



# Serving on a Nonprofit Board of Directors: What Attorneys Need to Know

*Presented by the Nonprofit Law Practice Group*

**Friday, September 23, 2016**



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# Serving on a Nonprofit Board of Directors

September 23, 2016

## AGENDA

- 8:30 a.m.**                    **Registration & Continental Breakfast**  
Breakfast Sponsored by Pro Bono Partnership of Ohio
- 8:55 a.m.**                    **Welcome & Opening Remarks**  
Erin C. Childs, Esq., Executive Director,  
*Pro Bono Partnership of Ohio*
- 9 a.m.**                        **Board Governance & Fiduciary Duties**                    **Section A**  
Beth Short and Christopher A. Wagner, Esq.,  
*Ohio Attorney General's Office*
- 10:30 a.m.**                    **Understanding Financial Statements**                    **Section B**  
Patrick Frambes, CPA, and Jason Terwillinger, CPA  
*Barnes Dennig & Co. Ltd.*
- 11:30 a.m.**                    **Break & Pick-up Box Lunch**
- 11:45 a.m.**                    **Volunteer Board Opportunities**                    **Section C**  
Anna Coutts, *BOLD Senior Associate,*  
*United Way of Greater Cincinnati*
- 12 p.m.**                        **Ethical Considerations for Attorneys Serving on**                    **Section D**  
**Nonprofit Boards**  
Moderator: Allison H. Kropp, Esq., *Dinsmore & Shohl LLP*  
Panelists: Sister Sally Duffy, President & Executive Director,  
*SC Ministry Foundation*  
Jeniece D. Jones, Esq., *Housing Opportunities Made Equal*  
David T. Wallace, Esq., Board Chair,  
*Beech Acres Parenting Center*  
Kent Wellington, Esq., *Graydon Head & Ritchey LLP*
- 1 p.m.**                        **Adjourn**

# **Section A**

## **Board Governance & Fiduciary Duties**





Charitable Law Section  
Office 614-466-3181  
Fax 614-466-9788  
150 East Gay Street, 23<sup>rd</sup> Floor  
Columbus, Ohio 43215

[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)

## **BETH SHORT**

Beth Short, who handles outreach and education for the Ohio Attorney General's Charitable Law Section, has spent her career working for and with nonprofit organizations. Her passion for the nonprofit sector is evidenced by her professional and volunteer background working with charities as a staff member, board member, consultant and volunteer for large and small organizations. She brings a background in journalism, legislative and public affairs and training, complemented by a Master's Degree in Business that focused on nonprofit management issues. Her work in the Charitable Law Section focuses on the development of strategies aimed at strengthening the nonprofit sector. She is a graduate of the Ohio State University and Ohio University



Christopher Wagner, Managing Attorney  
Cincinnati Regional Office  
Office 513-852-3497  
Direct 513-852-1555  
Fax 866-431-4735  
[christopher.wagner@ohioattorneygeneral.gov](mailto:christopher.wagner@ohioattorneygeneral.gov)

441 Vine Street  
1600 Carew Tower  
Cincinnati, Ohio 45202  
[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)

## **CHRISTOPHER WAGNER**

Christopher Wagner is a former Cuyahoga County Assistant Prosecutor in Cleveland, Ohio where he served under William D. Mason from 2001 to 2007. He was promoted in 2006 to a position as a Major Trial Prosecutor where he litigated murder and rape cases. Also during his time in Cleveland, Christopher served as a Special Assistant United States Attorney in the Northern District of Ohio on a task force formed to combat drug trafficking and violence committed by rival gangs in Cleveland. Christopher tried 49 jury trials in Cleveland and represented the State of Ohio in numerous appellate matters.

In 2007, Christopher joined the Ohio Attorney General's Office and serves as the Managing Attorney of the Cincinnati Office for Attorney General Mike DeWine. Throughout his career with the Attorney General's office, Christopher litigated cases throughout Ohio. He was appointed Special Prosecutor in eleven different Ohio counties. Christopher litigated two nuisance abatement lawsuits in Ohio as part of the Attorney General's statewide anti-public nuisance campaign. The case, *AG v. Georgescu, et al*, shuttered the last opiate "pill mill" in Scioto County, Ohio. Additionally, Christopher serves as the legal counsel to numerous state governmental agencies in litigation and administrative actions, including the University of Cincinnati and the Ohio State Racing Commission. Currently, Christopher protects Ohio charities from fraud and theft through the statutory and common law powers of the Attorney General.

Christopher participates in the educational outreach program of the Ohio Attorney General's office instructing Ohioans about consumer fraud, protecting non-profit organizations, and other aspects of the office.

Christopher currently serves on the Cincinnati Bar Association Board of Trustees. Christopher also serves as a coach for the University of Cincinnati Law School trial practice team.

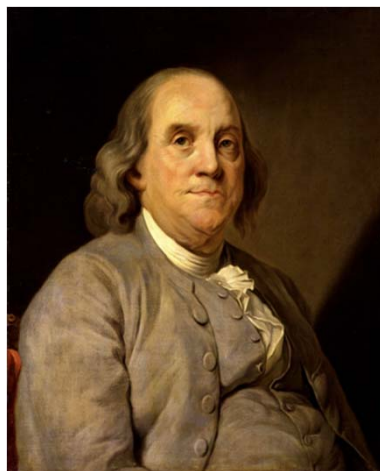
Minding the Business While Changing the World

# Charitable Board Member Roles and Responsibilities

Ohio Attorney General's Office, Charitable Law Section



**“To pour forth benefits for the common  
good is divine.”**



**- Benjamin Franklin**



## Thank You!



The quality of life of all Ohioans is enriched by the important efforts of the charitable sector.



## Role of the Attorney General

- Assisting board members in knowing and fulfilling their duties. Many resources are available through the web page.



# Role of the Attorney General



- Attorney General's role in oversight of charitable trusts is one of the most ancient duties of the Attorney General
- Dates to the Elizabethan period
- Standing in the shoes of those with no voice

MIKE DEWINE  
OHIO ATTORNEY GENERAL





## Did you know?

- There are more than 1.5 million nonprofit groups in the US – a 31% increase since 1999.
- Roughly 1.1 million of those groups are 501(c)(3) groups – an increase of nearly 60% since 1999



### Ex-nonprofit employee charged with embezzlement

*Man allegedly took \$67,000 from Partners in Education*

#### Former hospice worker indicted

Officials advise all nonprofits to routinely audit procedures, books

Friday, November 21, 2008 3:18 AM

BY JOSH JARMAN  
THE COLUMBUS DISPATCH

NEWARK, Ohio -- All nonprofit organizations need to guard themselves against long-term embezzling such as that alleged against a former employee of a local hospice that is out more than \$400,000, officials said this week.

Kathleen Lee, 60, of Heath, was arrested Oct. 28 after police say she admitted to stealing \$411,858 over five years from Hospice of Central Ohio, her former employer. She has been indicted on felony counts of aggravated theft, forgery and engaging in a pattern of corrupt activities and faces 18 years in prison if convicted on all counts.

A Deitz Avenue woman was accused of forgery Aug. 16. She is accused of writing a check to herself from the Glover Elementary School PTA for \$2,400. Reports said that she is one of the signers of the check, but she forged the signature of the secondary signer.

### PTA treasurer ordered to pay restitution

By Beacon Journal staff report

POSTED: 03:56 p.m. EST, Jun 09, 2008

A treasurer of an Akron elementary school PTA has been ordered to pay restitution for stealing money from the organization.

Katherine F. Delaney pleaded guilty last month to a felony theft charge stemming from the the alleged embezzlement of more than \$12,425 from the Sam Salem Elementary School PTA over a three-year period.

She was sentenced to 100 hours of community service.

Last week, Summit County Common Pleas Judge Brenda Burnham Unruh ordered Delaney to pay the organization \$3,961 — the balance owed to the organization.

Delaney told the court she already had paid part of the restitution.

Akron police have said the alleged theft came to light following a recent audit of the PTA's books for 2004 through 2007.



## National Issues



- Fraud
- Who should regulate charities?
- Are all charities equal?
- Integrity and accountability



## What's the role of a state charity regulator?

- Help us stop problems before they become major headaches – contact us with concerns
- Last year, the Charitable Law Section fielded nearly 1,000 complaints



# Online Charitable Registration System

A more intuitive system that, based on the information provided, determines what filings or fees might be needed under the various statutory provisions

BUSINESS > SERVICES FOR CHARITIES > CHARITABLE REGISTRATION

### Charitable Registration

Please be aware that the filing system may experience slowdowns during peak hours.

Ohio requires charitable organizations located in Ohio and groups that ask Ohioans for contributions to file annual reports with the Attorney General's Office. These filings are public and contribute to accountability and transparency within the charitable sector.

Groups are required to use the online system to fulfill their duties under the Charitable Trust Act (RC 109.23) and the Charitable Solicitations Act (R.C. 1716.02). Multiple individuals from each organization are encouraged to create accounts in order to receive reminders on filing deadlines, confirmation of filings, and other important information.

[File Online](#)



## Research Charities

- Check on registration status and filings with our office
- Other research information

### Research Charities

**Search Criteria:**

Organization Name:  Contains

Employer identification number (EIN XX-XXXXXXX):  Contains

[Search](#)

**Search Results:**

The form, **Verification of Registration** with the Ohio Attorney General's Office, is no longer available. Instead, charities and donors can use this page and search for a charity. The resulting information will indicate whether the organization is registered and current and can be printed as verification of registration.

