



OHIO  
ASSOCIATION for  
JUSTICE  
TRIAL LAWYERS HELPING PEOPLE

# **2017 Annual Convention**

## **Professional Conduct**



**OHIO**  
**ASSOCIATION for**  
**JUSTICE**  
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**2017 Annual Convention**

**Professional Conduct**

Important Things to Know About Ohio's Legal Ethics System

*Richard Dove, Director of Board of Professional Conduct, Supreme  
Court of Ohio*

*Columbus, OH*



Ohio Board of Professional Conduct

## OHIO ETHICS AND DISCIPLINARY PROCESS

OHIO ASSOCIATION FOR JUSTICE  
May 4 and 5, 2017

Richard A. Dove, Esq.  
Director



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### COVER TODAY

- Board of Professional Conduct
  - Cases
  - Education and Outreach
- Disciplinary Process
- Types of Misconduct
- Anatomy of a Board Case
- Responding to a Grievance



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Ohio Board of Professional Conduct

## BOARD MEMBERSHIP AND RESPONSIBILITIES



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## MEMBERSHIP

- 28 Commissioners, appointed by Supreme Court:
  - 17 lawyers
  - 7 judges
  - 4 nonattorney, public members
- Three-year terms; significant time commitment
- Diverse make-up



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## PRIMARY RESPONSIBILITIES

- Conduct hearings and make reports and recommendations to Supreme Court
- Issue advisory opinions
- Accept Financial Disclosure Statements from judges, magistrates, judicial candidates
- Engage in “compliance” activities



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## WHAT THE BOARD DOES NOT DO

- Accept, review, or investigate grievances (ODC or CGCs)
- Accept self-reports
- Provide legal advice, other than ethics
- Impose discipline



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## COMPLIANCE ACTIVITIES

- Advisory opinions
- Staff letters
- Ethics Guides—client file retention, succession planning
- Education presentations (judges, lawyers, judicial candidates, law students)
- Phone calls and emails—more than 2,000/yr.



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Ohio Board of Professional Conduct

## OHIO DISCIPLINARY PROCESS



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## DISCIPLINARY PROCESS

- Three tiers—investigation (ODC/CGCs), adjudication (Board), disposition (Supreme Court)
- Confidentiality—during grievance investigation
- Dual responsibility—ODC and CGCs
- Due process



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## COMMON RULE VIOLATIONS

As alleged in grievances opened for investigation:

- Neglect/Communication
- IOLTA violations—comingling; lack of records
- Unearned/Excessive Fees
- Personal misconduct
- Judicial misconduct



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## TRENDING UP (OR DOWN?)

- Personal misconduct—criminal convictions, sometimes unrelated to the practice of law
- Sex with clients
- Noncooperation; deception



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## OTHER FACTORS

- Default
- Disorders—mental disorders, substance use, gambling
- Self-representation



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## ELEMENTS OF A DISCIPLINARY CASE



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### ELEMENTS OF A DISCIPLINARY CASE

- Facts
- Aggravating and Mitigating Circumstances
- Sanction



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### REQUIREMENTS

- Board is required to “consider all relevant factors, precedent established by the Supreme Court of Ohio, and the aggravating and mitigating factors set forth in this section.”
- Board also must bear in mind that the primary purpose of the disciplinary system is not to punish the offender but to protect the public.



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## AGGRAVATING AND MITIGATING FACTORS

### AGGRAVATION

- Prior discipline
- Selfish/dishonest motive
- Lack of cooperation; failure to acknowledge obviously wrongful conduct
- Failure to make restitution

### MITIGATION

- No prior discipline
- Absence of a selfish/dishonest motive
- Full & free disclosure; cooperative attitude
- Timely and good faith effort to make restitution



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## AGGRAVATING AND MITIGATING FACTORS

### AGGRAVATION

- Harm to victims, especially vulnerable victims
- Pattern of misconduct
- Multiple offenses

### MITIGATION

- Character and reputation
- Other penalties and sanctions
- Remorse
- Existence of a disorder



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## DISORDERS

- Mental, substance use, nonsubstance-related
- Four-part test:
  - Diagnosis from a qualified health care professional
  - Causation
  - Extended period of counseling or treatment
  - Prognosis from a qualified health care professional
- May receive partial credit if some, but not all, factors are present



