

**OHIO RULES OF PROFESSIONAL CONDUCT**

**“Back to the Basics”**

**Ottawa County Bar Association**  
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**Presented by**

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## **NEW OHIO RULES OF PROFESSIONAL CONDUCT What You Do Not Know Can Hurt You<sup>1</sup>**

**On February 1, 2007, New Ohio Rules of Professional Conduct became effective. It is incumbent upon every lawyer to become familiar with the New Ohio Rules of Professional Conduct (“New Rules”).**

### **I 2011 Board of Commissioners Advisory Opinions**

#### **A. Bd. Op. 2011-1, Issued February 11, 2011**

**It is improper for a plaintiff’s lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such agreements are not authorized by Prof. Cond. Rule 1.15(d) and violate Prof. Cond. Rule 1.8(e) and 1.7(a)(2). Further, it is improper for a lawyer to propose or require, as a condition of settlement, that a plaintiff’s lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). The Board recommends that this advisory opinion be prospective in application.**

### **II 2010 Board of Commissioners Advisory Opinions**

#### **A. Bd. Op. 2010-1, Issued February 5, 2010**

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**It is improper for a lawyer to name a law firm the lawyer's surname followed by the words Intellectual Property or the initials IP. The use of an area of practice or specialization in a law firm name constitutes a trade name. Prof. Cond. Rule 7.5(a), Gov. Bar R. III(2), and Prof. Cond. Rule 7.4 do not authorize the inclusion of an area of practice or specialization in a law firm name and Prof. Cond. Rule 7.5 specifically does not allow a trade name. An additional consideration when naming a law firm is that Gov. Bar R. III(2) requires that a name of a law firm formed under a corporate structure, must, in addition to compliance with Prof. Cond. Rule 7.5, include the proper descriptive designation required by law, such as LLC or LLP, and that the name of a legal professional association must end with the legend "Co., LPA" or have below it the words "A Legal Professional Association."**

**B. Bd. Op. 2010-2, Issued April 9, 2010**

**Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interests checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about a case will most likely be an item reasonably necessary to a client's representation. If a lawyer's**

notes includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer.

**C. Bd. Op. 2010-3, Issued June 11, 2010**

As part of the settlement of a legal malpractice claim, it is improper for a lawyer to require a current or former client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance. Such conduct constitutes conduct prejudicial to the administration of justice under Prof. Cond. Rule 8.4(d) and conduct adversely reflecting on fitness to practice law under Prof. Cond. Rule 8.4(h). Further in response to a demand for information by a disciplinary authority a lawyer is required by Prof. Cond. Rule 8.1(a) and 8.1(b) to respond truthfully and fully in the disciplinary matter including inquiry, investigation, and subsequent disciplinary proceedings. A lawyer's attempts to avoid discipline hinder the disciplinary process.

**D. Bd. Op. 2010-4, Issued June 11, 2010**

A judge, who has sentenced an offender for a felony or a misdemeanor offense, should not grant the offender's request to fulfill a community control sanction of community service by making a financial contribution to a charitable organization. First, unless authorized by law, a judge's granting of an offender's request to replace a community control sanction with a financial contribution to a charitable organization is not ethically proper under Jud. Cond. Rules 1.1 and 2.2, which require a judge to uphold the law. Second, unless authorized by law, a judge's permission to an offender to make a financial contribution to a

charity, instead of serving a community control sanction as sentenced, does not promote public confidence in the independence, integrity and impartiality of the judiciary as required by Jud. Cond. Rule 1.2 for it allows offenders with money to assert influence over their sentencing sanctions. Third, unless authorized by law, a judge's use of judicial power to allow an offender to make a financial contribution to a charity, in lieu of serving a community control sanction as sentenced, conveys the impression that money and outside influence impacts sentencing and thereby contravenes Jud. Cond. Rules 1.3 and 2.4(C), which prohibit external influence on judicial conduct.

**E. Bd. Op. 2010-5, Issued August 13, 2010**

The assistant state public defenders in the state public defender's central appellate office located in the state's capital city and the assistant public defenders in the state public defender's trial branch offices located in four different counties are not automatically considered lawyers associated in the same firm for purposes of imputing conflicts of interest under Prof. Cond. Rule 1.10(a). If an appellate state public defender *does not* provide assistance to a trial branch state public defender in a trial matter, there is no ethical reason to impute a conflict of interest when an appellate attorney is asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter. The appellate state public defenders *are not* associated with the trial branch state public defenders in that matter. But, if an appellate state public defender *does* provide assistance to a trial branch state public defender in a trial matter, it would be appropriate under the ethical rules to impute a conflict of interest, when an appellate attorney is asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter. The appellate state public defenders *are* associates with the trial branch public defenders in that matter.

**There is not a per se conflict of interest when an appellate assistant public defender in the central appellate office conducts a merit review, asserts an appeal, or pursues a postconviction remedy asserting that another assistant public defender in a branch office rendered ineffective assistance at trial. Under Prof. Cond. Rule 1.7(a)(2), whether an appellate state public defender in the central office has a conflict of interest in asserting ineffectiveness of an assistant state public defender in a trial branch office will depend upon whether there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for the defendant is limited by the appellate lawyer's own personal interests. This will always be a factual determination in each matter. If an appellate assistant state public defender in the central office has a significant close personal relationship or unyielding institutional loyalty to the trial assistant state public defender, it is likely there is a substantial risk of material limitation on the appellate representation in that matter. Or, if an appellate assistant state public defender in the central office has provided assistance to an assistant state public defender in a trial matter, it is likely that there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the appellate lawyer's own personal interest arising from involvement in the trial matter, when asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter.**

**F. Bd. Op. 2010-6, Issued October 8, 2010**

**A lawyer representing a client in a civil matter may not enter into a contingent fee agreement whereby the client grants the lawyer a power of attorney to take any action and execute all documents that the attorney deems necessary in the matter, including but not limited to signing on the client's behalf a settlement agreement and release, a settlement check, or a closing statement. Such use of a broad power of attorney in a contingent fee agreement**

contravenes Prof. Cond. Rule 1.2(a) by improperly allocating all of the authority regarding the representation from the client to the lawyer and disregards Prof. Cond. Rule 1.4(a) by eliminating required communication by the lawyer to the client. Such practice is improper unless a lawyer is able to demonstrate that there is an extraordinary circumstance in which there is an exigent reason for a client to grant such authority to the lawyer. For example, an extraordinary circumstance might arise when there is an urgent surgery or travel to a remote location.

**G. Bd. Op. 2010-7, Issued December 3, 2010**

A judge may be a ‘friend’ on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge’s participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct. A judge who uses a social networking site should follow these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), a judge should not make comments on a social networking site about any matters pending before the judge – not to a party, not to a counsel for a party, not to anyone. To comply with Jud. Cond. Rule 2.9(C), a judge should not view a party’s or witnesses’ pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), a judge should disqualify himself or herself from a proceeding when the judge’s social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a

party. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.

### **III 2009 Board of Commissioners Advisory Opinions**

#### **A. Bd. Op. 2009-1, Issued February 13, 2009**

Rule 3.11(B) of the Ohio Code of Judicial Conduct prohibits a full-time magistrate from serving as an independent contractor for any business entity, unless allowed by one of the exceptions within the rule. Because none of the exceptions apply, it is improper under Rule 3.11(B) of the Ohio Code of Judicial Conduct for a full-time magistrate to engage in outside employment performing legal research projects as an independent contractor for a legal publishing company. If a full-time magistrate has undertaken such employment, he or she should relinquish the employment as soon as practicable pursuant to Rule 3.11(D). This opinion does not prohibit a full-time magistrate from writing or teaching. Under the exception provided in Rule 3.11(B)(3), a full-time magistrate is permitted to write or teach, provided the conditions of Rule 3.11(C) and Rule 3.1 are met, and subject to applicable restrictions in Ohio Ethics Law. The advice offered in this opinion also applies to a full-time judge.