Learning about an organization and its activities can help donors make wise giving decisions. In addition to checking whether an organization is current with its registration requirements with the Ohio Attorney General's office, other good sources of information include:

- The IRS's Exempt Organizations Selection Check can be used to verify if an organization has a valid 501(c)(3) or other tax-exempt designation. The [IRS also lists organizations](#) that have had their tax-exempt status revoked.
- Private watchdog organizations often review data and reports on organizations and may grade them based on various spending standards and other procedures. Some of those groups are [CharityWatch](#), [Charity Navigator](#), and the [Better Business Bureau Wise Giving Alliance](#). Your local Better Business Bureau may also be a resource and can be identified through the Wise Giving Alliance link above.



|                                |  |   |
|--------------------------------|--|---|
| <b>Organization Details:</b>   |  | Description of Organization's Purpose: Strengthen the capacity of |
| Organization Name: Ohio U      | Organiza   | Is the organization's registration status current? Yes            |
| DBA Names:                     | DBA Nam  |   |
| Employer identification number | Employer identification number (EIN): 31-4379529 |   |
| Address line 1: 395 E Broad    | Address line 1: 395 E Broad Ste 320              |   |
| Address line 2:                | Address line 2:                                  |   |
| City: Columbus                 | City: Columbus                                   |   |
| State: Ohio                    | State: Ohio                                      | Total Revenue: \$863,085.00                                       |
| ZIP code: 43215-3844           | ZIP code: 43215-3844                             | Total Expenses: \$843,472.00                                      |
| County: Franklin               | County: Franklin                                 | Total Program Expenses: \$743,179.00                              |
| Country: United States         | Country: United States                           | Percent of Total Expenses: 88%                                    |
| Telephone: (614)224-8146       | Telephone: (614)224-81                           | Total Assets: \$672,066.00  |
| Web address: www.ouw.org       | Web address: www.ouw.                            |   |
| Date of formation: 07/04/19    | Date of formation: 07/04/1913                    |   |
| Organization type: 501(c)3     |  |   |



## Ohio Attorney General Responsibilities



- Common law authority
- Statutes
  - Charitable Trust Act (ORC 109)
  - Charitable Organizations (Solicitation) Act (ORC 1716)
  - Gambling Code (ORC 2915)
  - Ohio Nonprofit Corporations Act (ORC 1702)
- Ohio Administrative Code



# Ohio Charitable Trust Act

RC 109



- Charitable trust defined:
- Not limited to formal trust agreements
- Broadly defined as any organization that holds money or property for a charitable, religious or educational purpose
- Applies to the “nature” of the entity



# Ohio Charitable Trust Act



- Registration and Reporting
- Investigative powers and enforcement authority
- Necessary party to certain litigation
- Involvement in certain transactions



## Ohio Charitable Organizations (Solicitation) Act (ORC 1716)



- Applies when an appeal is used that suggests a charitable purpose for a solicitation
- Registration of professional solicitors and fundraising counsel
- Enforcement and investigation powers
- Annual report on professional solicitors



## Nonprofit Corporation Law- Chapter 1702

- Public benefit corporations
- Notice to Attorney General on certain sales of assets and mergers/consolidations



## Gambling-Chapter 2915



- Bingo licensing, investigations, enforcement
- Raffles and games of chance
- Definition of eligible organizations
- Restrictions on activities



Regardless of size of the nonprofit, all board members share important duties



## Fiduciary Duties

- Duty of care
- Duty of loyalty
- Duty to maintain accounts
- Duty of compliance



## Duty of Care



- Standard of Care
- Directors of unincorporated charitable trusts must conduct themselves with the level of care, skill and diligence that an ordinarily prudent person would exercise in the handling of his or her own affairs.



## Duty of Care

- Attend meetings
- Prepare for meetings
- Actively participate
- Establish policies
- Selection of organization's key staff members



## Duty of Care Policies



## Duty of Care Policies

Major expenditures



Spending, investment and asset allocation



Hiring professionals



## Duty of Care Policies

Conduct of meetings



Whistleblower protection



## Duty of Care

In short



## Duty of Loyalty

Requires that the interest of the charity is foremost and is placed above any personal interest



# Duty of Loyalty

## Conflicts of Interest!



Types of conflict situations:

- Personal financial interest
- Loyalty or relationship that can influence decision

# Duty of Loyalty

## Conflict of interest policy



## Duty of Loyalty

Conflict of interest policy



Gathers information on board members' affiliations and those of the board members' families

## Duty of Loyalty

Conflict of interest policy



Requires disclosure of conflicts

## Duty of Loyalty

Conflict of interest policy



Prohibits board members with conflicts from voting or seeking to influence decisions

## Duty of Loyalty

Conflict of interest policy

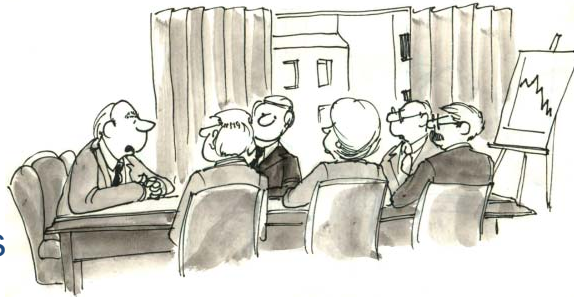


Requires that minutes reflect when a member is excluded from discussion and voting

## Duty of Loyalty

To avoid problems:

- Regularly update the disclosure statements.
- Cultivate a board culture that invites candid discussions of potential conflicts.



"Well, now we know what not to do."



## Duty to Maintain Accounts

Requires that accurate records are maintained and that financial matters are properly managed.



## Duty to Maintain Accounts



- Keep accurate records of income, investments, expenses
- Develop and monitor budgets
- Establish internal control systems – checks and balances

## Duty to Maintain Accounts

- Maintain accurate records of all organization activities
- Records retention policy





## Duty of Compliance

Board must comply with all legal requirements and other obligations, including:



- Federal and state law
- Governing documents
- Agreements, contracts
- Representations made in solicitations



## Duty of Compliance

### Federal law



- Compliance with IRS regulations
- Filing of annual returns
- Sarbanes-Oxley (whistle-blower protections and prohibits destruction of documents if under investigation)



## Duty of Compliance

### State law

- Registration and filing with Attorney General
- Secretary of State
  - Incorporation, continued existence filings
- Other employer and industry regulations



## Board Governance



Where to begin??

# Special Challenges

## Fiscal Management – Board Overview



Just like household budgets, charity budgets reflect projections of income and expenses. Just like household resources, you need to protect the charity's resources.



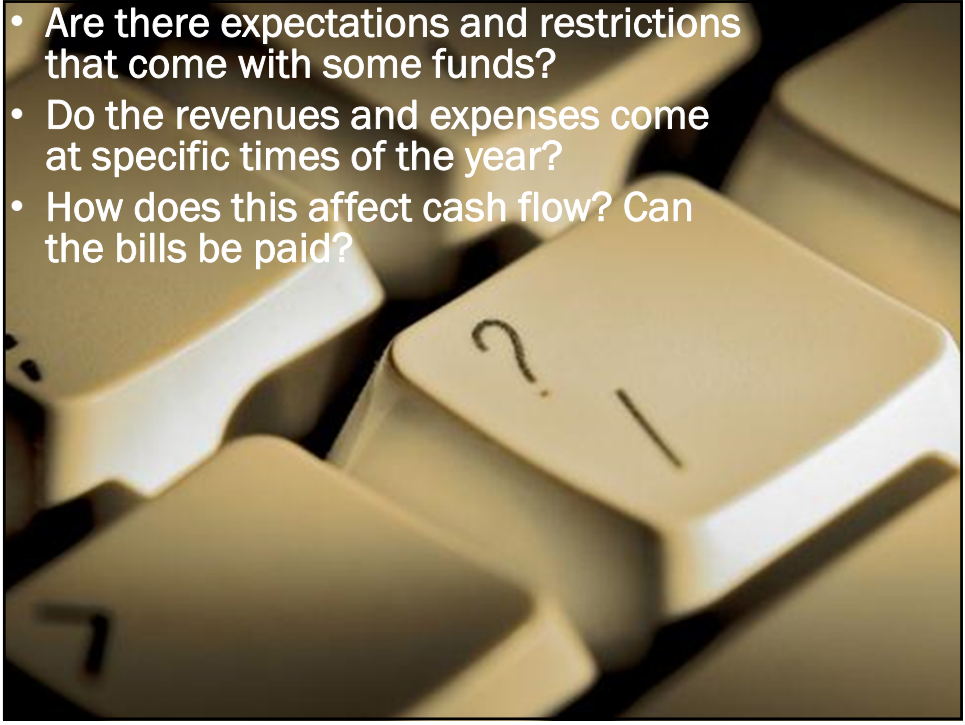
## Know the basics

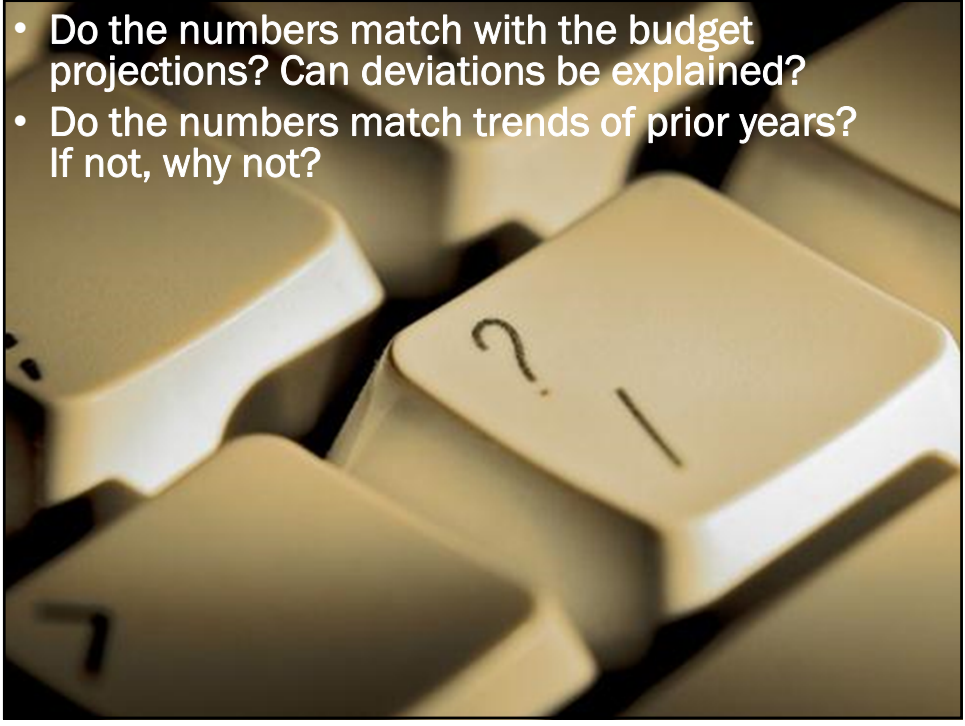


Sources of revenue:  
donations, grants,  
pay for services,  
etc.

Expenses: salaries,  
supplies,  
overhead, etc.



- 
- Are there expectations and restrictions that come with some funds?
  - Do the revenues and expenses come at specific times of the year?
  - How does this affect cash flow? Can the bills be paid?

