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**JURY SELECTION IN THE SOCIAL
MEDIA ERA**

**Ethics: Update on the New Ethics
Rules**

Presented By:

**Attorney Martin H. Belsky
The University of Akron School of Law**

Recent Developments in Ethics, Professional Responsibility and Professionalism - June 2016

Martin H. Belsky
Randolph Baxter Professor of Law

Guidance

- Refresh yourself on changes from CPR to Ohio Rules of Professional Conduct
- Read decisions and ethics advisories from Ohio
- Check American Bar Association Formal and Informal Opinions
- Be Aware of How Other States are interpreting same language as in Ohio Rules
- “Educated Common Sense” - Smells/Walks/Talks/Duck

Refresher

Ohio Rules of Professional Conduct

- Effective February 1, 2007
- Closely Based on Model Rules of Professional Conduct - American Bar Association
- Change from Code of Professional Responsibility
 - Rules and Comments Format

Key Changes

- Highest Priority - Competence [Rule 1.1];
Diligence [Rule 1.3]; Communication [Rule 1.4]
- Keys are
- “Reasonable Diligence and Promptness” [Rule 1.3]
“Informed Consent;” “Reasonably Consult;”
“comply as soon as practicable with reasonable requests for information” ; “explain . . . to extent reasonably necessary to permit client to make informed decisions.” [Rule 1.4]

Language is that of negligence –
“reasonableness” – *italics in original of Ohio
Rules – Not in ABA Rules*

Ohio Prof. Cond. - Scope

[20] Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer’s violation of a rule may be evidence of breach of the applicable standard of conduct.

- Move away from “Zealousness” - Not even mentioned in Rules
 - Comment to Rules Comparison to ABA Rules [1.3] - Supreme Court upheld deletion of language about zeal - “Zealous Advocacy is often invoked as an excuse for unprofessional conduct.”
 - Advocacy - “The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause , **but also a duty not to abuse legal procedure.**” [Rule 1.3, Comment 3][Emphasis added]

Ohio Rules of Professional Conduct: Preamble

[5] Lawyers play a vital role in the preservation of society. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. **A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.**

Rule 1.2 (a)

“. . . A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. . . .”

* * * * *

This sentence is not in the Model Rules. It was included by the Supreme Court of Ohio

- Fair Dealing - Public Obligations Can Outweigh Loyalty to Client

Rule 1.6 (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:

(2) to prevent the commission of a crime by the client or other person;

* * * * *

Unlike prior Ohio ethics law and the Model Rules, Ohio Rule allows disclosure when felt necessary to prevent the commission of any crime – and not just financial crimes that involve the lawyer.

Unlike prior Ohio ethics law and the Model Rules. Ohio Rule allows disclosure when felt necessary to prevent the commission of any crime **by any person** – and not just the client.

(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:

(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;

* * * * *

Unlike the Model Rules, Ohio Rule 1.6(b)(3) allows disclosure to mitigate substantial financial injury from any *illegal* act and not just a crime or fraud.

Rule 3.3(a) A lawyer shall not *knowingly* do any of the following:

- (1) make a false statement of fact or law to a *tribunal* or **fail to correct** a false statement of material fact or law previously made to the *tribunal* by the lawyer;
- (2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

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

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

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

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

Rule 4.1: In the course of representing a client a lawyer shall not *knowingly* do either of the following:

(a) make a false statement of material fact or law to a third person;

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an *illegal* or *fraudulent* act by a client.

Responsibilities of Partners. Supervising Lawyers - Over Associates [Rule 5.1] and Staff [Rule 5.3 - Non-Lawyer Assistants]

Rule 5.1 - Comment [2] - Lawyers with managerial authority within a firm or government agency should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or government agency will conform to the Ohio Rules of Professional Conduct.

Rule 5.3 Comment [1]

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment,The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Comment [2] - [L]lawyers with managerial authority within a law firm or government agency [are] to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers . . . will act in a way compatible with the Ohio Rules of Professional Conduct. . . .