#### **B. Bd. Op. 2009-2, Issued February 13, 2009**

It is improper for a juvenile court judge (or court staff) to accept travel expenses (payment or reimbursement of travel, meals, and lodging) from the owners of a private placement facility that receives or seeks to receive placements of juveniles by the court,

**for travel to a facility for an informational tour or to assess a juvenile placed there by the court.**

**It is improper for a juvenile court judge (or court staff) while attending a conference to accept a gratuitous non-conference meal paid for by a private placement facility that receives or seeks to receive placement of juvenile by the court.**

**A juvenile judge's (or court staff's) reporting on an annual financial disclosure statement does not resolve all the impropriety in accepting travel expenses (payment or reimbursement of travel, meals, and lodging) or gratuitous non-conference meal from an improper source such as a private placement facility that receives or seeks to receive placements of juveniles from the court, but fulfills ethical and legal reporting requirements as to the annual financial disclosure statement under the Ohio Code of Judicial Conduct and Ohio Ethics Law.**

**C. Bd. Op. 2009-3, Issued June 12, 2009**

**A county prosecuting attorney may represent multiple statutory clients in the *negotiation of a contract or a memorandum of understanding* except when there is a conflict of interest under Rule 1.7(a)(1) or (a)(2) that cannot be ameliorated under rule 1.7(b) or when there is a nonconsentable conflict of interest under 1.7(c)(1) or (c)(2). A conflict of interest arises under Rule 1.7(a)(1) when the client's interests are directly adverse. A conflict of interest arises under Rule 1.7(b)(2) when there is a substantial risk that the county prosecutor's ability to represent one client will be materially limited by responsibilities to the other client.**

**Not every disagreement among clients constitutes a conflict of interest. A county prosecuting attorney must exercise professional judgment to decide whether a Rule 1.7(a)(1) or (a)(2) conflict of interest exists and whether it may be ameliorated by meeting the conditions set forth in Rule 1.7(b)(1) through (3). Rule 1.7(b)(1)**

requires a prosecutor's determination that the prosecutor's office is able to give competent and diligent representation to each affected client; Rule 1.7(b)(2) requires each affected client to give informed consent, confirmed in writing; and Rule 1.7(C)(1) precludes, despite client consent, a representation prohibited by law. Rule 1.7(c)(2) precludes, despite client consent, a representation involving the assertion of a claim by one client against another client represented by the lawyer in the same proceeding which includes negotiation or mediation. Regardless of consent, multiple representations should not be undertaken when two client's interests are fundamentally antagonistic or when contentious litigation or contentious negotiations between two clients are imminent or contemplated.

Whether representation of multiple statutory clients may be provided by different assistant county prosecuting attorneys employed in the office of the county prosecutor depends upon whether the conflict of interest is one that may be ameliorated under Rule 1.7(b) or one that falls under Rule 1.7(c). For conflicts of interest that may be ameliorated under Rule 1.7(b) representation by different assistant county prosecutors is appropriate if the county prosecutor determines that the conditions set forth in (b)(1) through (b)(3) are met. For conflicts of interest that fall under Rule 1.7(c), once a county prosecuting attorney determines that a representation is prohibited by law or that the client has a claim against another client in the same proceeding, the county prosecuting attorney should not attempt to represent any of them, not even through different assistant prosecuting attorneys employed in the office of the county prosecuting attorney.

A county prosecuting attorney is prohibited by Rule 1.7(c)(2) from representing multiple statutory clients, such as two different public entities, in the *filing of a law suit* by one of the clients asserting a claim against the other, even through different assistant county prosecuting attorneys. When a controversy evolves into a legal dispute that must be resolved through the

filing of a lawsuit by one county official or entity against the other, the county prosecutor should withdraw in that matter from the representation of either client and special counsel should be appointed.

**D. Bd. Op. 2009-4, Issued June 12, 2009**

Upon conclusion of domestic relations mediation, a lawyer-mediator may not, pursuant to Prof. Cond. Rule 1.7(c)(2), prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing on behalf of *both* of the parties to the domestic relations proceeding. Upon conclusion of domestic relations mediation, a lawyer-mediator may prepare necessary legal documents, such a petitions, decrees, and ancillary documents, for filing by or on behalf of *one* of the parties to a domestic relations proceeding, provided the following conditions are met. First, as required by Prof. Cond. R. 1.12(b), during mediation, a lawyer-mediator must not negotiate to subsequently represent one of the parties. Second, as required by Prof. Cond. R. 1.12(a), both parties must give informed consent, confirmed in writing to a lawyer-mediator's subsequent representation of one of the parties. Third, as required by R.C. 102.03(A)(1) and through application of Prof. Cond. R. 1.7(c)(1), during employment or for one year after employment with the court, a lawyer-mediator who is a court employee must not undertake a representation in a matter in which he or she personally participated. Fourth, as required by Prof. Cond. R. 4.3, if one party is unrepresented, a lawyer-mediator who subsequently represents the other party, must properly deal with the unrepresented party. Fifth, a lawyer-mediator who undertakes a subsequent legal representation must comport with any applicable standards of practice for mediators.

**E. Bd. Op. 2009-5, Issued June 12, 2009**

A lawyer or law firm may be listed as "General Counsel" or similar reference on the letterhead of a client organization and

may use the designation in signing correspondence written on behalf of the client organization if the lawyer or law firm represents the client organization in all or most of the client's legal matters, devotes a substantial amount of professional time to the client organization, and is given the title by the organization. A lawyer's or law firm's designation as 'General Counsel' on the letterhead of a client organization and use of the designation in signing correspondence written on behalf of the client organization is proper under Prof. Cond. Rules 7.5 and 7.1, provided the communication is truthful - not false or misleading or nonverifiable.

F. Bd. Op. 2009-6, Issued August 14, 2009

The Ohio Rules of Professional Conduct *do not* prohibit an Ohio lawyer or law firm from outsourcing legal or support services domestically or abroad, either directly to lawyers or nonlawyers or indirectly through an independent service provider, but applicable rules *do* impose significant ethical requirements.

Pursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(A), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyers or nonlawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where the lawyer or law firm temporarily engages the services of a nonlawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice.

Pursuant to Prof. Cond. Rules 5.1(c)(1), 5.3(a), and 5.3(c)(1), a lawyer who outsources legal or support services has responsibility for another lawyer's violation of the professional obligations if the outsourcing lawyer orders, or with specific knowledge of the

conduct, ratifies the conduct involved; has responsibility to make reasonable efforts to ensure that a nonlawyer's conduct is compatible with the professional obligations of the lawyer; and is responsible for a nonlawyer's conduct if the outsourcing lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved. The extent of supervision for outsourced services is a matter of professional judgment for an Ohio lawyer, but requires due diligence as to the qualifications and reputation of those to whom services are outsourced and to whether the requested outsourced services will be provided with competence and diligence as required by Prof. Cond. Rules 1.1 and 1.3, confidences will be protected as required by Prof. Cond. Rule 1.6, and conflicts of interest will be avoided as required by Prof. Cond. Rules 1.7, 1.9 and 1.10.

Pursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill the client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise of professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis are previously charged.

G. Bd. Op. 2009-7, Issued August 14, 2009

It is improper under the Ohio Code of Judicial Conduct for a newly appointed full-time or part-time domestic relations court magistrate to continue serving out a term as an elected member of city council. Rule 4.5 requires a magistrate to resign as

magistrate upon becoming a candidate in a primary or general election for a nonjudicial elective office. A corollary of Rule 4.5 is that a magistrate may not continue to serve in a nonjudicial office that he or she was elected to prior to becoming a magistrate. Rule 1.2 and Rule 1.3 buttress the view that a magistrate may not continue to serve in a nonjudicial elective office. Rule 1.2 requires a magistrate to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. Rule 1.3 requires that a magistrate not abuse the prestige of judicial office to advance personal or economic interests. The simultaneous holding of a position as magistrate and an elective position as city council member may compromise public confidence in the magistrate's independence, integrity, and impartiality; may create an appearance of impropriety; and may appear to lend the prestige of being a magistrate to advance personal interests. Further, there may be statutory compatibility issues to consider, but those are beyond the scope of this advisory opinion.

#### H. Bd. Op. 2009-8, Issued October 10, 2009

Throughout a judicial campaign, a judicial candidate may truthfully state in person or in advertising that he or she is 'Endorsed by (or a nominee of) the Democratic Party' or 'Democratic Party Endorsed (or nominee)' or 'Endorsed by (or a nominee of) the Republican Party' or 'Republican Party Endorsed (or nominee)'; provided that the phrase identifies which political party entity endorses the candidate, for example, the county, state or national Democratic or Republican Party. Any other statement that identifies a judicial candidate as a member of or affiliated with a political party is regulated as follows. At any time during a judicial campaign, a judicial candidate may identify himself or herself in person as a member of or affiliated with a political party. From the date of becoming a judicial candidate through the day of the primary a judicial candidate may identify himself or herself in person and in

advertising as a member of or affiliated with a political party. After the day of a primary, a judicial candidate may in person, but not in advertising, identify himself or herself as a member of or affiliated with a political party. Jud. Cond. Rules 4.2(B)(4), 4.2(C)(6), 4.2(C)(7), 4.3(A), 4.3(M).

## **RULE CHANGE EFFECTIVE JANUARY 1, 2010**

Prof. Conduct R. 1.15(d) and Comment [4], regarding the lawyer's obligation of safekeeping of funds and property, are amended effective January 1, 2010. This Rule amendment addresses when the lawyer has an obligation to disburse monies to the third person or to hold monies in the lawyer's trust account when a third person has a lawful claim to specific funds or property in the lawyer's possession. *See complete text of the new Rule at [www.supremecourtofohio.gov](http://www.supremecourtofohio.gov)*

### **IV RECENT DISCIPLINARY CASES**

#### **A. Trust Accounts**

*\* Disciplinary Counsel v. Riek, 125 Ohio St.3d 46, 2010-Ohio-1556. F. Benjamin Riek III, commingled personal and client funds in his trust account. He used the funds in his trust account to pay personal and business expenses. On 4 occasions, Mr. Riek overdrew his trust account. In one client matter, Mr. Riek deposited a \$10,000 settlement check, then withdrew over \$8,000 in checks to pay himself and to pay his personal expenses. When his client attempted to cash the client's portion of the settlement monies, the check was dishonored. Mr. Riek told his client the reason the client's portion of the monies was dishonored was because the settlement check had been dishonored. Mr. Riek's statement to his client was false. About a month later, Mr. Riek told his client that the settlement check had now cleared so the client could resubmit the check for his portion of the settlement. The client's check cleared the second time.*

Mr. Riek's conduct was found to violate Prof. Cond. Rule 1.15(a), requiring a lawyer to hold property of clients or third persons separate from the lawyer's own property; Prof. Cond. Rule 8.4(c), prohibiting a lawyer from

engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and Prof. Cond. Rule 8.4(h) prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law. Mr. Riek was suspended from the practice of law for 18 months with 12 months stayed on the condition that he commit no further misconduct.