- 
- Do the numbers match with the budget projections? Can deviations be explained?
  - Do the numbers match trends of prior years? If not, why not?

## Boards need to understand and track the group's assets and liabilities

### Assets

cash, property,  
inventory, etc.

### Liabilities:

loans, accounts  
payable, etc.



## Some Questions:



What changes are expected in assets and liabilities that change the bottom line for the organization?



What responses are needed to respond to changes?

## Preventing Theft



### Internal Controls

Boards are the first line of defense in adopting and monitoring sound internal controls.

Processes protect the people and the organization.



Boards must review and discuss financial reports. Staff can assist in compiling reports, but **boards need to exert independent oversight.**

Board treasurer, audit and budget committee members and others may play a crucial role in this.



## Oversight of the Executive Director



Boards are sometimes guilty of failing to provide appropriate oversight of the executive director and relying too heavily on staff.



## Oversight of the Executive Director

### Board Policies and Practices

- ❖ Hiring process (what skills are needed, job description, ensuring wide pool of qualified candidates, objective interview process, references, background check, etc.)

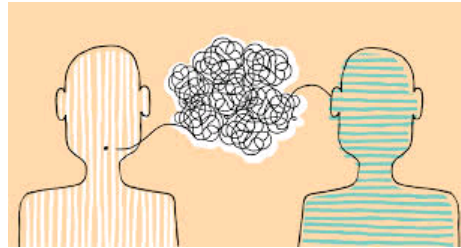


## Oversight of the Executive Director Board Policies and Practices

- ❖ Setting goals for performance



- ❖ Expectations for communication



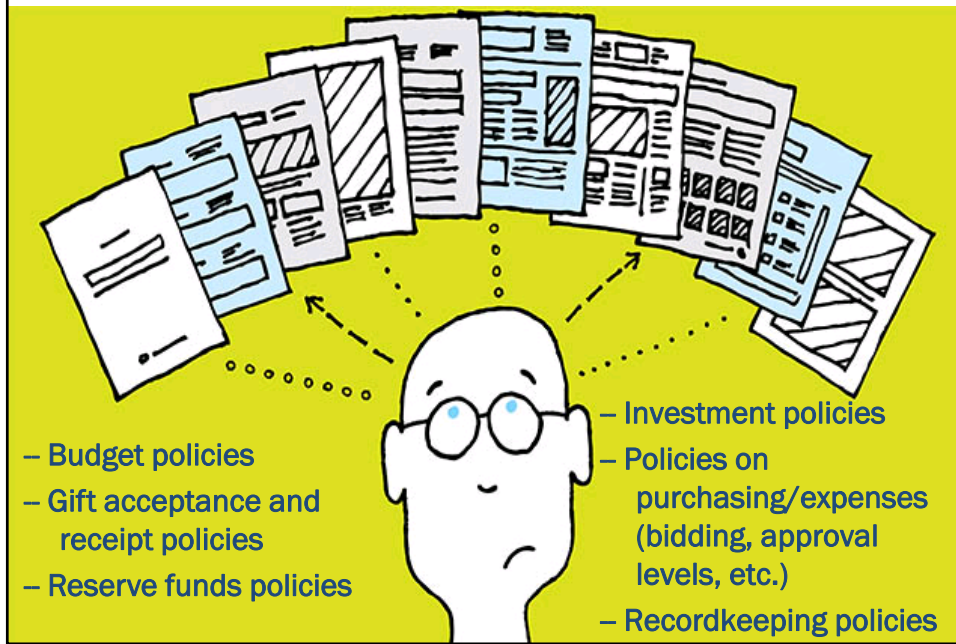
## Oversight of the Executive Director Board Policies and Practices



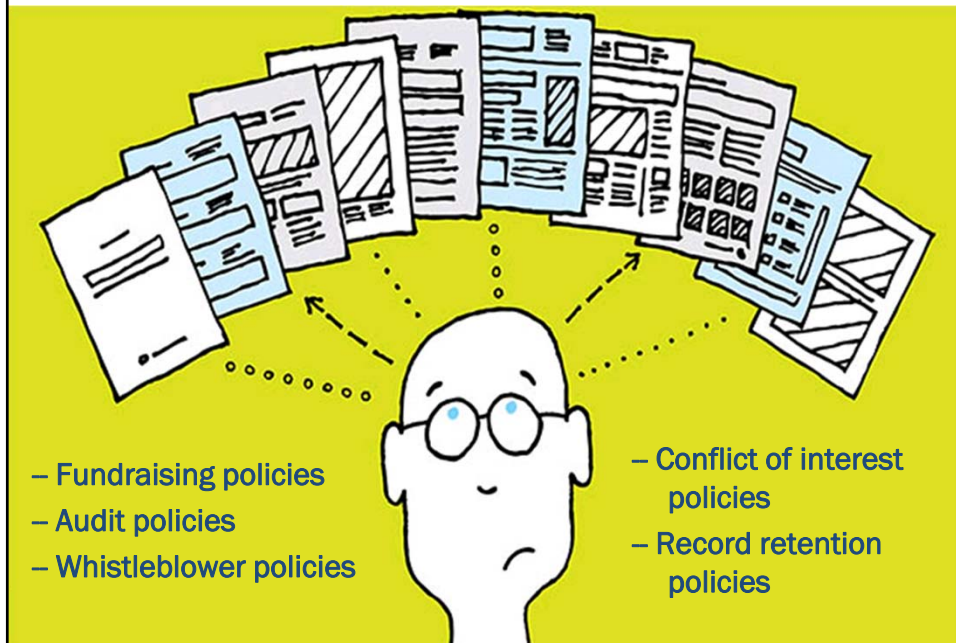
- ❖ Evaluation process (goals met, new objectives, board feedback, feedback from stakeholders, etc.)
- ❖ Compensation evaluation (seek information on pay levels for similar organizations, similar skills, etc.)



## Board Policies To Consider:



## Board Policies To Consider:



## Other Best Practices

- Annual 'check up' on organization's well-being and compliance (review of by-laws, policies, conflict of interest policies, document review, etc.)
- Timelines and transition documents reviewed annually to note important dates and deadlines for filings and reports (AG, Secretary of State, IRS, employment taxes, budgets, audits, staff evaluations, officer nominations, annual meetings, etc.)



## Other Best Practices

- Consideration of Directors and Officers (D&O) insurance coverage
- Board orientation
- Strategic planning – development of goals and assessment of performance (operational and mission delivery)



In effective organizations, the boards regularly evaluate themselves, too.



How well are you doing in being accountable to the organization?



**There are lots of resources to help board members learn how to fulfill their many duties.**



## Good Resources

- Ohio Attorney General's web page --  
<http://www.ohioattorneygeneral.gov/>

Check out Resources for Board Members  
under Services for Nonprofits:

- AG Handbook for Nonprofits
- Board Member Guide
- Newsletter, etc.



## Good Resources

- Better Business Bureau and Charity Seal Program ([www.us.bbb.org](http://www.us.bbb.org))
- Ohio Association of Nonprofit Organizations and Standards of Excellence ([www.oano.org](http://www.oano.org))



## Good Resources

- BoardSource at [www.boardsource.org](http://www.boardsource.org)
- IRS Resources at [www.irs.gov](http://www.irs.gov) and [www.stayexempt.org](http://www.stayexempt.org)
- Chronicle of Philanthropy



## Other Resources:

- Numerous books at libraries and bookstores on many nonprofit topics
- Talk with other nonprofits about how they have responded to specific issues
- Ask local businesses if they have an expert on a specific area who might volunteer, consult or serve on your board





If you haven't got charity in your heart, then  
you've got the worst kind of heart trouble.

-Bob Hope





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**How to contact us**

Ohio Attorney General's Office  
Charitable Law Section  
150 East Gay Street 23rd Floor  
Columbus, OH 43215-3130  
(800) 282-0515  
Fax Number (614) 466-9788  
[CharitableLaw@ohioattorneygeneral.gov](mailto:CharitableLaw@ohioattorneygeneral.gov)

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**MIKE DEWINE**  
OHIO ATTORNEY GENERAL

[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)

# **Section B**

## **Understanding Financial Statements**





**PATRICK A. FRAMBES, CPA**

**Senior Manager**

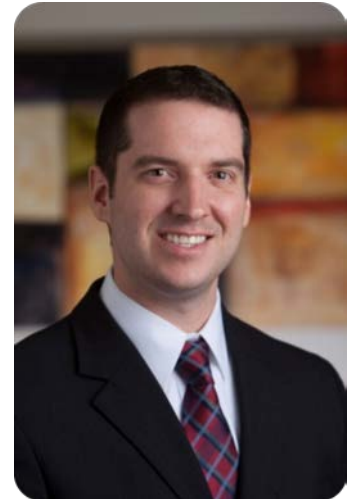
Patrick is a Senior Manager for Barnes Dennig's assurance service line. He has gained a wealth of knowledge of audit and accounting in the real world. He has experience in a number of industries with particular emphasis in the non-profit sector and in healthcare.

Patrick demonstrates exceptional technical knowledge and advanced understanding of the issues facing businesses and organizations today. In addition, he receives extensive technical education and training every year, much of which is focused on advanced accounting and audit issues.

His responsibilities include managing and performing audits, reviewing and preparing financial statements, and other related duties. Patrick has also performed numerous internal control related projects and agreed-upon procedure engagements for Barnes Dennig clients.

Patrick is the former Treasurer of UpSpring (formerly, Faces without Places) and a member of "The 50" at the Contemporary Arts Center. In addition he co-leads Barnes Dennig's United Way and ArtsWave Campaigns and annual Community Outreach Day, as well as volunteering at various non-profit organizations

Patrick is a graduate of Ohio University with a Bachelor of Business Administration in Accounting and Xavier University with a Masters in Business Administration. He has earned the designation of Certified Public Accountant.



**Areas of Focus:**

Not-For-Profit  
Education  
Religious Organizations  
Internal Controls

**Professional Affiliations:**

AICPA  
OSCPA

**Education:**

Ohio University  
Athens, OH

Xavier University  
Cincinnati, OH

**JASON TERWILLIGER, CPA****Internal Audit Senior**

Jason has over a decade of experience in accounting and attestation, ranging from external / internal audit, information technology audit and internal control consulting services to non-profit accounting services on an industry level. He has served educational organizations such as universities, elementary schools, high schools and school boards, as well as companies in the performing arts, associations, foundations, religious institutions and social service organizations. He is a member of the firm's non-profit audit and IT audit / service organization controls (SOC) teams.