Technology

New Rules - Amendments - 2014-15

- Confidentiality rules require competency about risks and benefits of technology - Changes throughout the rules
- Advertising and Solicitation rules apply to internet and telemarketing
- Definition of "writing" includes "electronic communications" of all sorts [Rule 1.0 (p)]
- Obligation and duties to those who "consult" with a lawyer about a relationship - obligation of confidentiality [Rule 1.8]
- Responsibility for oversight of non-lawyer service provider when lawyer or client selects provider [Comment to 5.3]

**Association of Professional Responsibility Lawyers -
4/26/2016**

Recommendation as to Solicitation - Rule 7.3

Ohio Rule 7.3 - and most state ethics rules - bar [absent a prior or family or friendship relationship] “real time electronic contact” as being the same as in-person or telephone contact

APRL states these are not the same - and there is less risk of overreaching, confusion, or other problems with electronic communication. It should be considered the same as advertising - barring only false and misleading communication and, of course, harassment or duress.

Ohio Rules, Advisory Opinions, Cases

Ohio Board of Professional Conduct - Advisory Opinion 2016-2
[April, 2016]

- Lawyer may not reveal information related to the representation of his client protected by the attorney-client privilege - even if it involves serious misconduct by the client's previous lawyer - unless the client gives explicit and informed consent
- Lawyer **does have** an obligation to report serious misconduct if unprivileged even if confidential [obtained not from client and in the course of representation]
 - Goes beyond traditionally accepted exception for privileged information - to information obtained not from client but in the course of representation - even if part of a confidentiality agreement made at the time of a settlement

Ohio Board of Professional Conduct - Advisory Opinion 2016-1

- Rule 1.5 provides that all fees- including those termed “earned upon receipt” or “non-Refundable” - must be earned - and the client must be told that in writing that the client may be entitled to a refund of any fee paid in advance if not earned because the lawyer did not complete the representation.
 - The Opinion does not address a “true retainer” - paid to secure “availability of the lawyer’s services for a period of time whether or not he or she actually performs work

Board of Professional Conduct Guidance - Client File Retention

- Length of Retention for Trust Records is at least 6 years
- Record of Signed Notice to client that not have malpractice insurance must be kept for 5 years
- Other records - must establish a file retention plan and inform client in writing at beginning of representation
 - Factors as to length depend on type of practice, statute of limitations
 - Client should return the file to the client at the end of representation and keep a copy for himself or herself for as long as the plan states

Rule VI - Rules for the Government of the Bar of Ohio - Amendment - effective September 15, 2016

- Allows non-active attorneys to undertake limited legal practice to Provide Pro-Bono Service
- Must have been in active practice for 15 years
- Biennial Registration and Small Fee [\$75]
- Must be associated with a law school clinic; legal aid; approved legal services organization, public defenders, or other legal services organization - can not do on own

Sheriff v. Gillie [US Supreme Court - May 2016]

- State of Ohio hires contract attorneys [called "special counsel"] to collect on student loans and medical debts owed to the state.
- These attorneys used letterhead from the Ohio Attorney Generals Office for their collection letters
- Debtors complained that this was in violation of the federal Fair Debt Collection Practices Act - as it was misleading and abusive
- Court held - unanimously - not misleading - were authorized by the state - were "special counsel" of the state - letter conveyed that debt owed to the state and the Attorney General is the state's debt collector
- No reason to construe federal law to "interfere with states' arrangements for conducting their own governments."

Ohio 8th District Court of Appeals - reviewing trial court sanctions against a Cleveland lawyer who told an “alternative weekly” about a case

- Upcoming trial about cover-up of abuse at “Nanny School” in Chagrin Falls
- Information provided was all public records and scheduling information [allowed under Ohio Supreme court rule 3.6 (b)(2) &(4)]
- Story published first day of jury selection

Out of State Developments

New York Law requires out of state attorney to maintain a New York Office if they wish to practice in New York

- Divided Decision [2-1] - 2nd Cir. - upheld - as not in violation of Commerce or Privileges and Immunities clauses - ***Schoenfeld v. Schneiderman*** [April 2016]

Iowa State Bar Asstn Commission on Ethics - Opinion 14-02 - Reporting Misconduct

Iowa Rule 8.3 [same as Ohio rule] **requires** a lawyer to report another lawyer to the disciplinary authority for professional misconduct that raises a question of another lawyer's honesty, trustworthiness or fitness.