\* *Disciplinary Counsel v. Maley*, 119 Ohio St.3d 217, 2008-Ohio-3923. Lawrence Maley received an 18 month suspension with the last 6 months stayed on condition that he comply with Prof. Cond. R. 1.15, Safekeeping Funds and Property, complete a CLE course on law-office management, and complete an additional 3 hours of CLE in ethics and professionalism for multiple disciplinary rule violations.

Maley delegated to his secretary the authority to use the office credit cards, collect client fee payments, manage the office checking account and to meet with clients.

From July 2004 through August 2005, the secretary collected filing fees and agreed to file at least 39 bankruptcy petitions. In 34 of these cases, petitions were filed without Mr. Maley's knowledge. Even after Mr. Maley fired the secretary in March 2005, she entered his office after business hours and filed another 19 bankruptcy petitions.

The secretary also used the office credit cards for unauthorized personal expenses.

For part of 2004 and all of 2005, Mr. Maley did not have an IOLTA trust account. Unearned retainer fees and settlement checks were deposited into his business checking account.

\* *Disciplinary Counsel v. Fletcher*, 122 Ohio St.3d 390, 2009-Ohio-3480. Peter Fletcher of Northfield, Ohio received a six month suspension, all stayed on conditions. The conditions: "(1) he complete a one-year probation including monitoring of his IOLTA account by an attorney appointed by relator and 2) he commit no further misconduct."

Mr. Fletcher did not maintain the records required by Ohio Prof. Cond.

**R. 1.15(a)(2) for more than one year after the new Rule became effective.**

**In addition, from 2002 until August 2007, he did not maintain an operating account. Mr. Fletcher used his IOLTA account to pay business bills and personal expenses. Mr. Fletcher commingled his personal funds in his IOLTA account.**

**Mr. Fletcher also loaned \$900 to a client for personal expenses. For this same client, he also cashed checks from the client's cleaning company through his IOLTA account. Occasionally, the client would pay Mr. Fletcher a \$25 or \$50 fee for the "check-cashing and loan service."**

**\* *Disciplinary Counsel v. Crosby*, 2009-Ohio-6763, was decided by the Supreme Court on December 29, 2009. Mr. Crosby was charged in a three-count disciplinary complaint for violations arising out of his use and maintenance of his IOLTA account.**

**The Supreme Court found that from January 2006 to May 2007, Mr. Crosby used his IOLTA account as his personal bank account and as his operating account. The following transactions were from Mr. Crosby's IOLTA account: 20 checks to Mr. Crosby's office assistant for wages or bonuses; 18 electronic withdrawals to pay telephone bills; 16 checks to various creditors for either office or personal bills, and 8 checks to Mr. Crosby's wife for household expenses.**

**In addition, between 2006 and 2007, Mr. Crosby failed to promptly withdraw his earned fees from his IOLTA account. Thus, he commingled his personal funds with client funds in his IOLTA account.**

**The Supreme Court found Mr. Crosby to have violated, *inter alia*, Prof. Cond. Rule 1.15(a), Prof. Cond. Rule 1.15(a)(3), failure to maintain a record of each IOLTA account and Prof. Cond. Rule 5.3(b) failure to take reasonable steps to ensure that a nonlawyer employee's conduct is compatible with the professional obligations of the lawyer.**

**The Supreme Court suspended Mr. Crosby for 24 months, and conditioned his reinstatement on his completing 6 hours of additional CLE in**

law office management and accounting, and fully paying or providing evidence of compromise of 12 judgments against him.

*\* Toledo Bar Assn. v. Weisberg*, 124 Ohio St.3d 274, 2010-Ohio-142. Mr. Weisberg was convicted of one count of federal income tax evasion. He was interimly suspended based upon the felony conviction. His disciplinary case then proceeded through the discipline system. Mr. Weisberg admitted in his disciplinary case that from 1997 through 2002, he deposited and kept his personal funds in his IOLTA account “in an attempt to conceal his assets from the IRS.” *Id. at ¶12.*

The Court stated, “We have deemed attempts to willfully evade federal income taxes to be illegal conduct involving moral turpitude.” *Id. at ¶16.*

The Court also stated, “Clearly, a lawyer may not use his trust account, which is a tool established for the benefit of the profession, as a ‘safe haven’ for his money to avoid his personal financial responsibilities . . . .[I]t is ‘of the utmost importance that attorneys maintain their personal and office accounts separate from their clients’ accounts and that the violation of that rule warrants a substantial sanction whether or not a client has been harmed.’” *Id. at ¶17.*

After considering the aggravating and mitigating circumstances, the Court suspended Mr. Weisberg from the practice of law for 2 years, with no credit for the interim suspension, but stayed the entire suspension on conditions: serve a 2 year monitored probation, enter into an OLAP contract and obtain counseling and any appropriate therapy for his gambling. If Mr. Weisberg fails to abide by the conditions of his probation, the stay will be lifted and he will serve his entire two-year suspension.

## B. Fees

*\* Cuyahoga Cty Bar Assn. v. Cook*, 121 Ohio St.3d 9, 2009-Ohio-259. Gary Cook of Euclid, Ohio was given a six-month suspension stayed on conditions. The conditions: “he reimburse Buchanan \$1,000 with interest at the judgment rate within the six-month suspension period, take six hours of CLE in law-office management in addition to the requirements of Gov. Bar R.

**X, and commit no further misconduct.”**

**Mr. Cook agreed to represent Ms. Buchanan on various legal matters arising out of a pending foreclosure action in Common Pleas Court. The fee agreement terms included “a ‘flat rate retainer’ of \$4,500 and 20 percent of any recovery from a counterclaim alleging predatory lending.”**

**The Court opined, “In finding violations of DR 2-106(A), we have generally disapproved of nonrefundable, earned-upon-receipt legal fees absent a true ‘general’ retainer agreement, one that secures the services of a particular attorney for any contingency and requires the lawyer to forego employment by a competitor of the client. *Cuyahoga Cty. Bar Assn. v. Okocha* (1998), 88 Ohio St.3d 3, 6, 697 N.E.2d 594 (nonrefundable retainer plus 40 percent contingent fee in a wrongful-discharge case found to be excessive). We have cautioned against charging nonrefundable fees because DR 2-110(A)(3) and successor Rule 1.16(e) of the Rules of Professional Conduct require in all but narrow circumstances that upon withdrawal from representation, a lawyer must return fees that the client has paid in advance and that the lawyer has not earned. See *Columbus Bar Assn. v. Halliburton-Cohen*, 106 Ohio St.3d 98, 2005-Ohio-3956, 832 N.E.2d 42 . . . .”**

### **C. Client Files**

**\* *Lake Cty. Bar Assn. v. Kubyn*, 121 Ohio St.3d 321, 2009-Ohio-1154. Attorney Kubyn received a public reprimand. Attorney Kubyn admitted that he “violated Prof. Cond. R. 1.16(d) and (e). Prof. Cond. R. 1.16(d) requires lawyers, upon withdrawal or termination, to take reasonably practicable steps to protect the client’s interests, including delivering client papers and property to which the client is entitled. With an exception not relevant here, Prof. Cond. R. 1.16(e) requires lawyers, upon withdrawal or termination, to promptly return any part of a fee that has not been earned.”**

**Attorney Kubyn was retained in December 2006 to represent Mr. Butz in a divorce and other matters. Mr. Butz paid \$5,000 towards the legal fees. On January 31, 2007, Mr. Butz discharged Attorney Kubyn, informed him that he had retained new counsel, and requested “an itemized billing and to return any unearned fees.”**

In March 2007, Attorney Kubyn sent an itemized bill to Butz and returned \$1,032.50 in legal fees. “Because the itemized statement assessed charges for work done after Butz discharged him, respondent later repaid an additional \$362.50.” Attorney Kubyn responded to Butz’ new attorney’s request for Butz’ file that he had “no duty to produce it because he had sent Butz copies of all the paperwork as it was generated or received, so Butz already had the complete file.”

#### **D. Client Authorization Needed/Settlements**

*\* Disciplinary Counsel v. Horton, 124 Ohio St.3d 434, 2010-Ohio-579.* Ms. Horton negotiated a settlement agreement of her client’s auto injury case WITHOUT “notifying her clients or obtaining their consent to the agreement” *id at ¶16*. Then, she forged the client’s signatures on three separate settlement checks, cashed the checks and converted the settlement monies to her own use.