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Ohio Board of Professional Conduct

## RESPONDING TO A GRIEVANCE



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### RESPONDING TO A GRIEVANCE

- Always respond—it’s not going away
- Respond promptly—if you need more time, ask for it
- Respond completely—provide narrative and documentation
- Seek professional help—hire a lawyer or have a trusted colleague review your reply
- Don’t make matters worse—if you’ve dug yourself a hole, stop digging



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Ohio Board of Professional Conduct

## QUESTIONS?



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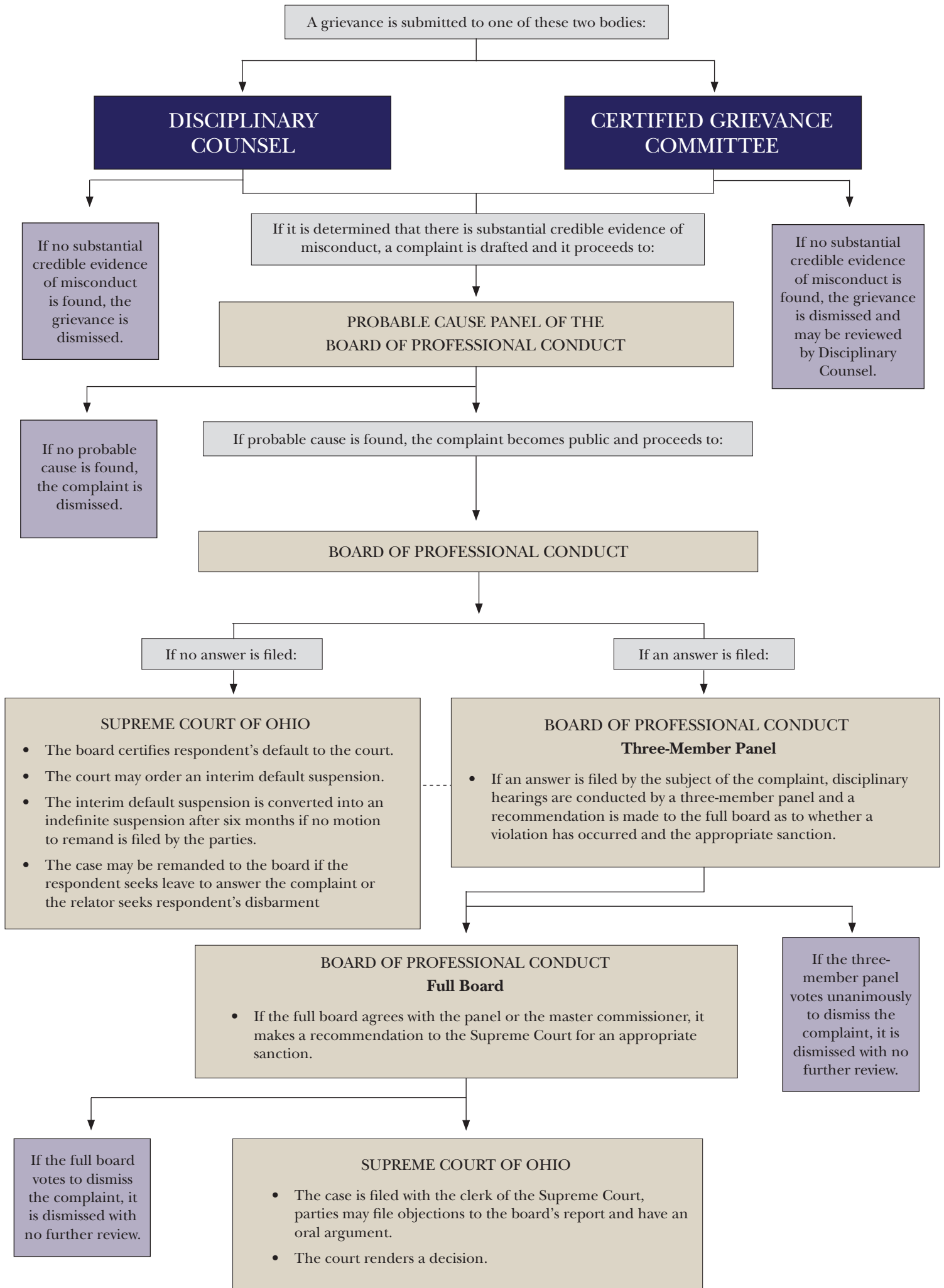
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# DISCIPLINARY PROCESS