In Jason's work, he has documented and tested accounting processes and internal controls for numerous local organizations. Jason has worked with clients that use software systems ranging from platforms as simple as QuickBooks to more sophisticated systems such as Sage, Blackbaud and Jenzabar.

Jason uses best practice tools for evaluating system process documentation and controls over all disbursement, revenue, payroll and other accounting cycles related to financial reporting. He uses the Committee of Sponsoring Organizations (COSO) framework for evaluating management and control issues. Jason also has industry-level experience in accounting and research positions at a university, where he was involved in student account management and federal / state reporting.

Jason graduated Magna Cum Laude in 2002 from Georgetown College earning a B.S. in Accounting and a concentration in Economics. He is a member of the American Institute of Certified Public Accountants, the Ohio Society of Certified Public Accountants and the Institute for Internal Auditors. Jason is licensed in the state of Ohio.

**Areas of Focus:**

Internal Audit  
Internal Controls  
Non-Profit

**Professional Affiliations:**

AICPA  
OSCPA  
IIA

**Education:**

Georgetown College,  
Georgetown, KY

# Understanding Non-Profit Financials and Controls

*Patrick Frambes, CPA*  
*Jason Terwilliger, CPA, CIA*



## Agenda

- ❖ Non-profit financial statements
- ❖ Risks for non-profits
- ❖ Internal control best practices

## Financial Statements

### ❖ Basic financial statements

- Statement of financial position
- Statement of activities
- Statement of functional expenses
- Statement of cash flows
- Notes to financial statements

## Financial Statements

### ❖ What's different?

- Net assets – not “equity”
  - Unrestricted
    - includes board-designated or legally restricted
  - Temporarily restricted – donor imposed restriction
  - Permanently restricted – donor imposed restriction

## Financial Statements

### ❖ What's different?

#### ➤ Revenue streams

- Contributions (cash or non-cash)
  - Voluntary, non-reciprocal transfers
- Exchange transactions
  - Providing goods or services
  - Reciprocal transfers

## Financial Statements

### ❖ What's different?

#### ➤ Contributions

- Recorded when acknowledgement is received
  - Pledge commitments (discounted to present value)
- Unrestricted vs. restricted
- Could take form of interest in trust
  - Only record if "irrevocable"

## Financial Statements

### ❖ What's different?

#### ➤ Other items

- Classified balances sheet not required
- Functional expenses
  - Program, administrative and fundraising
- Endowments
  - Disclosures required under UPMIFA

## Financial Statements

### ❖ What's different?

#### ➤ Other items

- Alternative investments (i.e. hedge funds)
  - Recorded at net asset value per share (NAV)
- Straight-line lease expense
- Defined benefit pension plans
  - Actuarial gain/loss can be shown outside of operations

## Financial Statements

### ❖ What's different?

#### ➤ Other items

- Consolidation rules
  - If related entity is a for-profit – consolidate based on ownership %
  - If non-profit – only consolidate if control AND economic interest are present

## Non-Profit Risks

### ❖ Significant Risks (Financial Statement)

- Completeness of Contributions
- Existence of Expenditures
- Classification of Net Assets
  - Consideration of Donor-Imposed Restrictions

## Non-Profit Risks

### ❖ Significant Risks (Operational)

#### ➤ Governance

- “Owned” by a Board of Trustees/Directors
- Need for transparency

#### ➤ Limited Staffing

- Segregation of duties

## Overview

### ❖ What are internal controls?

#### ➤ COSO definition – a process to achieve

- Effective and efficient operations
- Reliable financial reporting
- Compliance with applicable laws and regulations



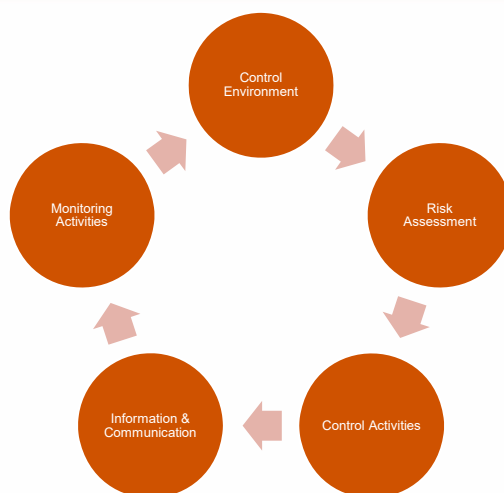
## Overview

### ❖ What are internal controls?

#### ➤ COSO framework

- Control Environment – tone at the top
- Risk Assessment
- Control Activities – processes and procedures
- Information and Communication
- Monitoring

## Overview



## Overview

### ❖ What are internal controls?

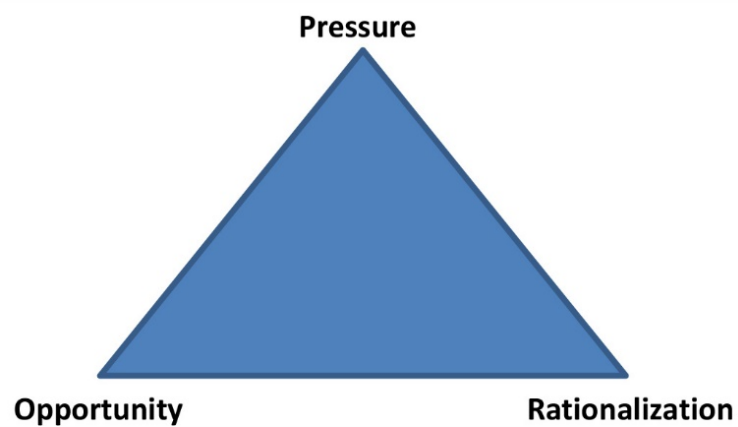
#### ➤ Preventative controls

- Limiting access

#### ➤ Detective controls

- Review and approval

## Fraud Triangle



## Fraud Risks and Opportunity

- ❖ Girl Scouts of Greater New York – 2011
  - Executive Director embezzled \$300K
  - Unauthorized credit card charges
- ❖ National Relief Charities – 2013
  - President embezzled over \$4M
  - Funded fictitious charity set-up in his name

## Fraud Risks and Opportunity

- ❖ City of Covington – August 2013
  - Finance Director allegedly stole over \$600K
  - Issued unauthorized checks
- ❖ American Cancer Society – Oct 2013
  - Employee set-up separate account
  - Deposited and withdrew \$68K

## Best Practices

### ❖ Cash Receipts

- Mail opened by non-financial staff
- Marked with restrictive endorsement
- Who prepares the deposit?
- Reconcile accounting/development reports

## Best Practices

### ❖ Cash Disbursements

- Who is authorized to sign checks?
- Dual signature thresholds
  - Similar requirements for EFT/ACH
- Implement Positive Pay
- Review of cleared checks (w/ statement)

## Best Practices

### ❖ Cash Disbursements (credit cards)

- Monitor credit limits or use of p-cards
  - How many credit cards are actually needed?
- Who reviews credit card statements?
  - CEO credit card reviewed by Board member

## Best Practices

### ❖ Payroll

- Who prepared payroll for submission?
- Pre- and post-submission review
  - Review of change reporting

## Best Practices

### ❖ Month-End Close

- Bank reconciliation
  - Timeliness
  - Preparation and review
- Independent review of bank statements
- Board/FC review of complete financials

## Best Practices

### ❖ Two-person office

| Bookkeeper/Office Manager              | CEO                                   |
|--|---------------------------------------|
| Enter cash receipts/ track receivables | Receive cash/checks and make deposit  |
| Prepare/mail checks                    | Approve invoices and sign checks      |
| Prepare and record payroll             | Review pre- and post-submission       |
| Record g/l entries                     | Review financial statements           |
| Reconcile bank statements              | Review reconciliations and statements |

## Best Practices

### ❖ Three-person office

| Bookkeeper/Clerk                        | Office Manager                 | CEO                         |
|---|--------------------------------|-----------------------------|
| Enter cash receipts / track receivables | Receive cash/checks            | Complete deposit slip       |
| Prepare checks                          | Approve invoices & mail checks | Sign checks                 |
| Prepare and record payroll              | Review pre-submission          | Review post-submission      |
| Record g/l entries                      | Approve g/l entries            | Review financial statements |
| Reconcile bank statements               | Review reconciliations         | Review bank statements      |

## Best Practices

### ❖ Four-person office

| Clerk                     | Bookkeeper                        | Office Manager        | CEO                         |
|---------------------------|-----------------------------------|-----------------------|-----------------------------|
| Receive cash/checks       | Enter receipts/ track receivables | Complete deposit slip |                             |
| Prepare checks            | Mail checks                       | Approve invoices      | Sign checks                 |
| Prepare payroll           | Record payroll                    | Review pre-submission | Review post-submission      |
| Record g/l entries        | Approve g/l entries               |                       | Review financial statements |
| Reconcile bank statements | Review reconciliations            |                       | Review bank statements      |

# Thank You!

**Patrick Frambes, CPA**  
[pframbes@barnesdennig.com](mailto:pframbes@barnesdennig.com)

**Jason Terwilliger, CPA, CIA**  
[jterwilliger@barnesdennig.com](mailto:jterwilliger@barnesdennig.com)



**Barnes Dennig**  
150 East Fourth Street  
Cincinnati, OH 45202  
(513) 241-8313

[www.barnesdennig.com](http://www.barnesdennig.com)



# **Section C**

## **Volunteer Board Opportunities**





**Anna Coutts  
BOLD Senior Associate  
United Way of Greater Cincinnati**

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Anna Coutts currently serves as the BOLD Senior Associate of United Way of Greater Cincinnati. In this role she works with diverse professionals in the Greater Cincinnati region to enhance their involvement and effectiveness on non-profit boards/committees through facilitating United Way of Greater Cincinnati's BOLD (Board Orientation and Leadership Development) program and assisting with the matching of candidates to boards, committees and task forces for United Way and community agencies.

In addition to Anna's community work through her position at United Way she serves as the Partnerships Committee Chair on the Attitude Board of the Cincinnati Ballet and as a member of the ArtsWave YP Committee. In the past she has volunteered in the education realm as the Treasurer of Accelerated Achievement Academy, a drop out recovery charter school.