When her clients contacted her about the status of the case, Ms. Horton falsely represented that she had filed a law suit on their behalf and that the law suit was pending in the Cuyahoga County Court of Common Pleas and scheduled for trial in early 2007. The clients discovered the misrepresentations and conversions after they went to a new lawyer to investigate the status of their case.

Ms. Horton admitted violating the following Rules: engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; engaging in conduct that adversely reflects her fitness to practice law; neglecting a legal matter; failing to deposit client funds in an IOLTA account; failing to promptly pay to the client funds to which the client is entitled.

Ms. Horton presented mitigation evidence of: significant illnesses in her family, care taking demands for her family; her husband’s job loss resulting in losing her home and filing bankruptcy; no prior discipline, cooperative during the disciplinary process, made partial restitution to her clients, otherwise good character and reputation; counseling with OLAP for stress management.

Ms. Horton was suspended from practice for 2 years with the second year of the suspension stayed on conditions (complete 3-year treatment regimen per OLAP, complete 12 hours of CLE in law office, caseload and time management in addition to required hours of CLE, complete one year of monitored probation, repay \$1,300 to her clients).

#### **E. Sexual Contact with Clients and Others**

In *Cleveland Metropolitan Bar Assn. v. Lockshin*, 125 Ohio St.3d 529, 2010-Ohio-2207, Mr. Lockshin was indefinitely suspended for “engaging in a pattern of inappropriate sexual communication and behavior with a number of women, including his clients, and failing to file a timely notice of appeal on behalf of a client.” *Id.* @ ¶ 1.

During his representation of a 16 year old female, Mr. Lockshin called the client and “asked her personal questions that were entirely unrelated to her case.” *Id.* @ ¶ 10. After the case was resolved, Mr. Lockshin used instant messaging for flirtatious conversations with the former client.

When the former client was 17 and incarcerated at the juvenile detention center, the Court appointed Mr. Lockshin to represent the 17 year old female. When Mr. Lockshin visited her at the detention center, “he engaged in inappropriate personal conversations, ‘played footsie’ with her, touched her leg, and informed her that he was sexually aroused.” *Id.* @ 11.

Mr. Lockshin displayed photographs of scantily clad female client to Attorney Ray while the two of them were having lunch. During the lunch, Mr. Lockshin telephoned the female client and “asked her to send something so he would have an incentive to do well in the hearing that afternoon.” *Id.* @ 17.

When representing another client in a divorce, Mr. Lockshin told the client “he wanted to meet her at a hotel to have sex . . . talking to her on the phone sexually aroused him . . . he would be satisfied just giving her oral sex. . . he wanted to see and touch her breasts.” *Id.* @ 19.

There were a total of seven counts against Mr. Lockshin in his

disciplinary case. When determining the sanction to impose in the disciplinary case, The Supreme Court of Ohio stated, “Moreover, the record demonstrates that respondent has significant mental-health concerns that he has failed to address in the three years since his misconduct first came to light.” *Id @ 50*. The Court went on to state, “Because respondent has not yet received the treatment necessary to develop a realistic and effective plan to decrease his risk of repeating inappropriate sexual behaviors, he remains at risk to reoffend . . . . Respondent is therefore indefinitely suspended from the practice of law in Ohio and, pursuant to Gov. Bar R. V(10)(B)(1), may not petition for reinstatement for two years from this order.” *Id @ 51*.

## V 2008 BOARD OF COMMISSIONERS OPINIONS

### A. Bd. Opinion 2008-1, Issued February 8, 2008

A lawyer in a law firm may be ‘of counsel’ to another law firm if the requisite continuing relationship exists between the lawyer and the law firm. The requisite continuing relationship is other than as a partner or associate or its equivalent and is more than a mere forwarder or receiver of legal business, more than a one-time advisor/consultant relationship, and more than a one-case relationship. The ‘of counsel’ relationship is continuing, close, regular and personal.

A lawyer who enters an ‘of counsel’ relationship must be aware of the accompanying ethical implications. A lawyer who serves as ‘of counsel’ must have an active license to practice law. A law firm may continue to include in the firm name the name of the lawyer who was already a name partner or name shareholder but who becomes ‘of counsel’ to the law firm. A law firm may not include in the firm name the name of an ‘of counsel’ lawyer who not already a name partner or name shareholder in the law firm. The listing of an out-of-state lawyer as ‘of counsel’ to an Ohio law firm

must include the jurisdictional limitation of the ‘of counsel’ lawyer on the letterhead. An ‘of counsel’ lawyer is considered a lawyer in the same firm for purposes of division of fees under Rule 1.5(e); therefore, the restrictions on division of fees with a lawyer not in the same firm do not apply to a lawyer who is properly designated as ‘of counsel’. A lawyer may serve as ‘of counsel’ to more than one law firm. Conflicts of interest are attributed in an ‘of counsel’ relationship. “Of counsel’ relationships may be entered into between Ohio lawyers and law firms and out-of-state lawyers and law firms.

**B. Bd. Opinion 2008-2, Issued June 6, 2008**

A lawyer who sits on the board of directors of a corporation but not as corporate counsel has a material limitation conflict of interest under Rule 1.7(a)(2) that prohibits the lawyer from representing a client in a lawsuit against the corporation.

Pursuant to Rule 1.7(c)(2), the conflict of interest of a lawyer, who sits as a corporate director but not as a corporate counsel, in the representation of a client suing the corporation cannot be waived under Rule 1.7(b) because the client and the corporation are directly adverse in the same proceeding. The corporation is not technically a client of the a lawyer director who is not corporate counsel, but a lawyer director cannot isolate the fiduciary duties owed to the corporation from his professional duties as a lawyer.

The prohibited lawyer’s conflict of interest is imputed to the law firm under Rule 1.10(a). Therefore, it would be improper for a law firm member, partner, or associate of the prohibited lawyer to represent a client in a lawsuit against the corporation on which

**the prohibited lawyer serves on the board of directors. Imputation of the law firm's disqualification may be waived by the affected client (the client suing the corporation) pursuant to Rule 1.10(e); however, pursuant to Rule 1.7(c)(2), the conditions set forth for waiving a conflict under Rule 1.7(b) cannot be met because the corporation and the client are directly adverse to each other in the same proceeding. The corporation is not technically a client of the law firm but the lawyer director's fiduciary duties to the corporation cannot be isolated from the lawyer's professional duties.**

**This opinion applies to the representation of a client who is directly adverse in the same proceeding to a corporation on which the lawyer or a member or associate of the lawyer's firm serves as a corporate director.**

**C. Bd. Opinion 2008-3, Issued August 15, 2008**

**The proper disposition of client funds in a lawyer's IOLTA or individual client trust account, when either the identity or the whereabouts of the client who is the owner of the funds is unknown, is for the lawyer to follow statutory procedure for the disposition of unclaimed funds to the state set forth in Chapter 169 of the Ohio Revised Code. A lawyer's reporting of unclaimed funds of a client whose identity or whereabouts are unknown does not violate either the ethical duty of safekeeping a client's funds under Rule 1.15 or the ethical duty to protect a client's confidentiality under Rule 1.6.**

**D. Bd. Opinion 2008-4, Issued August 15, 2008**

**Pursuant to Rule 1.7(a)(1) and (a)(2), an assistant**

county public defender should not represent co-defendants at a preliminary hearing in a felony case due to the inherent risk of a conflict of interest that likely could not be ameliorated under Rule 1.7(b). Two different assistant public defenders in the same county public defender's office should not separately represent the co-defendants at a preliminary hearing because the conflict of interest of one assistant public defender is imputed to the other pursuant to Rule 1.10(a) and Rule 1.0(c).

Pursuant to Rule 1.7(a)(1) and (a)(2), an assistant county public defender should not represent one co-defendant in a felony case while simultaneously representing the other co-defendant in an unrelated misdemeanor case due to the inherent risk of a conflict of interest that likely could not be ameliorated under Rule 1.7(b). A different assistant public defender in the same county public defender's office should not represent the co-defendant in the unrelated misdemeanor case because the conflict of interest of one assistant public defender is imputed to the other pursuant to Rule 1.10(a) and Rule 1.0(c). If a *former* client in an unrelated matter is a witness in a defendant's criminal case, an assistant county public defender may represent the criminal defendant, but may not use or reveal information of the former client that is protected from disclosure under Rule 1.9(c).

**E. Bd. Opinion 2008-5, Issued August 15, 2008**

A city director of law or an assistant city director of law is prohibited from representing criminal defendants in proceedings in which the state is a plaintiff. A lawyer associated in a law firm with a city director of law or an assistant city director of law may not represent criminal defendants in a

proceeding prosecuted by the city director of law or the assistant city director of law. A lawyer associated in a law firm with a city director of law or an assistant city director of law may be privately retained to represent criminal defendants in a proceeding in which the state of Ohio is plaintiff, if the proceeding outside of the jurisdiction of the city director of law. A lawyer associated in a law firm with any city director of law or an assistant city director of law may not serve as a court appointed counsel, a public defender, or a co-counsel to a public defender.