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



# OHIO BOARD OF PROFESSIONAL CONDUCT

## Case Statistics 2013-2015

### Supreme Court Disciplinary Decisions on Report of Board

	2013		2014		2015	
	Total	% of Total	Total	% of Total	Total	% of Total
<b>All Decisions (Excluding Reinstatements)</b>	<b>44</b>	<b>-</b>	<b>52</b>	<b>-</b>	<b>50</b>	<b>-</b>
Consent-to-Discipline Cases	4	9%	10	19%	11	22%
Default Cases (Indefinite Suspension)	4	9%	12	23%	21	42%
Respondent with Prior Disciplinary Record	9	21%	15	29%	14	28%
Court Modified Board's Recommended Sanction	8	19%	9	17%	9	18%
Court Decreased Sanction	2	5%	2	14%	4	8%
Court Increased Sanction	6	14%	7	4%	5	10%
<b>Reinstatements to the Practice of Law</b>	<b>13</b>	<b>-</b>	<b>17</b>	<b>-</b>	<b>10</b>	<b>-</b>
Reinstatements upon Petition	1	8%	6	35%	4	40%
Reinstatements upon Application	12	92%	11	65%	6	60%

### Active Registered Attorneys

2013
44,073

2014
44,985

2015
44,157

### Awards to Victims of Lawyers

\$1,142,572
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\$782,741
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\$767,081
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### Total Grievances

Total Grievances for Office of Disciplinary Counsel (ODC)

Total Grievances for Certified Grievance Committee (CGC)

### Total Dismissals†

Dismissed after initial review by ODC

Dismissed after initial review by CGC

### Total Investigations†

Opened for Investigation by ODC

Opened for Investigation by CGC

### Complaints filed with the Board

2013
<b>4285</b>
2678 (63%)
1607 (38%)
2175
1298 (30%)
877 (20%)
2110
1228 (29%)
882 (21%)

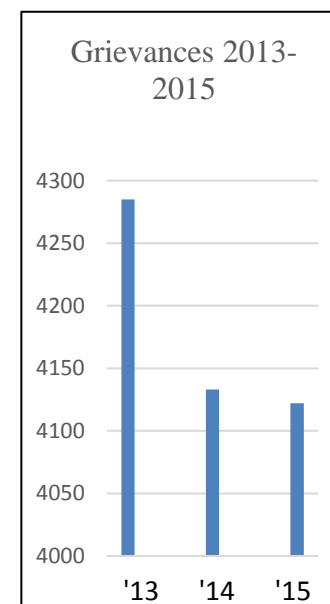
2014
<b>4133</b>
2586 (63%)
1547 (37%)
1864
1431 (35%)
433 (10%)
2269
1046 (25%)
1223 (30%)

2015
<b>4122</b>
2392 (58%)
1730 (42%)
1830
1439 (35%)
391 (9%)
2292
978 (24%)
1314 (32%)

71
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104
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77
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† Percentages based on Total Grievances

# OHIO BOARD OF PROFESSIONAL CONDUCT

## Case Statistics 2013-2015

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### The Ohio Disciplinary System: Historical Data

	2013	2014	2015
<b>Sanction Imposed by Type (All Cases)</b>			
Public Reprimand	7	2	8
Term Suspension	12	27	22
Indefinite Suspension	16	22	4
Permanent Disbarment	5	3	2
Dismissal on Merits	2	1	1
<b>Consent to Discipline</b>			
Public Reprimand	1	5	9
Term Suspension	2	4	2
<b>Judicial Misconduct</b>			
Gov.Bar R. V	1	5	3
Gov.Jud.R. II(5)	0	1	0
Dismissals	0	0	0
<b>Miscellaneous Disciplinary Disposition</b>			
Resignation Discipline Pending	6	18	20
Resignation Denied	1	0	0
Interim Remedial Suspension	0	3	3
Child Support Suspension	3	1	1
Interim Felony Suspension	9	13	14
Mental Illness Suspension	2	0	0
Reciprocal Discipline	5	7	1