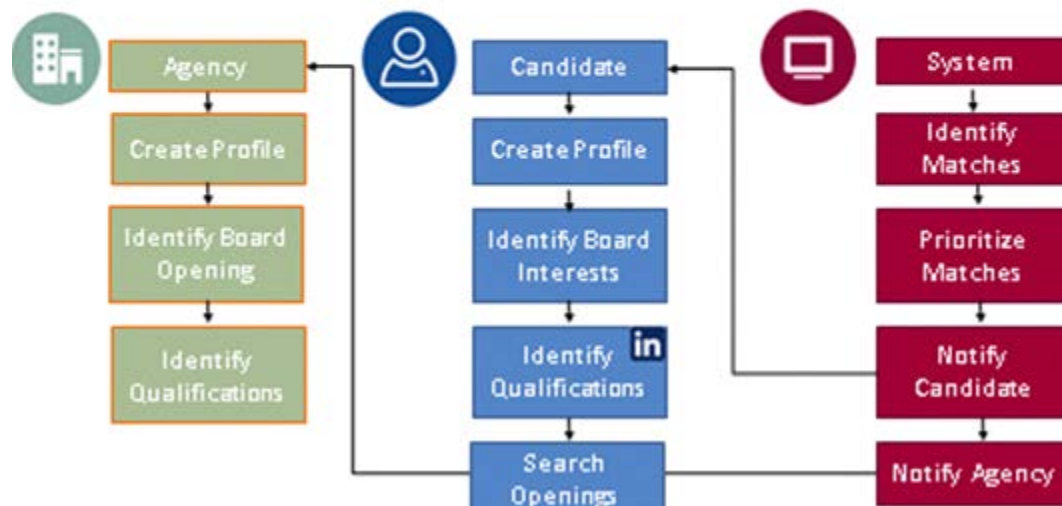
Anna is a graduate of University of Kentucky where she received her B.A. in Arts Administration with a minor in Business. She is currently a member of Cincy Next Class 3 through the Cincinnati USA Regional Chamber.

**BoardBank Summary**

BoardBank is a tool intended to connect potential nonprofit board candidates with local nonprofit agencies looking to fill open board positions. United Way of Greater Cincinnati is transitioning BoardBank from a short term event based tool with significant manual intervention to a relationship driven engagement model that provides continual benefit to both agencies and candidates and an improved data model. BoardBank will consist of a searchable website that provides recommended matches and the means to make direct contact, connecting those wishing to volunteer at the leadership level with opportunities in our community.

Current state BoardBank is only available to graduates of United Way’s BOLD (Board Orientation & Leadership Development) program. The new BoardBank model will allow opportunity to include other qualified community members through partnerships with various training programs and organizations. By expanding BoardBank’s scope to more than the confined BOLD graduate population, further connections will be made, better filling the large number of Cincinnati board needs. According to a recent study through University of Cincinnati, the Greater Cincinnati region has 7,649 501(c)(3) nonprofit organizations. As boards seek to diversify their leadership and continually fill openings, BoardBank will become the community wide tool and hub of Cincinnati board placement – a need not currently being met.

## How will it work?



BoardBank will provide the opportunity for: Stronger, more diverse boards overseeing Greater Cincinnati’s nonprofits. More individuals using their skills to volunteer in strategic ways. Bridging the gap in leadership needs in the nonprofit community. And, more Cincinnatians feeling connected to their community.

# **Section D**

## **Ethical Considerations for Attorneys Serving on Nonprofit Boards**



**Sally Duffy, SC**  
SC Ministry Foundation  
Cincinnati, Ohio

Sally Duffy, SC is a member of the Sisters of Charity of Cincinnati since August of 1977. She serves as President and Executive Director with SC Ministry Foundation in Cincinnati, Ohio.

Sally has a master degree from the following universities: M. Ed. From Xavier University in Guidance and Counseling, M. PA from the University of Colorado in Health Care, and a M. Div. from Loyola of Chicago University in Spirituality. She also has additional graduate work in Theology and Counseling Psychology. Her undergraduate work was completed at Ohio Dominican University with a B.A. in Political Science.

Sally has served in the following capacities: high school teacher, coach, and guidance counselor; university student affairs staff and women's basketball coach; oncology and emergency room crisis counselor; hospital administration including President & C.E.O.; college campus minister, and student affairs administration including VP Student Affairs.

Sally is a member of the TriHealth Board of Directors in Cincinnati, Seton High School – Board of Directors, Local Initiatives Support Corporation – Local Advisory Committee, Place Matters – Comprehensive Community Investment Initiative – Core Group, Catholic Legal Immigration Network Inc (CLINIC) – Board of Directors and Treasurer, Price Hill Will Board of Directors and FADICA (Foundations and Donors Interested in Catholic Activities, Inc) – Board of Directors and Chair of the Board.

Some of Sally's past honors include: the Pueblo, Colorado Chamber of Commerce Business Leader of the Year, Ohio Dominican University Distinguished Alumni and a Charter Member of their Athletic Hall of Fame, Selected as one of the top fifty women basketball players in the USA in 1970 by the US Olympic Committee, Central Ohio High School Basketball Coaches Hall of Fame, and Student Graduate School Graduation Speaker for Loyola University of Chicago.

Most recently, Sally has received: the Sr. Blandina Award (Santa Maria Community Services) Kinship Award (Urban Appalachian Council), Community Development Corporations Association of Greater Cincinnati Volunteer of the Year, an Honorary Doctorate from the College of Mount St. Joseph, the Charles Carroll Award in Catholic Philanthropy and recognition from the Leadership Conference of Women Religious for service to Women Religious after Katrina. SC Ministry Foundation received the Champion Award from Catholic Legal Immigration Network in 2012. Sally was an Executive Co-Producer on the Gabriel Award documentary "We Shall Not Be Moved: Catholic Sisters of New Orleans."

**Jeniece D. Jones, Esq.,  
Executive Director, Housing Opportunities Made Equal**

Jones comes to HOME after nearly 10 years of nonprofit leadership as CEO at Community Shares. Her role there involved raising public awareness and funding for local social justice causes. Jones also has accomplished practice experience as a real estate lawyer in Ohio. She holds a Juris Doctorate from Salmon P. Chase College of Law, a Master's Degree in Public Administration from Northern Kentucky University and a Bachelor's Degree in Journalism from West Virginia University.



## Allison H. Kropp

Of Counsel

Cincinnati, OH

P: (513) 977-8338

F: (513) 977-8141

allison.kropp@dinsmore.com

Allison is a Partner, Of Counsel, in the Corporate Department and the Tax, Benefits and Wealth Planning Group in the Cincinnati office. Allison's practice is focused exclusively on advising non-profit and tax-exempt organizations.

She is experienced in advising non-profit and tax-exempt organizations on a variety of issues from formation and application for recognition of tax-exempt status, to compliance and governance matters. Charities, foundations, museums, and other nonprofits are among her clients. She advises both private foundations and public charities on operational and programmatic issues, including executive compensation, private foundation excise taxes, unrelated business income, corporate sponsorships, lobbying and campaign intervention, and board governance practices.

Allison is a member of the firm's Professional Development Committee.

### Memberships & Affiliations

- ▶ Cincinnati Bar Association, Non-Profit Law Committee, Chair
- ▶ Cincinnati Museum Center, Board of Trustees
- ▶ Catholic Inner-City Schools Education Fund (CISE), Advisory Board
- ▶ CISE Foundation, Trustee and Chair of the Planned Giving Committee
- ▶ Duke Energy Children's Museum, Advisory Board Chair
- ▶ Summit Country Day School, Board of Trustees
- ▶ The Children's Theatre of Cincinnati, Board of Trustees, Secretary
- ▶ Raymond "Jit" Trainor Endowment, Board of Trustees, Institute for the Study of Diplomacy, School of Foreign Service, Georgetown University
- ▶ Georgetown University Alumni Admissions Committee
- ▶ Beech Acres Parenting Center, former Board of Trustees
- ▶ Mercy Health Partners Foundation, former Board of Trustees

### Education

- ▶ J.D., Georgetown University Law Center, (2003)
- ▶ B.S., Foreign Service, Georgetown University, (1997)

### Bar Admissions

- ▶ Ohio

### Related Services

- ▶ Nonprofit Organizations
- ▶ Corporate & Transactional

**David T. Wallace, Esq.**

Dave has been a staff attorney with the United States Sixth Circuit Court of Appeals since 1990. An active participant in Greater Cincinnati's nonprofit community, Dave currently serves as Board Chair for Beech Acres Parenting Center and for Executive Service Corps of Cincinnati. He also is a member of the Board of Trustees for PreventionFIRST! An alumnus of Leadership Cincinnati Class 39, Dave is a member of Leadership Cincinnati's Steering Committee.



**Kent Wellington**  
***Graydon Head & Ritchey LLP***

Kent has a diverse practice with an emphasis in litigation and labor/ employment law. Kent has tried cases to favorable jury verdicts in all the local state and federal courts, but prides himself on avoiding litigation and getting cases resolved quickly and cost effectively. Kent is the immediate past chair of the firm's Litigation Group and currently serves on the firm's Executive Committee.

Professionally, he is most proud of the strong client relationships and client friendships he has developed over the years. Kent was described by the GM/CEO of one large publically traded client as follows: "What has always impressed me about Kent is his emotional intelligence. He exudes a great deal of confidence and he is aggressive in his pursuit of any issue, yet he is compassionate and caring in the process. He is able to make all kinds of people feel very comfortable around him." Based on client comments like this and the grading and comments of his peers, Kent is recognized with an AV Rating, the highest rating given to lawyers by Martindale-Hubbell.

Since 2005, Kent has been recognized every year as a "Super Lawyer" (or "Rising Star"). Only 2.5 percent of Ohio lawyers receive this honor. In 2004, the Cincinnati "Business Courier" named Kent (along with his late wife, Karen) two of Cincinnati's top "Forty under 40." Kent also has received awards from the American (1997), Ohio (2000) and Cincinnati (2008) Bar Associations, The Ohio State University College of Law (2001), the Cincinnati Society (2002), and the Cincinnati Park Board (2015).