**F. Bd. Opinion 2008-6, Issued December 5, 2008**

Opinion 2008-5 is modified by this opinion in the following manner. First, a city director of law or assistant city director of law who has no legal duty to represent the state of Ohio may represent criminal defendants provided that: 1) no city police officers from the city are involved; 2) the criminal charges are based solely on alleged violations of state law, and 3) the city is not otherwise directly or indirectly involved or affected. Although Opinion 2008-5 did not address representation of criminal defendants by village solicitors, the Board takes this opportunity to advise that a village solicitor who has no legal duty to represent the state of Ohio may represent criminal defendants under similar conditions as set forth above. Second, whether a lawyer associated in a law firm with any city director of law or an assistant city director of law may serve as a court appointed counsel, a public defender, or a co-counsel to a public defender is subject to R.C. 120.39(A). Appointment of a partner or employee of a village solicitor is subject to R.C. 120.39(A) and (B). Advice as to the application of R.C. 120.39 is outside of this Board

advisory authority.

**G. Bd. Opinion 2008-7, Issued December 5, 2008**

**A lawyer or law firm may employ an attorney who is disqualified (disbarred or resigned with discipline pending) or suspended from the practice of law, but only in compliance with the conditions set forth in Gov. Bar R. V(8)(G) and (H). This governing bar rule imposes conditions upon *both* the employing lawyer or law firm *and* the employed disqualified or suspended lawyer. An employing lawyer or law firm must register the employment, contractual, or consulting relationship with the Office of Disciplinary Counsel on a form provided by that office and provide an affidavit that the employing or supervisory attorney has read and understands the limitations of the order of disbarment, suspension, or resignation with discipline pending. An employing lawyer or law firm must received written confirmation from the Office of Disciplinary Counsel before commencing the employment relationship. An employing lawyer or law firm is required to provide written notice to every client on whose matters the disqualified or suspended attorney will perform work or provide services. A disqualified attorney is not permitted to enter an employment, contractual, or consulting relations with a lawyer or law firm with which the disqualified attorney was associated at the time the misconduct which resulted in the attorney's disbarment or resignation with discipline pending. A suspended attorney may enter an employment, contractual, or consulting relationship with a law firm with which the suspended attorney was associated at the time of the misconduct resulting in suspension. A disqualified or suspended attorney must have no direct client contact**

other than as observer at a meeting, hearing, or interaction between an attorney or client and must not receive, disburse, or otherwise handle client trust funds or property. A disqualified or suspended attorney does not violate the condition of no direct client contact by serving as a receptionist at a law firm provided that any communication with a client is limited to scheduling an appointment, taking a message, or transferring a question or call to the appropriate legal or non-legal staff, or other similar conduct. If a hiring lawyer or law firm limits the duties of a disqualified or suspended attorney to activities such as receptionist, mail room services, copying services, filing pleadings in court, or other similar conduct, the requirement of notification to clients would not be invoked since these activities do not directly involve performing work or providing services on a client matter. If a hiring lawyer or law firm expands the duties of a disqualified or suspended attorney to performing legal research and writing on client matters, the requirement of notification to the clients is invoked since the activity involves performing work or providing services on a client matter. A disqualified or suspended attorney must not engage in the practice of law in Ohio and must comply with the court's order of disbarment, resignation with discipline pending, or suspension. A judge or a lawyer who is concerned that a disqualified or suspended attorney is engaging in the practice of law should direct those concerns to the Office of Disciplinary Counsel.

## VI WRITINGS

### A. Preferred Writings

Prof. Cond. Rule 1.2(c): a lawyer may limit the scope of the lawyer's

representation of the client provided such limitation is reasonable under the circumstances and the limitation is communicated to the client “preferably in writing”.

Prof. Cond. Rule 1.5 (b): “nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible” It is preferred that said communication be in writing. These required disclosures are to occur “before or within a *reasonable* time after commencing the representation.” The one exception: a regularly represented client who will be charged “on the same basis as previously charged.”

## B. Required Writings

1. Prof. Cond. Rule 1.4(c) : either maintain professional liability insurance in the minimum amounts of \$100,000 per occurrence and \$300,000 in the aggregate or send a written disclosure to the client, get the client’s signature on same and then maintain a copy of the signed disclosure statement for a period of 5 years after the termination of the representation of the client remains unchanged.

2. Prof. Cond. Rule 1.5(c)(1): ALL contingent fees are required to be in writing. The written contingent fee agreement is required to contain all of the following:

- h. signatures of the client and the lawyer;
- i. method by which fee is to be calculated, including what percent fee for the lawyer if settlement, trial or appeal;
- j. litigation and all other expenses deducted from recovery;
- k. whether expenses are deducted before or after lawyer’s fee is calculated;
- l. whether client will be liable for expenses in the event no recovery is achieved.

3. Prof. Cond. Rule 1.5(c)(2): written closing statement, which statement is required to be provided to the client “at the time of or prior to receipt of the compensation under the agreement.” when using written contingent fee contracts. Requirements of the written closing statement are:

- how the compensation was determined;

- any costs and expenses deducted by the lawyer;
- if the fee is being divided between lawyers not in the same law firm, the actual division of the fees between the lawyers;
- signature of the client and all lawyers sharing in the fee.

Contingent fees are still prohibited in domestic relations matters and criminal defense matters.

4. Prof. Cond. Rule 1.5(d)(3): provides that if a lawyer uses phrases for fees, such as, “earned upon receipt”, “nonrefundable” or “similar terms”, the lawyer is also required to advise the client “in *writing* that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.”

5. Prof. Cond. Rule 1.5(e)(1)-(4): creates specific requirements when lawyers not in the same law firm divide fees. Lawyers not in the same law firm may **ONLY** divide fees if **ALL** of the following are done:

- the division of fees is in proportion to the services performed by each lawyer **OR** each lawyer assumes joint responsibility and “agrees to be available for consultation with the client.”
- the gives written consent after full disclosure of the identity of all lawyers sharing in the fee, that the fees will be divided, and whether fees are divided based upon work performed or joint responsibility;
- the written closing statement is required to be signed by the client and each lawyer sharing in the fee, and **MUST** include all of the other information required by Prof. Cond. Rule 1.5(c)(2);
- the total fee is reasonable.

6. Prof. Cond. Rule 1.7, Conflicts Current Clients: requires informed consent, confirmed in writing.

7. Prof. Cond. Rule 1.8(a), Conflicts Current Clients, Specific Rules: requires written disclosure to client, which written disclosure must be signed by the client.

8. Prof. Cond. Rule 1.8(f)(4): requires written Statement of Insured

**Clients Rights either given to client in person at first meeting or by mail within 10 days after lawyer receives notice of retention by insurer.**

**9. Prof. Cond. Rule 1.9(a), Duties to Former Clients : requires informed consent, confirmed in writing to obtain a waiver.**

**10. Prof. Cond. Rule 1.9(b): requires informed consent confirmed in writing to obtain a waiver.**

**11. Prof. Cond. Rule 1.10(d)(2), Imputation of Conflicts: requires written notice to affected former client.**

**12. Prof. Cond. Rule 1.11(a)(2), Special Conflicts Former & Current Government Officers and Employees: requires informed consent, confirmed in writing to obtain a waiver.**

**13. Prof. Cond. Rule 1.11(d)(2): requires informed consent confirmed in writing to obtain a waiver.**

**14. Prof. Cond. Rule 1.12(a), Former Judge, Arbitrator, Mediator or Other Third Party Neutral: requires informed consent, confirmed in writing in order to obtain a waiver.**

**15. Prof. Cond. Rule 1.15(d), Safekeeping Funds and Property: requires that an agreement between a client and third person as to how and when a lawyer will deliver funds or property be confirmed in writing.**

**16. Prof. Cond. Rule 1.17(e), Sale of Law Practice: requires selling lawyer to provide written notice of sale of the law practice to clients of the selling lawyer.**

**17. Prof Cond. Rule 1.17(f): requires purchasing lawyer, who is purchasing a law practice from an estate, or representative of disabled or disappeared lawyer, to provide written notice of the sale of the law practice and to obtain written consent from each client to act on that client's behalf.**

**18. Prof. Cond. Rule 1.18(d)(1), Duties to Prospective Clients: requires**

**informed consent confirmed in writing for waiver of disqualification.**

**19. Prof. Cond. Rule 1.18(d)(2)(ii): requires written notice to affected client when a lawyer receives disqualifying information from prospective client. (NOTE: Also requires that disqualified lawyer be screened from participation in the case and “is apportioned no part of the fee therefrom.”)**

**20. Prof. Cond. Rule 7.3(e), Direct Contact with Prospective Clients: requires “Understanding Your Rights” document be sent with targeted, direct mail solicitation that is sent “within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death . . .”**

## **VII RECORD RETENTION REQUIREMENTS**

### **A. Prof. Cond. Rule 1.15**

**Prof. Cond. Rule 1.15 sets forth record-keeping requirements for lawyers who receive either money or property from clients.**

**First, the concept of Client Trust Account or IOLTA account is maintained. What is new are the specific record-keeping requirements set forth in Prof. Cond. Rule 1.15(a)(1) - (5).**

**For EACH client, lawyers are now required to do ALL of the following:**

- maintain a copy of the fee agreement with each client;**
- maintain a funds record for each client, which sets forth all of the following:  
Name of client;  
Date, amount and source of all funds received;  
Date, amount, payee and purpose of each distribution;  
Current balance for each client;**

**NOTE: these documents MUST be held by the lawyer for 7 years “after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first.”**

**For EACH BANK ACCOUNT, lawyers are now required to do ALL of**

the following:

- name of account;
- date, amount and client affected by each credit or debit;
- balance in the account;
- maintain all bank statements, deposit slips, and canceled checks (if provided by the bank);
- perform a monthly reconciliation of all of items contained in Prof. Cond. Rule 1.15(a)(2), (3) and (4).