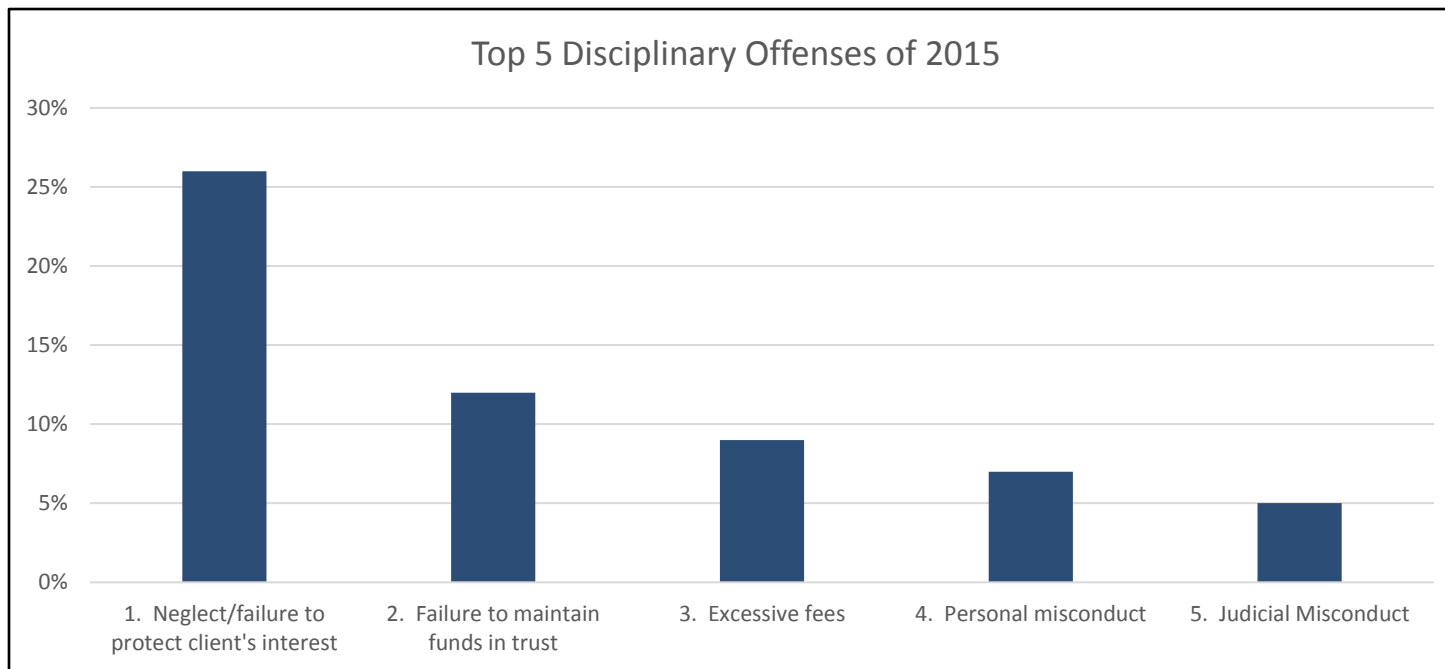
**OHIO BOARD OF PROFESSIONAL CONDUCT**  
**Case Statistics 2013-2015**

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**Top 5 Disciplinary Offenses of 2015**

1. Neglect/failure to protect client's interest
2. Failure to maintain funds in trust
3. Excessive fees
4. Personal misconduct
5. Judicial Misconduct

	<b>2015</b>	<b>3-Year Avg.</b>
1. Neglect/failure to protect client's interest	26%	30.33%
2. Failure to maintain funds in trust	12%	12.67%
3. Excessive fees	9%	11.33%
4. Personal misconduct	7%	9.33%
5. Judicial Misconduct	5%	5.67%