Kent has two primary passions outside of work: mentoring vulnerable kids (for the past 25 years) and putting some FUN on the calendars of families LIVING with cancer (for the past 10 years). A leader in our *Graydon on Main* Office, Kent also spends a significant amount of time in our downtown OTR neighborhood through Saturday Hoops, Dribblethon, and other not-for-profit, entrepreneurial, and faith-based groups. On September 26, 2006, President George W. Bush presented Kent with the President's Volunteer Service Award. Kent also received leadership and advocacy awards in 2004 from both The Arc-Hamilton County (MR/DD) and W.E.B. DuBois Academy (OTR), from St. Aloysius Orphanage (in 2011), and the "Linda K. Heines Award of Inspiration and Hope" (with his two children) from the Breast Cancer Alliance in 2013. Kent is also a graduate of the United Way BOLD program, the Cincinnati Academy of Leadership for Lawyers ("CALL), and Leadership Cincinnati (Class 39).

Kent resides in Mt. Lookout with his son Robby (21) and daughter Angeline (19) lives nearby at the University of Cincinnati. Kent also enjoys biking, running, swimming and coaching basketball. He has competed in triathlons since the early 1990's, including the Escape from Alcatraz triathlon and several 1/2 Ironman's.

## Panelists' "Top 12" Ethical & Good Governance Practices

1. **THE "GOLDEN RULE":** Understand Your Fiduciary Duties and the Model Rules of Professional Conduct. Knowing and keeping your fiduciary duties of care/good faith, loyalty and compliance, as well as the duty to manage accounts are essential for good Board service. As attorneys, you must also follow the Ohio Rules of Professional Conduct. Using good faith and being reasonable are hallmarks of a good attorney and a good Board member.
2. Advocate the Mission. Understand the organization's mission so you can sell, move the needle and make a difference. Lawyers are good advocates. Be an advocate for the mission.
3. Understand your Role. You may be wearing a variety of hats at various times. Make sure you're contributing (e.g., "get, give or get-off"). Board work should not be about photo-ops, resumes or names on letterheads. Also, avoid conflicts and always be proactive about disclosing any potential conflicts.
4. Know the Rules. This includes the law (for organization's and for your organization's industry) as well as the organization's own code of regulations, conflict and confidentiality policies and even minutia (e.g., what constitutes a quorum). For example, Ohio law requires that any vote taken outside of a meeting must be by unanimous vote of all Board members. O.R.C. 1702.25(A). Boards often mistakenly assume that a vote taken outside of a meeting (by email, for example) is OK if a majority of the members respond in the affirmative. Odds are that if you don't know these rules or know about these policies, the non-lawyers on the board won't either.
5. Review and Oversee Governance. This is related to knowing the rules. Review governing documents every year or two to determine that they are current, consistent, and meeting the needs of the agency. Also, confirm that the agency is acting consistently with its by-laws. In addition, ensure that your agency provides a copy of its Form 990 to the Board for review. The IRS asks if the agency has taken that step. The bigger challenge is how to make that review more than a pointless exercise, literally just checking a box. And, if the agency is a member organization, determine which decisions can be handled by the Board and which ones require votes by the entire membership. Work to ensure internal controls exist and are maintained, through accounting policies such as segregation of duties, etc. and external controls, through an audit.
6. Be Transparent. Be open about what you can and can't do, disclose conflicts and abstain from voting where appropriate. Avoid legal jargon that no one will understand.
7. Issue Spot. We're good at issue spotting (e.g., do we have D&O coverage? What does it cover? How much are we paying? Did we shop around? Do we have consents for photographs used on a website vs. incidental use?).
8. Be Proactive and Find a Way. You're a board member for a non-profit organization. So the odds are you have the equities on your side. People want to help vulnerable and sick kids, disabled adults, etc. Help the board spot legal issues and, more importantly, help them understand the issues. Not all issues are created equal. Determine which issues are significant

and which are not. There are a lot of urban legends out there about best practices that Executive Directors or ultra-conservative board members will divert the mission unnecessarily). Help them understand the downside risk – which is often de minimis. You also live in Cincinnati – lawyers in our town invest in our community and make it better. That’s why some of us became lawyers.

9. Manage the Executive Director. This could include help with the Executive Director’s annual evaluation, compensation and incentives, succession, etc. As a board member, we have a fiduciary duty to act in the best interest of the organization. That usually is consistent with what’s best for the Executive Director, but not always.

10. Get your Hands Dirty. It’s hard to be an effective board member if you can’t feel the mission of the organization. Feeling the mission often means getting in the trenches, interacting with staff and getting your hands dirty. Don’t be someone who just shows up occasionally at board meetings as a potted plant.

11. Be Objective. If the Emperor has no clothes, say something. Is the mission working? Is it moving the needle enough? Or are we just going through the motions? Monitor and evaluate programs and advocate for systemic change. Some non-profit organizations need to be closed down (sunsetting) or missions merged.

12. Be Collaborative. It’s important to be collaborative with other organizations and with people. Be on the look-out for talent to make your organization better. Share the credit, be humble and look for opportunities to leverage missions and people. Odds are there are others out there who are trying to solve the same problem. Work with them (or, at least, talk to them).

# I. CLIENT-LAWYER RELATIONSHIP

## RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.

### Comment

#### Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [RESERVED]

[4] A lawyer may accept representation where the requisite level of competence can be achieved through study and investigation, as long as such additional work would not result in unreasonable delay or expense to the client. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

#### Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the

representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c). The lawyer should consult with the client about the degree of thoroughness and the level of preparation required, as well as the estimated costs involved under the circumstances.

### **Retaining or Contracting with Other Lawyers**

[6] Before a lawyer retains or contracts with another lawyer outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyer's services will contribute to the competent and ethical representation of the client. See also Rule 1.2, 1.4, 1.5(e), 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with another lawyer outside the lawyer's own firm will depend on the circumstances, including the education, experience, and reputation of the nonfirm lawyer, the nature of the services assigned to the nonfirm lawyer, and the legal protections, professional conduct rules, and ethical environments of the jurisdiction in which the services will be performed, particularly relating to confidential information. The decision to contract with a lawyer for purposes other than the provision of legal services, such to serve as an expert witness, may be governed by other rules. See Rule 1.4 and 1.5.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers should ordinarily consult with each other and the client about the scope of their respective representations and the allocation of responsibility between or among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law and beyond the scope of these rules.

### **Maintaining Competence**

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

### **Comparison to former Ohio Code of Professional Responsibility**

Rule 1.1, requiring a lawyer to handle each matter competently, replaces DR 6-101(A)(1) and DR 6-101(A)(2). The rule eliminates the existing tension between DR 6-101(A)(1), which forbids a lawyer to handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle the matter, and EC 6-3, which suggests that a lawyer can accept a matter that the lawyer is not initially competent to handle "if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client." Rule 1.1 does not confine a lawyer to associating with competent counsel in order to satisfy the lawyer's duty to provide competent representation. As highlighted by the addition to Comment [4], no matter how a lawyer gains the necessary competence to handle a matter, the lawyer must be diligent and may charge no more than a reasonable fee.

## **Comparison to ABA Model Rules of Professional Conduct**

Rule 1.1 is identical to Model Rule 1.1. Certain comments have been revised.

Comment [3] is stricken. The rule itself recognizes that competence is evaluated in the context of what is reasonably necessary under the circumstances. To the extent that Comment [3] was intended to affirm that this test would apply in an emergency situation, it does not add to the rule. On the other hand, Comment [3], as written, could erroneously be understood by practitioners to create an exception to the duty of competence.

Comment [4] is amended to incorporate language of EC 6-3. EC 6-3 cautions that if a lawyer intends to achieve the requisite competence to handle a matter through study and investigation, the lawyer's additional work must not result in unreasonable delay or expense to the client.

Although a lawyer must always perform competently, a lawyer can provide competent assistance within a range of thoroughness and preparation. Comment [5] is revised to suggest that a lawyer consult with a client regarding the costs and extent of work to be performed.

## RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the commission of a crime by the client or other person;
- (3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order;
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a *firm*, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client.

(d) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

## Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law. See also Scope.

[4] Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

### Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.



## Disclosure Adverse to Client

[6] Permitting lawyers to reveal information relating to the representation of clients may create a chilling effect on the client-lawyer relationship, and discourage clients from revealing confidential information to their lawyers at a time when the clients should be making a full disclosure. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Division (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Division (b)(2) recognizes the traditional "future crime" exception, which permits lawyers to reveal the information necessary to prevent the commission of the crime by a client or a third party.

[8] Division (b)(3) addresses the situation in which the lawyer does not learn of the illegal or fraudulent act of a client until after the client has used the lawyer's services to further it. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct [see Rule 4.1], there will be situations in which the loss suffered by the affected person can be mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate or recoup their losses. Division (b)(3) does not apply when a person is accused of or has committed an illegal or fraudulent act and thereafter employs a lawyer for representation concerning that conduct. In addition, division (b)(3) does not apply to a lawyer who has been engaged by an organizational client to investigate an alleged violation of law by the client or a constituent of the client.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, division (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Ohio Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in the conduct of a client or a former client or other misconduct of the lawyer involving representation of the client or a former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have

been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Division (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by division (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, division (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

### **Detection of Conflicts of Interest**

[13] Division (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.*, the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of a divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, division (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

[14] Any information disclosed pursuant to division (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Division (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to division (b)(7). Division (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, division (b)(6) permits the lawyer to comply with the court's order.

[16] Division (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. A disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. Before making a disclosure under division (b)(1), (2), or (3), a lawyer for an organization should ordinarily bring the issue of taking suitable action to higher authority within the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

[17] Division (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in divisions (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by division (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by division (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

### **Acting Competently to Preserve Confidentiality**

[18] Division (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to or the inadvertent or unauthorized disclosure of information related to the representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the

safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forego security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state or federal laws that govern data privacy or that impose specific notification requirements upon the loss of or unauthorized access to electronic information is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm see Rule 5.3, Comments [3] and [4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws governing data privacy, is beyond the scope of these rules.

#### **Former Client**

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

#### **Comparison to former Ohio Code of Professional Responsibility**

Rule 1.6 replaces Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), including DR 4-101 (Preservation of Confidences and Secrets of a Client) and ECs 4-1 to 4-6 of the Ohio Code of Professional Responsibility.

Rule 1.6(a) generally corresponds to DR 4-101(A) by protecting the confidences and secrets of a client under the rubric of "information relating to the representation." To clarify that this includes privileged information, the rule is amended to add the phrase, "including information protected by the attorney-client privilege under applicable law." Rule 1.6(a) also corresponds to DR 4-101(B) by prohibiting the lawyer from revealing such information. Use of client information is governed by Rule 1.8(b).