- If in a document, or court proceeding or in any other public manner a lawyer charges another lawyer with unprofessional conduct or fraud, dishonesty or deceit, failure to immediately report such behavior to the disciplinary authority **is itself a violation.**
- Use of "threats" or other form of coercive tactics is prohibited - citing ABA Formal Ethics Opinion 94-383

Pa. Legal Ethics Committee Formal Opinion 2014-100 - Waivers of Claims for Ineffective Assistance of Counsel

- Rule 1.7 (a)(2) [conflicts between a client and the lawyer's own interests] bars a lawyer from recommending to his or her client that the client accept a pleas bargain that waives the right to later file a post-conviction claim of ineffective assistance of counsel
- It is also unethical for a prosecutor to propose such a plea bargain condition
- Opinion cites similar opinions in Missouri, Florida and **Ohio** [Ohio Bd of Comm'rs on Grievance and Discipline Op. 2001-6 [December 7, 2001]

Naughton v. Pfaff (Ill. March 2016) [Fee Sharing]

- Lawyer referred a client to another lawyer. The first lawyer did not get consent from the client for a sharing of the fee and the new lawyer did not get any such consent.
- The referring lawyer has no contract or fiduciary breach or other claim against the receiving lawyer or the client - Rule 1.5 [same rule in Ohio] requires any fee sharing agreement to be in writing
- Trust between lawyers to “do the right thing” is not enough

ABA Formal Opinion 474 [April 2016][Fee Splitting]

- Rule 1.5 requires “joint responsibility” - “as if in a partnership”
- Such “joint responsibility” means all the conflict of interest rules apply [1.7; 1.8; 1.9; 1.10]
- No directly adverse or materially limited representation of another or one own interest
- Illustration - does only transactional work; refers negligence case to another attorney as possible defendant is business client - not able to have “joint responsibility” so no referral fee
- “Informed consent” - will be carefully scrutinized - full and complete disclosure

Shapiro v. Rinaldi - NJ Superior Ct - March 2016
["Prospective Clients" - Expectations]

- Shapiro called lawyer's office and spoke to secretary about a negligence case against the city and then followed up with pictures of the area where she fell into a pothole
- Secretary never told lawyer and Shapiro after waiting for several months called another lawyer
- New lawyer said claim barred by statute of limitations
- Court - no implied representation - reliance was "unreasonable" - Rule 5.3 (b) - supervision of non-legal personnel not make a contract or tort claim - potential ethics violation doesn't create a cause of action

Power of State Supreme Courts

Florida - 2009 Florida statute limited Workman's Compensation fees to and barred any additional compensation other than statutorily allowed [a percentage of the claim rather than an amount based on hours spent times a reasonable hourly charge

- Declared unconstitutional by Florida Supreme Court - **Castellanous v. Next Door Company [April 28, 2016]**
- Interferes with right of client to get adequate medical care as interferes with ability to get adequate legal services - versus "due process"

Florida Appellate Court struck down statute that barred clients or other parties [union] from paying a fee to attorneys in workman's compensation cases

- Court reasoned that insurance carriers could pay whatever rate or amount but claimants could not - violated claimants "First Amendments right to hire an attorney" among other state law bases

Legal Education

BYU - J. Reuban Clark Law School Being Investigated by American Bar Association

- Policy allows Mormons and Non-Mormons to attend the law school
- Policy provides that if a Mormon leaves the church, must be expelled
- Issue is whether this violates ABA Accreditation Policy and rules against religious discrimination or is an appropriate accommodation for a Religiously Based Institution.

Judges

Winter v. Wolnitzek (EDKy) (May 2016)- state judicial conduct commission rule prohibiting overt political activity and promises and commitments by judicial candidates and judges seeking reelection as to specific issues is **unconstitutional** - as in violation of free speech under 1st Amendment

- Court also ruled that barring judge or judicial candidate from making “misleading statements” also unconstitutional as “vague”