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**Professional Conduct**

Legal Ethics: A View From the Bench

*Honorable Jennifer Brunner, Judge*

*Columbus, OH*

**DO'S AND DON'TS OF ARGUING STATE APPEALS  
BEFORE COURTS OF APPEALS**

Prepared by Judge Jennifer Brunner, Ohio Tenth District Court of Appeals

DO	DON'T	PROMOTE
Refer to the judges as “your honor”	Refer to the judges as “you guys”	Respect for the judiciary
Acknowledge your opposing counsel and show courtesy and professionalism, no matter how contentious the litigation and appeal	Interrupt your opposing counsel, shake your head or make faces	Professionalism
Say, “my client” or “my clients”	(At least not very often) say, “we”	Objectivity
Accept the decision of the court and appeal it or ask for reconsideration if it doesn't work for your client	Sue the judges of the panel in federal court, even if the decision results in you being subject to sanctions in the lower court, a malpractice claim or a disciplinary action	Efficiency of the justice system; respect for the judiciary
Appear for oral argument unless you have waived it in advance	Just not show up, unless it is a genuine mistake – and if there was a mistake, contact the court administrator afterward who can let the panel know of your apology	Professionalism
If you are late for oral argument, call the court administrator so the bailiff can be notified, and perhaps the order of oral arguments can be adjusted	If you are late for oral argument, not call and show up late, saying traffic was bad	Professionalism, efficiency of the justice system
When you believe there is a conflict for a panel member, request recusal of a judge in writing in advance, and if the judge refuses, file with the Ohio Supreme Court an affidavit of prejudice	Call a panel member's administrative assistant and complain that a particular a judge on the panel has it out for you	Professionalism, objectivity, competent representation of client
Remember to reserve a specified time for rebuttal if you are representing the appellant	Use up your 15 minutes and then ask for more time – you might not get it	Competent representation of client

## DO'S AND DON'TS OF ARGUING STATE APPEALS BEFORE COURTS OF APPEALS

DO	DON'T	PROMOTE
Provide supplemental authority in writing advance of the oral argument	Approach the panel at oral argument with paperwork such as supplemental authority unless you offer it and are asked to approach the bench	Respect for the judiciary, competent representation of client, professionalism
Show respect to a pro se opposing litigant, no matter how difficult the situation	Visibly lose patience with a pro se opposing litigant, but you can criticize the problems with the pro se legal theory or support for pro se litigant's position	Respect for the judiciary, professionalism
Live within local rule page limitations, unless you receive advance leave of the court for a longer brief	Use excessive footnotes to get around the page limitations or use a smaller than permitted font for quoted passages	Respect for the judiciary, honesty
Ask for additional time to complete a brief well in advance of its due date	File a brief late or try to file an agreed judgment entry; the court prepares its own entries	Efficiency of the judicial system; respect for the judiciary
Point out your client is in the gallery if the client is in attendance	Ignore your client or have your client sit at counsel table with you; this is an appeal, not a trial, and you only have 15 minutes	Efficiency of the judicial system; respect for the judiciary; objectivity
Dress professionally in a way that your appearance distracts from the sound and effective delivery of your legal arguments	Dress flamboyantly or slovenly or in a way such that your appearance distracts from the sound and effective delivery of your legal arguments	Competent representation of client; respect for the judiciary
Criticize the decision or actions of the trial judge	Criticize the trial judge personally	Respect for the judiciary; objectivity
Refer to attorneys, judges, doctors and other professionals when theoretically speaking as "he or she"; call women "women"	Refer to attorneys, judges, doctors and other professionals when theoretically speaking as "he"; call women "girls" or "gals"	Respect for judiciary; competent representation of client; professionalism
Answer questions from the media about procedure or technical or background information about your case	Tell the media that you should win or should have won your case or publicly criticize a particular judge or panel	Respect for the judiciary; professionalism