Rule 1.6(a) further corresponds to DR 4-101(C)(1) by exempting disclosures where the client gives "informed consent," including situations where disclosure is "impliedly authorized" by the client's informed consent.

Rule 1.6(b) addresses the exceptions to confidentiality and generally corresponds to DR 4-101(C)(2) to (4). Rule 1.6(b)(1) is new and has no comparable Code provision. Rule 1.6(b)(2) is the future crime exception and corresponds to DR 4-101(C)(3), with the addition of “or other person” from the Model Rule. Rule 1.6(b)(3) expands on the provisions of DR 7-102(B)(1) by permitting disclosure of information related to the representation of a client, including privileged information, to mitigate substantial injury to the financial interests or property of another that has been caused by the client’s illegal or fraudulent act and the client has used the lawyer’s services to further the commission of the illegal or fraudulent act.

Rule 1.6(b)(4) is new, and codifies the common practice of lawyers to consult with other lawyers about compliance with these rules. Rule 1.6(b)(5) tracks DR 4-101(C)(4), adding “any disciplinary matter” to clarify the rule’s application in that situation. Rule 1.6(b)(6) is the same as DR 4-101(C)(2).

Rule 1.6(c) makes explicit that other rules create mandatory rather than discretionary disclosure duties. For example, Rules 3.3 and 4.1 correspond to DR 7-102(B), which requires disclosure of client fraud in certain circumstances.

### **Comparison to ABA Model Rules of Professional Conduct**

The additions to Rule 1.6(a) are intended to clarify that “information relating to the representation” includes information protected by the attorney-client privilege.

The exceptions to confidentiality in Rule 1.6(b) generally track those found in the Model Rule, although two of Ohio’s exceptions [Rules 1.6(b)(2) and (3)] permit more disclosure than the Model Rule allows.

Rule 1.6(b)(1) is the same as the Model Rule and reflects the policy that threatened death or serious bodily harm, regardless of criminality, create the occasion for a lawyer’s discretionary disclosure. Nineteen jurisdictions have such a provision.

Rule 1.6(b)(2) differs from the Model Rule by maintaining the traditional formulation of the future crime exception currently found in DR 4-101(C)(3), rather than the future crime/fraud provision in Model Rule 1.6(b)(2) that is tied to “substantial injury to the financial interests of another.” Twenty-two jurisdictions, including Ohio, opt for this stand-alone future crime exception. This exception is retained because it mirrors the public policy embodied in the criminal law.

Rule 1.6(b)(3) differs from Model Rule 1.6(b)(3) in two ways: it deletes the words “prevent” and “rectify;” and it allows for disclosure to mitigate the effects of the client’s commission of an illegal (as opposed to criminal) or fraudulent act. The prevention of fraud is deleted from Rule 1.6(b)(3) because it is addressed in Rule 4.1(b). The extension of “criminal” to “illegal” is consistent with the use of the term “illegal” in Rules 1.2(d), 1.16(b), 4.1(b), and 8.4(b), but it is not found in either the Model Rule or Ohio disciplinary rules as an exception to confidentiality. Only two jurisdictions have included illegal conduct as justification for disclosure in Rule 1.6.

Rule 1.6(b)(4) is similar to the Model Rule.

Rule 1.6(b)(5) adds “disciplinary matter” to clarify the application of the exception.

Rule 1.6(c) is substantially the same as Model Rule 1.6(b)(6), except that it clarifies the mandatory disclosure required by other rules.

## **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]

[2] In order to analyze and resolve a conflict of interest problem under this rule, a lawyer must: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation is barred by either criteria of division (c); (4) evaluate, under division (b)(1), whether the lawyer can competently and diligently represent all clients affected by the conflict of interest; and (5) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing. [analogous to Model Rule Comment 2]

[3] To determine whether a conflict of interest would be created by accepting or continuing a representation, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, for collecting and reviewing information about the persons and issues in all matters handled by the lawyer. See also Comment to Rule 5.1. Ignorance caused by a failure to institute or follow such procedures will not excuse a lawyer's violation of this rule. [derived from Model Rule Comment 3]

[4] A lawyer must decline a new representation that would create a conflict of interest, unless representation is permitted under division (b). [derived from Model Rule Comment 3]

[5] If unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, create a conflict of interest during a representation, the lawyer must withdraw from representation unless continued representation is permissible under divisions (b)(1) and (c) and the lawyer obtains informed consent, confirmed in writing, of each affected client under the conditions of division (b)(2). See Rule 1.16. [analogous to a portion of Model Rule Comment 4]

[6] Just as conflicts can emerge in the course of a representation, the nature of a known conflict of interest can change in the course of a representation. For example, the proposed joint representation of a driver and her passenger to sue a person believed to have caused a traffic accident may initially present only a material limitation conflict, as to which the proposed clients may give informed consent. However, if the lawyer's investigation suggests that the driver may be at fault, the interests of the driver and the passenger are then directly adverse, and the joint representation cannot be continued. A lawyer must be alert to the possibility that newly acquired information requires reevaluating of a conflict of interest, and taking different steps to resolve it. [derived from Model Rule Comment 5]

[7] When a lawyer withdraws from representation in order to avoid a conflict, the lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must also continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c). [analogous to a portion of Model Rule Comment 5]

[8] When a conflict arises from a lawyer's representation of more than one client, whether the lawyer must withdraw from representing all affected clients or may continue to represent one or more of them depends upon whether: (1) the lawyer can both satisfy the duties owed to the former client and adequately represent the remaining client or clients, given the



lawyer's duties to the former client (see Rule 1.9); and (2) any necessary client consent is obtained. [analogous to a portion of Model Rule Comment 4]

### **Identifying the Client**

[9] In large part, principles of substantive law outside these rules determine whether a client-lawyer relationship exists or is continuing. See Scope [17]. These rules, including Rules 1.2, 1.8(f)(2), 1.13, and 6.5, must also be considered.

### **Identifying Conflicts of Interest: Directly Adverse Representation**

[10] The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest. A directly adverse conflict can occur in a litigation or transactional setting. [derived from Model Rule Comment 6]

[11] *In litigation.* The representation of one client is directly adverse to another in litigation when one of the lawyer's clients is asserting a claim against another client of the lawyer. A directly adverse conflict also may arise when effective representation of a client who is a party in a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit. A lawyer may not represent, in the same proceeding, clients who are directly adverse in that proceeding. See Rule 1.7(c)(2). Further, absent consent, a lawyer may not act as an advocate in one proceeding against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. [derived from Model Rule Comment 6]

[12] *Class-action conflicts.* When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying division (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of an unnamed class member before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. [analogous to Model Rule Comment 25]

[13] *In transactional and counseling practice.* The representation of one client can be directly adverse to another in a transactional matter. For example, a buyer and a seller or a borrower and a lender are directly adverse with respect to the negotiation of the terms of the sale or loan. [*Stark County Bar Assn v. Ergazos* (1982), 2 Ohio St. 3d 59; *Columbus Bar v. Ewing* (1992), 63 Ohio St. 3d 377]. If a lawyer is asked to represent the seller of a business in negotiations with a buyer whom the lawyer represents in another, unrelated matter, the lawyer cannot undertake the new representation without the informed, written consent of each client. [analogous to Model Rule Comment 7]

## **Identifying Conflicts of Interest: Material Limitation Conflicts**

[14] Even where clients are not directly adverse, a conflict of interest exists if there is a substantial risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The mere possibility of subsequent harm does not, itself, require disclosure and consent. The critical questions are: (1) whether a difference in interests between the client and lawyer or between two clients exists or is likely to arise; and (2) if it does, whether this difference in interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of any affected client. [analogous to Model Rule Comment 8]

### **Lawyer's Responsibility to Current Clients-Same Matter**

[15] *In litigation.* A "material limitation" conflict exists when a lawyer represents co-plaintiffs or co-defendants in litigation and there is a substantial discrepancy in the clients' testimony, incompatible positions in relation to another party, potential cross-claims, or substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal matter is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of division (b) are met. [analogous to Model Rule Comment 23]

[16] *In transactional practice.* In transactional and counseling practice, the potential also exists for material limitation conflicts in representing multiple clients in regard to one matter. Depending upon the circumstances, a material limitation conflict of interest may be present. Relevant factors in determining whether there is a material limitation conflict include the nature of the clients' respective interests in the matter, the relative duration and intimacy of the lawyer's relationship with each client involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to each client from the conflict. These factors and others will also be relevant to the lawyer's analysis of whether the lawyer can competently and diligently represent all clients in the matter, and whether the lawyer can make the disclosures to each client necessary to secure each client's informed consent. See Comments 24-30. [analogous to a portion of Model Rule Comment 26]

### **Lawyer's Responsibility to Current Client-Different Matters**

[17] A material limitation conflict between the interests of current clients can sometimes arise when the lawyer represents each client in different matters. Simultaneous representation, in unrelated matters, of clients whose business or personal interests are only generally adverse, such as competing enterprises, does not present a material limitation conflict. Furthermore, a lawyer may ordinarily take inconsistent legal positions at different times on behalf of different clients. However, a material limitation conflict of interest exists, for example, if there is a substantial risk that a lawyer's action on behalf of one client in one case will materially limit the lawyer's effectiveness in concurrently representing another client in a

different case. For example, there is a material limitation conflict if a decision for which the lawyer must advocate on behalf of one client in one case will create a precedent likely to seriously weaken the position taken on behalf of another client in another case. Factors relevant in determining whether there is a material limitation of which the clients must be advised and for which consent must be obtained include: (1) where the cases are pending; (2) whether the issue is substantive or procedural; (3) the temporal relationship between the matters; (4) the significance of the issue to the immediate and long-term interests of the clients involved; and (5) the clients' reasonable expectations in retaining the lawyer. [derived from Model Rule Comments 6 and 24]

### **Lawyer's Responsibilities to Former Clients and Other Third Persons**

[18] A lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as family members or persons to whom the lawyer, in the capacity of a trustee, executor, or corporate director, owes fiduciary duties. [Model Rule Comment 9]