As before, lawyers can only put their own funds into a client trust account/IOLTA account the monies necessary to cover bank services charges.

Prof. Cond. Rule 1.15(c) now clarifies that BOTH fees and expenses paid in advance should be deposited into the client trust/IOLTA account. The lawyer may only withdraw “as fees are earned or expenses incurred.”

Prof. Cond. Rule 1.15(f) requires that if a law firm dissolves, the lawyers “shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records generated under division (a) of this rule.”

Under Prof. Cond. Rule 1.15(g) the lawyer selling the practice has to account for all client funds. The lawyer purchasing another lawyer’s law practice (permitted under Prof. Cond. Rule 1.17), is required to take the financial records of the purchased practice along with the client files.

Prof. Cond. Rule 1.15(h) applies to lawyers or law firms that own an ancillary business (business that provides law-related services). The ancillary business is required to comply with R.C. sections 3953.231, 4705.09, 4705.10 and any rules adopted by the Ohio Legal Assistance Foundation, which means that the ancillary business has to establish an interest-bearing trust account. The ancillary business also has to notify the Legal Assistance Foundation of the existence of that interest-bearing trust account.

## VIII CONFLICTS OF INTERESTS

### A. Prof. Cond. Rule 1.7 Conflicts of Interest: Current Clients

Prof. Cond. Rule 1.7 provides the general guidelines for conflicts of interests. Under Prof. Cond. Rule 1.7(a), a conflict of interest is created when:

- the representation of client A will be “directly adverse” to a current client; and
- a “*substantial* risk that the lawyer’s ability to consider, recommend, or carry out an appropriate course of action for that client [A] will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or the lawyer’s own personal interests.”

If a situation set forth in Prof. Cond. Rule 1.7(a) is created, then the lawyer is prohibited from accepting the representation or continuing the representation **UNLESS ALL OF THE FOLLOWING APPLY:**

- the lawyer will be able to provide competent and diligent representation to each affected client;
- each affected client gives *informed consent, confirmed in writing*;
- the representation is not precluded by division (c) of this rule;

Even if the clients consent, some conflicts can NOT be waived. Those conflicts are:

- the representation is prohibited by law;
- the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

It is important to note that in addition to the requirement that conflict waivers be in writing, the terms “informed consent” and “confirmed in writing” are defined terms under Prof. Cond. Rule 1.0.

Prof. Cond. Rule 1.0(f) defines “informed consent” as:  
denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the

material risks of and reasonably available alternatives to the proposed course of conduct.

Prof. Cond. Rule 1.0(b) defines “confirmed in writing” as: when used in reference to informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See division (f) for the definition of ‘informed consent’. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain and transmit it within a reasonable time thereafter.

**B. Prof. Cond. Rule 1.8 Conflicts of Interest: Current Clients:**  
**Specific Rules**

Prof. Cond. Rule 1.8(a) prohibits business transactions with clients, unless ALL of the following apply:

- the transaction and terms on which the lawyer acquires the interest are fair and *reasonable* to the client and are fully disclosed to the client in *writing* in a manner that can be reasonably understood by the client;
- the client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel on the transaction;
- the client gives *informed consent*, in *writing* signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

Prof. Cond. Rule 1.8(c) prohibits a lawyer from soliciting “any *substantial* gift from a client.

Lawyers are still prohibited from drafting testamentary documents that give the lawyer, the lawyer’s partner, associate, paralegal, law clerk or other employee of the lawyer/law firm, an “of counsel” lawyer or any other person

related to the lawyer some part of the testator's estate. Prof. Cond. Rule 1.8(c). However, the prohibition of Prof. Cond. Rule 1.8(c) does not apply to persons related to the lawyer, such as the lawyer's "spouse, child, grandchild, parent, grandparent, sibling, or other relative with whom the lawyer or the client maintains a close, familial relationship." *Prof. Cond. Rule 1.8(c)(1)*.

Prof. Cond. Rule 1.8(e)(1) continues to permit lawyers to advance court costs and expenses of litigation, "the repayment of which may be contingent upon the outcome of the matter." Prof. Cond. Rule 1.8(e)(2) now expressly permits "a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."

Prof. Cond. Rule 1.8(f)(4) requires lawyers compensated by an insurer to provide to the insured client "in person at the first meeting or by mail within 10 days after the lawyer receives notice of retention by the insurer" the Statement of Insured Client's Rights that is set forth in Prof. Cond. Rule 1.8(f)(4).

### C. Prof. Cond. Rule 1.9 Duties to Former Clients

Prof. Cond. Rule 1.9(a) requires that the former client give informed consent confirmed in writing in order to waive the conflict and permit a lawyer to represent another client "in the same or *substantially related matter* in which that person's interests are materially adverse to the interests of the former client."

Without informed consent confirmed in writing, a lawyer is prohibited from knowingly representing a person in the same or substantially related matter where the interests of the client are materially adverse to the former client; and the lawyer acquired information about the former client that is protected by Prof. Cond. Rule 1.6 (confidentiality) and Prof. Cond. Rule 1.9(c) and is material to the matter.

### D. Prof. Cond. Rule 1.10 Imputation of Conflicts of Interest: General Rule

Prof. Cond. Rule 1.10(a) imputes the conflicts of individual lawyers as set forth in Prof. Cond. Rules 1.7 and 1.9 to the other lawyers in the law firm.

The exception to imputation is “a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*.”

Even when a lawyer with a conflict is no longer employed by or associated in a law firm, the imputation of the conflict to the members of the former law firm continue if either of the following apply:

- the formerly associated lawyer represented the client in the same or a *substantially related matter*;
- any lawyer remaining in the *firm* has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Likewise, when a lawyer switches law firms, the conflicts of the new lawyer follow that new lawyer and are imputed to the new law firm. The exception to the imputation to the new law firm are:

- the new *firm* timely *screens* the personally disqualified lawyer from any participation in the matter and that lawyer is apportioned no part of the fee from that matter;
- *written* notice is given as soon as practicable to any affected former client.

#### E. Prof. Cond. Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Former government employees or public officers are required to follow “all applicable laws and Rule 1.9(c) regarding conflicts of interest.” *Prof. Cond. Rule 1.11(a)(1)*.

Former government employees or public officers are prohibited from representing “a client in connection with a matter in which the lawyer participated personally and *substantially* as a public officer or employee, unless the appropriate government agency gives its *informed consent, confirmed in writing*, to the representation.” *Prof. Cond. Rule 1.11(a)(2)*.

Prof. Cond. Rule 1.11(b) imputes the former government lawyer's conflict to the law firm with whom the former government lawyer is now affiliated. Just as in Prof. Cond. Rule 1.10, the law firm may timely screen the former government lawyer and give written notice to the government agency and thereby avoid the imputation of the former government lawyer's conflict to the entire law firm.

Prof. Cond. Rule 1.11(d) prohibits a current government lawyer from participating in a matter on behalf of the government if the lawyer participated in the matter "personally and *substantially* while in private practice or nongovernment employment, unless the appropriate government agency gives its *informed consent, confirmed in writing;*" and from negotiating for private employment with any person who is a party or a lawyer for a party if the government lawyer is "participating personally and *substantially*" in that matter. The exception is for a judicial law clerk, provided, the conditions set forth in Rule 1.12(b) are adhered to by the judicial law clerk.

## IX REQUIRED DISCLOSURES - CONFIDENTIAL INFORMATION

Prof. Cond. Rule 1.6 Confidentiality of Information, prohibits a lawyer from revealing 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 (c) of this rule." *Prof. Cond. Rule 1.6(a).*

Prof. Cond. Rule 1.6(b) permits a lawyer to reveal confidential protected by the attorney-client privilege when the lawyer "*reasonably believes* necessary for any of the following purposes:

- to prevent reasonably certain death or substantial bodily harm;
- to prevent the commission of a crime by the client or other person;
- 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;

- to secure legal advice about the lawyer’s compliance with these rules;
- 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;
- to comply with other law or court order.

Prof. Cond. Rule 1.6(c) requires lawyers to reveal the information protected by Prof. Cond. Rule 1.6(a) “to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

Prof. Cond. Rule 3.3 is entitled Candor Toward the Tribunal. Prof. Cond. Rule 3.3(b) provides:

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 relating to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.

