitate to call.

13

ohiolap.org

Scott Mote, Executive Director

Patrick J. Garry, Associate Director, 513/623-6853

14