[19] If a lawyer for a corporation or other organization serves as a member of its board of directors, the dual roles may present a "material limitation" conflict. For example, a lawyer's ability to assure the corporate client that its communications with counsel are privileged may be compromised if the lawyer is also a board member. Alternatively, in order to participate fully as a board member, a lawyer may have to decline to advise or represent the corporation in a matter. Before starting to serve as a director of an organization, a lawyer must take the steps specified in division (b), considering whether the lawyer can adequately represent the organization if the lawyer serves as a director and, if so, reviewing the implications of the dual role with the board and obtaining its consent. Even with consent to the lawyer's acceptance of a dual role, if there is a material risk in a given situation that the dual role will compromise the lawyer's independent judgment or ability to consider, recommend, or carry out an appropriate course of action, the lawyer should abstain from participating as a director or withdraw as the corporation's lawyer as to that matter. [analogous to Model Rule Comment 35]

### **Personal Interest Conflicts**

[20] *Types of personal interest.* The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, the lawyer may have difficulty or be unable to give a client detached advice in regard to the same matter. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to certain personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm). [Model Rule Comment 10]

[21] *Related lawyers.* When lawyers who are closely related by blood or marriage represent different clients in the same matter or in substantially related matters, there may be a substantial risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling, or spouse, ordinarily may not represent a client in a matter where the related lawyer represents another party, unless each client gives informed, written consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10. [Model Rule Comment 11]

[22] *Sexual activity with clients.* A lawyer is prohibited from engaging in sexual activity with a current client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j). [Model Rule Comment 12]

### **Interest of Person Paying for a Lawyer's Service**

[23] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f), and the special notice requirement for clients of insurance defense counsel in Rule 1.8(f)(4). If acceptance of the payment from any other source presents a substantial risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of division (b) before accepting the representation. [analogous to Model Rule Comment 13]

### **Adequacy of Representation Burdened by a Conflict**

[24] After a lawyer determines that accepting or continuing a representation entails a conflict of interest, the lawyer must assess whether the lawyer can provide competent and diligent representation to each affected client consistent with the lawyer's duties of loyalty and independent judgment. When the lawyer is representing more than one client, the question of adequacy of representation must be resolved as to each client. [derived from Model Rule Comment 15]

### **Special Considerations in Common Representation**

[25] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent

or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties is antagonistic, the possibility that the clients' interests can be adequately served by common representation is low. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties. [Model Rule Comment 29]

[26] Particularly important factors in determining the appropriateness of common representation are the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation does later occur between the clients, the privilege will not protect communications made on the subject of the joint representation, while it is in effect, and the clients should be so advised. [Model Rule Comment 30]

[27] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation on behalf of a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients. [Model Rule Comment 31]

[28] Any limitations on the scope of the representation made necessary as a result of the common representation must be fully explained to the clients at the outset of the representation and communicated to the client, preferably in writing. See Rule 1.2(c). Subject to such limitations, each client in a common representation has the right to loyal and diligent representation and to the protection of Rule 1.9 concerning the obligations to a former client. Each client also has the right to discharge the lawyer as stated in Rule 1.16. [analogous to Model Rule Comments 32 and 33]

### **Informed Consent**

[29] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that a conflict could have adverse effects on the interests of that client. See Rule 1.0(f). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of

multiple clients in a single matter is undertaken, the information must include the advantages and risks of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege. [Model Rule Comment 18]

[30] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. [analogous to Model Rule Comment 19]

### **Consent Confirmed in Writing**

[31] Division (b)(2) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document signed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b) and (p) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). Written confirmation of consent does not supplant the need, in most cases, for the lawyer to talk with the client: (1) to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives; and (2) to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. The writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of written consent. [Model Rule Comment 20]

### **Revoking Consent**

[32] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result. [Model Rule Comment 21]

### **Consent to Future Conflict**

[33] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of division (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and

open-ended, then the consent ordinarily will be ineffective, except when it is reasonably likely that the client will have understood the material risks involved. Such exceptional circumstances might be presented if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, particularly if the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make a waiver prohibited under division (b). [Model Rule Comment 22]

### **Prohibited Representations**

[34] Often, clients may be asked to consent to representation notwithstanding a conflict. However, as indicated in divisions (c)(1) and (2) some conflicts cannot be waived as a matter of law, and the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. [analogous to Model Rule Comment 14]

[35] Before requesting a conflict waiver from one or more clients in regard to a matter, a lawyer must determine whether either division (c)(1) or (2) bars the representation, regardless of waiver.

[36] As provided by division (c)(1), certain conflicts cannot be waived as a matter of law. For example, the Supreme Court of Ohio has ruled that regardless of client consent, a lawyer may not represent both spouses in the preparation of a separation agreement. [*Columbus Bar Assn v. Grelle* (1968), 14 Ohio St.2d 208] Similarly, federal criminal statutes prohibit certain representations by a former government lawyer, despite the informed consent of the former client. [analogous to Model Rule Comment 16]

[37] Division (c)(2) bars representation, in the same proceeding, of clients who are directly adverse because of the institutional interest in vigorous development of each client's position. A lawyer may not represent both a claimant and the party against whom the claim is asserted whether in proceedings before a tribunal or in negotiations or mediation of a claim pending before a tribunal. [derived from Model Rule Comment 17]

[38] Division (c)(2) does not address all nonconsentable conflicts. Some conflicts are nonconsentable because a lawyer cannot represent both clients competently and diligently or both clients cannot give informed consent. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic, regardless of their consent. [derived from Model Rule Comment 28]

### **Comparison to former Ohio Code of Professional Responsibility**

Rule 1.7 replaces DR 5-101(A)(1) and 5-105(A), (B), and (C). Some of the Ethical Considerations in Canon 5 have direct parallels in the comments to Rule 1.7, although no effort has been made to conform the text of any comment to the analogous Ethical Consideration.

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 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.

(b) If a lawyer for an organization *knows* or *reasonably should know* that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is a violation of law that *reasonably* might be imputed to the organization and that is likely to result in *substantial* injury to the organization, then the lawyer shall proceed as is necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.

(c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (c).

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer *knows* or *reasonably should know* that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's *written* consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization, other than the individual who is to be represented, or by the shareholders.

### Comment

#### The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. "Other constituents" as used in this rule and comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. The duties defined in this rule apply equally to unincorporated associations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the lawyer must keep the

communication confidential as to persons other than the organizational client as required by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may disclose to the organizational client a communication related to the representation that a constituent made to the lawyer, but the lawyer may not disclose such information to others except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] Division (b) explains when a lawyer may have an obligation to report "up the ladder" within an organization as part of discharging the lawyer's duty to communicate with the organizational client. When constituents of the organization make decisions for it, their decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Division (b) makes clear, however, that when the lawyer knows or reasonably should know that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining whether "up-the-ladder" reporting is required under division (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. In some circumstances, referral to a higher authority may be unnecessary; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice. In contrast, if a constituent persists in conduct contrary to the lawyer's advice, or if the matter is of sufficient seriousness and importance or urgency to the organization, whether or not the lawyer has not communicated with the constituent, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interests of the organization.

[5] Division (b) also makes clear that, if warranted by the circumstances, a lawyer must refer a matter to the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

## **Relation to Other Rules**

[6] Division (c) makes clear that a lawyer for an organization has the same discretion and obligation to reveal information relating to the representation to persons outside the client as any other lawyer, as provided in Rule 1.6(b) and (c) (which incorporates Rules 3.3 and 4.1 by reference). As stated in Comment [14] to Rule 1.6, where practicable, before revealing information, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. Even where such consultation is not practicable, the lawyer should consider whether giving notice to a higher authority within the organization of the lawyer's intent to disclose confidential information pursuant to Rule 1.6(b) or Rule 1.6(c) would advance or interfere with the purpose of the disclosure.

[7] [RESERVED]

[8] [RESERVED]

## **Government Agency**

[9] The duty to "report up the ladder" defined in this rule also applies to lawyers for governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. In addition, the duties of lawyers employed by the government or lawyers in military service may be defined by statute and regulation. Under this rule, if the lawyer's client is one branch of government, the public, or the government as a whole, the lawyer must consider what is in the best interests of that client when the lawyer becomes aware of an agent's wrongful action or inaction, as defined by the rule, and must disclose the information to an appropriate official. See Scope.

## **Clarifying the Lawyer's Role**

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

## **Dual Representation**

[12] Division (e) recognizes that a lawyer for an organization may also represent one or more constituents of an organization, if the conditions of Rule 1.7 are satisfied.

## **Derivative Actions**

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

### **Comparison to former Ohio Code of Professional Responsibility**

Ohio has no Disciplinary Rule directly addressing the responsibility of a lawyer for an organization. However, Rule 1.13 draws substantially upon EC 5-19.

### **Comparison to ABA Model Rules of Professional Conduct**

Rule 1.13 more closely resembles the substance of Model Rule 1.13 as it existed prior to its last revision by the ABA in August 2003. Specifically, Rule 1.13 identifies to whom a lawyer for an organization owes loyalty and requires that a lawyer for an organization effectively communicate to the organization concerning matters of material risk to the organization of which the lawyer becomes aware. Rule 1.13 does not include a provision of Model Rule 1.13 that imposes a "whistle-blowing" requirement upon lawyers for organizations.

Rule 1.13 alters Model Rule 1.13 in the following respects:

- Rule 1.13(a) is augmented to define the term "constituent" and to add the principle of EC 5-19 to the black letter rule.
- The rule and comment have been edited for greater simplicity and clarity. Among the changes are reconciliation of the apparent contradiction in Model Rule 1.13(b) between the direction to "proceed as reasonably necessary," which leaves the approach to the lawyer's discretion, and the mandatory direction to report to higher authority.
- The special "reporting out" requirement of Model Rule 1.13(c) has been stricken. Instead, a lawyer for an organization has the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). Model Rule 1.13(d) and Comments [6] and [7] are unnecessary in light of its revision of Rule 1.13(b).

- Model Rule 1.13(e) is deleted. That provision requires that a lawyer who has quit or been discharged because of “reporting up” or “reporting out” make sure that the governing board knows of the lawyer’s withdrawal or termination. Such a provision seems out of place in a code of ethics.

The comments to Rule 1.13 are revised to reflect changes to the rule.

## 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.

## **Offering Advice**

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

### **Comparison to former Ohio Code of Professional Responsibility**

There are no Disciplinary Rules comparable to Rule 2.1. However, EC 7-8 addresses the scope of the rule.

### **Comparison to ABA Model Rules of Professional Conduct**

Rule 2.1 is identical to Model Rule 2.1.