Under Prof. Cond. Rule 3.3(c), the obligations of 3.3(b) “continue[s] 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[confidentiality rule].”

Prof. Cond. Rule 4.1 is entitled Truthfulness in Statements to Others. Prof. Cond. Rule 4.1 prohibits a lawyer from “*knowingly* do[ing] 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.”

Comment 3 to Prof. Cond. Rule 4.1, illustrates the above prohibitions as

follows: “Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. Rule 4.1(b) requires a lawyer to disclose a material fact, including one that may be protected by the attorney-client privilege, when the disclosure is necessary to avoid the lawyer’s assistance in the client’s illegal or fraudulent act.”

It is important to note that Prof. Cond. Rule 1.0(d) defines fraud or fraudulent as:

denotes conduct that has an intent to deceive and is either of the following:

- (1) an actual or implied misrepresentation of a material fact is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;
- (2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

Prof. Cond. Rule 1.0(e) defines illegal as: “denotes criminal conduct *or a violation of an applicable statute or administrative regulation* [emphasis added].”

These definitions must be kept in mind when a lawyer represents an organization. Prof. Cond. Rule 1.13 Organization as Client is the specific rule dealing with those types of representations. There are “reporting up” requirements in Prof. Cond. Rule 1.13(b), when a constituent of the organization acts, intends to act or fails to act in certain situations.

Prof. Cond. Rule 1.13(c) provides: “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).” As set forth above, Prof. Cond. Rule 1.6(b) permits disclosures of client confidences in certain circumstances and Prof. Cond. Rule 1.6(c) requires disclosures of client confidences in certain circumstances.

## **X DUTIES OF PARTNERS/SUPERVISORY ATTORNEYS/ SUBORDINATES**

**Prof. Cond. Rule 5.1 and 5.2 do NOT have any counterparts in Ohio's Code of Professional Responsibility. These provisions are completely new to Ohio.**

**Under Prof. Cond. Rule 5.1(c), lawyer A can become vicariously liable for the acts of another lawyer (lawyer B) if either of the following occur:**

- **lawyer A “orders, or with *knowledge* of the specific conduct, ratifies the conduct” of lawyer B;**
- **lawyer A is “a *partner* or has comparable managerial authority in the *law firm* or government agency in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and *knows* of the conduct at the time when its consequences can be avoided or mitigated but fails to take *reasonable* remedial action.”**

**Under Prof. Cond. Rule 5.2(a), a subordinate lawyer “is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”**

**However, under Prof. Cond. Rule 5.2(b), if the subordinate lawyer is presented with a “question of professional duty”, the subordinate lawyer “does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s *reasonable* resolution of a question of professional duty.”**

## **XI 2007 BOARD OF COMMISSIONERS OPINIONS**

- **Bd. Opinion 2007-1, Issued February 9, 2007**

**A lawyer’s ethical duty to report professional misconduct under Rule 8.3 is fulfilled by informing Disciplinary Counsel or a certified grievance committee of a bar association. A lawyer’s ethical duty to report professional misconduct under Rule 8.3 is not fulfilled by informing a tribunal. However, a lawyer’s duty of candor to a tribunal under Rule 3.3 requires a lawyer to disclose to the tribunal any**

**information required by Rule 3.3, thus, there will be instances in which a lawyer's misconduct must be reported to Disciplinary Counsel or a certified grievance committee of a bar association pursuant to a lawyer's duty to report under Rule 8.3 and disclosed to a tribunal pursuant to a lawyer's duty of candor toward a tribunal under Rule 3.3**

**The duty to report professional misconduct under Rule 3.3 arises when a lawyer has unprivileged knowledge of a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer.**

**Privileged knowledge refers to the information imparted in a representation of a client that would be protected by the attorney-client privilege and to the information that Rule 8.3(c) specifically identifies as privileged.**

**A lawyer must use professional judgment in determining what misconduct raises a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer. If a lawyer has doubts as to whether misconduct raises questions as to honesty, trustworthiness, or fitness as a lawyer, he or should err on the side of reporting.**

**A mere suspicion of misconduct need not be reported. Actual knowledge is the standard, not mere suspicion.**

**A lawyer is not required to report to disciplinary authorities information regarding another lawyer's professional misconduct revealed through a privileged communication by a client to a lawyer during a representation; but, a lawyer should encourage a client to consent to reporting the**

**misconduct if it would not substantially prejudice a client's interests to do so.**

**A lawyer who is retained to represent another lawyer whose professional conduct is in question does not have an ethical duty to report the lawyer's professional misconduct because that information is privileged; in addition, the confidentiality of that information is protected under Rule 1.6.**

**A lawyer who receives information while serving as a member of a bar association committee or subcommittee, or as a member, employee, or agent of a bar association established non-profit corporation designed to assist lawyers with substance abuse or mental health problems does not have a duty to report such information to disciplinary authorities because that is privileged knowledge under Rule 8.3(c).**

**A lawyer is required to self-report his or her professional misconduct, as well as report other's misconduct that raises a question as to honesty, trustworthiness, or fitness as a lawyer.**

**A lawyer, licensed in Ohio, also has a duty under Gov. Bar R. V(11)(F)(1), to provide written notification to the Disciplinary Counsel and to the Clerk of the Supreme Court of Ohio of the issuance of a disciplinary order in another jurisdiction. The notification is to be made within 30 days of the issuance of the disciplinary order.**

- **Bd. Opinion 2007-2, Issued April 13, 2007**

**A new judge is not restricted by the Ohio Code of Judicial Conduct or the Ohio Rules of Professional**

**Conduct from receiving accounts receivable from his or her former law firm for legal services provided by the judge prior to assuming judicial office, but during this time the judge must disqualify from cases in which the former firm is counsel for a party. In hourly rate matters, the judge would be entitled to receive the accounts receivable reflecting the number of hours billed by the judge times the agreed upon hourly rate. In flat fee matters, the judge would be entitled to recover the accounts receivable for the agreed upon flat fee. In a contingent fee matter that is completed before the judge is sworn into office, the judge would be entitled to receive the accounts receivable for the agreed upon contingent fee rate in the fee agreement. In a contingent fee matter that is not completed before the judge is sworn into office, the most prudent approach is for the judge to accept compensation, once the contingency occurs, based upon quantum meruit for the services performed prior to assuming judicial office.**

**A new judge is not restricted by the Ohio Code of Judicial Conduct or the Ohio Rules of Professional Conduct from receiving retirement benefits from his or her former law firm pursuant to a law firm agreement. For example, pursuant to a retirement agreement, a judge may receive a percentage of the legal fees earned by other attorneys in the firm for providing legal services to the judge's clients while the judge was with the firm and during an agreed upon number of years after the judge's departure from the law firm. During the time the judge receives retirement benefits from his or her former law firm, the judge must disqualify from cases in which the former firm is counsel for a party. The time period for receiving retirement benefits should be reasonable in order to minimize the number of cases in which the**

**judge will be disqualified. A judge and a former law firm should not maintain a financial relationship ad infinitum.**

**Pursuant to Canon 2(D)(3)(a), if a judge receives payments from his or her former law firm of accounts receivable for legal services provided by the judge prior to assuming judicial office and or receives payments of retirement benefits from his or her law firm pursuant to the law firm agreement, the judge must list the former law firm as a source of income on the annual financial disclosure statement. Such payments are not required to be reported on the Quasi-Judicial or Extra-Judicial Activity Compensation Report.**

- **Bd. Opinion 2007-3, Issued April 13, 2007**

**A lawyer may accept credit card payments from clients for earned legal fees, reimbursement of legal expenses, advances on unearned legal fees and advances on future expenses. Credit card payments for earned fees and reimbursement for legal expenses belong in the business account, whereas, credit card payments for advances on unearned legal fees and advances on future legal expenses must go into a client trust account. Preferably, a lawyer would maintain two credit card merchants accounts, one used for credit card payments to a business account and one for credit card payments to a client trust account. But, because two merchant accounts may not be feasible or practical, it is acceptable for a lawyer to maintain one merchant account with the credit card payments all going into a client trust account, provided that the credit card payments for earned legal fees and reimbursements of expenses are promptly transferred from the trust account to a**

**business account.**

**A lawyer may place his or her own funds into a client trust account to pay brokerage and credit card service charges. Credit card service charges are the responsibility of the lawyer and may not be deducted from the interest earned on a client trust account.**

- **Bd. Opinion 2007-4, Issued June 8, 2007**

**A city director of law must apply Rule 1.11 and Rule 1.7 of the Ohio Rules of Professional Conduct to determine whether a conflict of interest exists between or among a city, city officials, or city entities and whether representation may be provided to each by assistant city law directors employed in the law director's office. Rule 1.11(d)(1) requires a city director of law to comply with Rule 1.7. The application of Rule 1.7 requires the exercise of professional judgment. First, a city director of law must determine whether there is a conflict of interest under Rule 1.7(a)(1) or (a)(2). Not every disagreement among a city, its officials or its entities creates a conflict of interest. Second, if a conflict of interest exists, the city director of law must determine whether the conflict falls under Rule 1.7(b) or Rule 1.7(c). Rule 1.7(b) allows representation of clients with a conflict of interest, if ameliorating conditions set forth in Rule 1.7(b)(1) through (3) are met. The conditions are that the city director of law must determine whether competent and diligent representation could be provided, such as through different assistant city law directors; must obtain informed consent confirmed in writing by the affected clients, and must determine that the representation is not prohibited by Rule 1.7(c). Rule 1.7(c) prohibits, even with client consent, representations prohibited**

by law. Rule 1.7(c)(1) prohibits, even with client consent, a representation of clients that involves the assertion of a claim by one against the another in the same proceeding. For purposes of Rule 1.7(c), a proceeding includes acts and events before a tribunal, as well as acts and events before mediators, arbitrators, or other administrative bodies.

Whether representation may be provided by different assistant city law directors employed in the office of the city director of law depends upon whether the conflict of interest is one that may be ameliorated under rule 1.7(b) or one that falls under Rule 1.7(c). For conflicts of interest that may be ameliorated under Rule 1.7(b), representation by different assistant law directors is appropriate if the law director determines that the conditions set forth in (b)(1) through (b)(3) are met. For conflicts of interest that fall under Rule 1.7(c), once a city director of law determines that a representative is prohibited by law or that the city, its officials, or its entities have a claim against each other in the same proceeding, the city director of law should not attempt to represent all of them in the proceeding, not even through different assistant law directors employed in the office of the city law director.

- **Bd. Opinion 2007-5, Issued June 8, 2007**

A lawyer's or law firm's advertising of legal services to a prospective business client through a personalized letter addressed to a contact person at the business is direct mail solicitation subject to the requirements of Rule 7.3(c). A lawyer or law firm should disclose in the letter how the identity of the prospective client was obtained. A lawyer or law firm should include the recital 'Advertising Material' or

**‘Advertisement Only’ in the text of the letter and on the envelope. And, a lawyer or law firm must refrain from addressing a predetermined evaluation of the merits of any legal matter that the business might pursue.**

- **Bd. Opinion 2007-6, Issued August 10, 2007**

**A court appointed lawyer for an indigent criminal defendant is not required to provide notice to the defendant that the lawyer does not maintain professional liability insurance. A court appointed lawyer for an indigent criminal defendant falls within the Rule 1.4(c)(3)(I) government entity exception to the notice requirement of Rule 1.4(c).**

- **Bd. Opinion 2007-7, Issued December 7, 2007**

**A lawyer’s duty of safekeeping funds in the lawyer’s possession extends not only to clients but also to third persons. A lawyer has an ethical duty of safekeeping funds for a third person when the lawyer knows a third person has a lawful claim to funds in the lawyer’s possession. *Not every claim of a third person triggers a lawyer’s safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15.* Examples of lawful claims are provided in this opinion.**

**When there is no dispute as to funds in a lawyer’s possession, the lawyer’s ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds to which a client or third person is entitled.**

**When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer’s**

possession, the lawyer's ethical duty under Rule 1.15(e) is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer is unclear whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

Ideally, a lawyer will try to resolve any known disputes between a client and a third person before disputed funds come into the lawyer's possession. But, when a dispute arises as to funds in a lawyer's possession, a lawyer should encourage the client and the third person to resolve the dispute through discussion. If appropriate, a lawyer may suggest to the client and the third person that they mediate or arbitrate the dispute. A lawyer should not unilaterally assume to arbitrate a dispute between a client and a third person. If efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking the court to resolve the dispute.

## **XII           SELECTED CASES**

*Disciplinary Counsel v. McNamee*, 119 Ohio St.3d 269, 2008-Ohio-3883.

**The Supreme Court imposed a one-year suspension stayed on conditions for the conflict of interest violations by Mr. McNamee. McNamee and his siblings owned an 80 acre tract of land. McNamee set up a joint venture – Arnold-McNamee Joint Venture – with a law firm client, local builder Arnold, to develop single-family houses, called the Summer Brooke development.**

**As part of McNamee’s representation of the Arnold-McNamee Joint Venture, he negotiated with the neighboring landowners, Mr. & Mrs. Vonada. McNamee provided the following legal services to Mr. & Mrs. Vonada: prepared the Arnold-Vonada Joint Venture Agreement, prepared and prosecuted the annexation and rezoning of the property in the Arnold-Vonada Joint Venture; sold the Vonadas property from the Arnold-McNamee Joint Venture; filed incorporation papers for the Vonadas’ construction company and other transactions.**

**McNamee stipulated that he never told Mr. & Mrs. Vonada of the potential conflicts “in his representing all sides to the Summer Brooke development project or advising them to obtain independent counsel.”**

***Cincinnati Bar Assn. v. Powers*, Slip Opinion No. 2008-Ohio-4785. The Supreme Court disbarred Donald Powers for his involvement in defrauding various financial institutions through the operation of a title company of which he was part owner.**

**Mr. Powers, and others, engaged in a “flipping scheme” through Premier Land Title Agency.**

**“The ‘flipping’ scheme involved buying a piece of real estate for low value, recruiting a buyer for the property who may not otherwise be able to afford property, and creating false documents, including pay stubs, W-2 forms, bank statements and employment verification for the potential buyer. Next, a falsely inflated appraisal of the property would be obtained, and a false loan package would be submitted to the bank or lender in order to obtain a highly inflated loan. . . . Additionally, Respondent and/or Premier Land Title Agency took part in acts which defrauded various federally insured financial institutions in the execution of the ‘flipping’ scheme by**

knowingly submitting false Housing and Urban Development (HUD) forms to the financial institutions in support of a loan application. In signing numerous HUD forms, Respondent falsely certified that the buyer had a down payment to the closing, which he knew not to be true. . . . Respondent further participated by acting as both the title agent and the seller in connection with five properties involved in the ‘flipping’ scheme.”

*Cuyahoga Cty. Bar Assn. v. Frenden*, 114 Ohio St.3d 236, 2007-Ohio-3676. The Supreme Court imposed a one-year suspension with six months stayed. One of the violations was failure to inform the client that he did not carry professional liability insurance.

*Akron Bar Assn. v. Amourgis*, 113 Ohio St.3d 32, 2007-Ohio-974. Attorney Amourgis received a one-year suspension stayed on condition because he sent targeted, direct mail solicitations to defendants in domestic relations cases without first verifying through the court’s docket that service had been made on the defendant. Attorney Amourgis also registered a corporate name, Phillip Edwards McCormick, P.C. and began practicing law under that name.

*In re Disqualification of Hoover*, 113 Ohio St.3d 1233, 2006-Ohio-7234, Chief Justice Moyer wrote: “In recognition of the unique standards of professionalism required of judges, this court adopted ‘A Judicial Creed’ in 2001 on the recommendation of the Supreme Court Commission on Professionalism. By doing so, the court sought to remind all judges of the high standards expected of them by the public they serve.” Judge Hoover was disqualified from that case and all other cases involving attorney Harmon “because a reasonable and objective observer familiar with the facts presented to me might reasonably question the judge’s ability to preside fairly and impartially in Harmon’s cases.”

*In Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, the Supreme Court held that “R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived. (*State v. McDermott* (1995), 72 Ohio St.3d 570, 651 N.E. 2d 985, followed.)”

*Ohio State Bar Assn. v. Allen*, 107 Ohio St.3d 180, 2005-Ohio-6185, was decided by The Supreme Court on December 7, 2005. This case illustrates the civil penalty that the Supreme Court can impose when it finds someone engaging in the unauthorized practice of law in Ohio. John Dale Allen was doing business as Freedom Trust. The Court found that Mr. Allen prepared at least 3 divorce complaints and 1 trust document, as well as, counseled people as to their legal rights. Mr. Allen did not cooperate during the UPL proceedings.

The Court stated: “We also adopt the recommendation to impose a civil penalty. Respondent flouted our constitutional authority, delegated in part to relator and the board, to regulate the practice of law and protect the public from interlopers not subject to the ethical constraints and educational requirements of this profession. Though given ample opportunity, respondent refused to cooperate in this process, flagrantly practiced law without a license, and caused unsuspecting and vulnerable customers harm by taking their money in exchange for providing inferior services with potentially disastrous ramifications. Gov. Bar R. VII(8)(B)(1) through (5). Pursuant to Gov. Bar R. VII(19)(D)(1), respondent is therefore ordered to pay the civil penalty of \$40,000.”

*Disciplinary Counsel v. Herman*, 99 Ohio St.3d 362, 2003-Ohio-3932. In this case, Mr. Herman changed the amount of money (almost doubled) that his client would be entitled to receive under the QDRO prepared by opposing counsel. Mr. Herman then signed the names of opposing counsel and the opposing client to the changed QDRO. Mr. Herman entered a plea to a 2<sup>nd</sup> degree misdemeanor - attempted tampering with documents – and all felony charges against him were dismissed. When the Board and the Court looked at aggravation and mitigation to determine the discipline to impose, the Court’s majority found that Mr. Herman “had a reputation in the legal community for exemplary character and professionalism during his lengthy legal career.” and based upon that and other mitigation, suspended Mr. Herman from the practice of law for one year with 6 months stayed.