## DO'S AND DON'TS OF ARGUING STATE APPEALS BEFORE COURTS OF APPEALS

DO	DON'T	PROMOTE
Stand when the judges enter and exit the courtroom, and do not sit down until the presiding judge indicates you may be seated and all the judges have exited the courtroom and the door has shut	Sit when the bailiff announces “all rise”, unless you have an infirmity that prevents it or begin shuffling your papers after the argument before the judges leave the courtroom if you are the last argument of the session	Respect for the judiciary; professionalism
If you are on crutches or need accommodation physically, ask for it	Try to argue at a podium when you have physical limitations that will cause you pain while you are arguing or prevent you from doing your best for your client	Competent representation of client
Stop speaking if a judge speaks, even if the judge is interrupting you, and listen	Talk through a judge’s speaking like you are on a political cross-fire Sunday morning show	Respect for the judiciary
Be prepared to be interrupted by a judge’s question or comment; know the points you absolutely have to make and use a question to pivot to the points you need to make	Get flustered because now your argument is out of order and you can’t make all the points you prepared and planned to make	Competent representation of client
Stand up for your client’s needs by way of politely disagreeing using case law to rebut a judge’s sometimes erroneous legal application or theory	Tell the judge that what he or she says is irrelevant or that the judge is wrong	Respect for the judiciary, competent representation of client
Try to ascertain whether the panel has read the briefs and is already familiar with the facts; if need be frame the case factually by the type of case it is and then move on to the legal arguments as quickly as possible	Expend excessive time in oral argument on the facts underlying the appeal, unless you are sure the panel has not read the briefs—you’ll be wasting valuable time for argument of the legal issues you want the court to examine	Competent representation of client
Clarify if a fact discussed during oral argument is not in the record; sometimes judges ask for context	Argue facts not in the record	Honesty, respect for the judiciary; competent representation of client

# **RULE OF LAW PRIMER**

Compiled by Judge Jennifer Brunner, Ohio Tenth District Court of Appeals

**RULE OF LAW:** the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.

1. **“The government and its officials and agents as well as individuals and private entities are accountable under the law.**
2. **The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.**
3. **The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.**
4. **Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”**

“These four universal principles constitute a working definition of the rule of law. They were developed in accordance with internationally accepted standards and norms, and were tested and refined in consultation with a wide variety of experts worldwide.

Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of peace, equity, and opportunity—underpinning development, accountable government, and respect for fundamental rights.

Traditionally, the rule of law has been viewed as the domain of lawyers and judges. But everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law.”

From: **The World Justice Project® (WJP)**, an independent, multidisciplinary organization working to advance the rule of law worldwide. WJP’s mutually-reinforcing lines of business employ a multi-disciplinary approach through original research and data, an active and global network, and practical, locally-led programs to advance the rule of law worldwide.

Founded by William H. Neukom in 2006 as a presidential initiative of the American Bar Association (ABA), and with the initial support of 21 other strategic partners, the World Justice Project transitioned into an independent 501(c)(3) non-profit organization in 2009. Its offices are located in Washington, DC, and Seattle, WA, USA.



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Alcohol & Substance Abuse Education for Lawyers

*William Mann, Esq.*

*Powell, OH*

## **DRUG ABUSE EDUCATION: A SIMPLE LESSON FOR LAWYERS**

The bad news is that drug abuse is real. The good news is, that with proper medical intervention, it is frequently treated successfully.

Drug abuse is a chronic relapsing brain disease [ that is, a medical problem] that is characterized by compulsive drug seeking and use, despite harmful consequences.

Chronic – persisting for a long time.

Relapsing – returning; a deterioration of health after a period of improvement or of no further deterioration.

Compulsive – resulting from an irresistible urge.

Harmful – likely to cause damage.

The scientific community has not agreed on “a” cause for drug abuse. Generally, it is believed to be related to:

1. Certain personality types;
2. One’s environment;
3. One’s genetic makeup; and
4. A combination of some or all of the above.

Drug abusers typically manifest reduced productivity at home, at play and at work. For lawyers this means that drug abuse will significantly increase the lawyer’s chances of:

1. Committing legal malpractice / professional negligence;
2. Committing ethical violations;
3. Reducing the lawyer’s reputation, which leads to a reduction in professional opportunities including obtaining new clients; and
4. Criminal consequences.

As stated above, the good news is that drug abuse is frequently treated successfully by proper medical intervention.

There are several sources for good quality drug abuse treatment. Consistent with our desire to keep this presentation simple, and to make certain that everybody in our audience has a solid grasp of what it does, I will focus on the Ohio Lawyers Assistance Program (OLAP) when

discussing treatment. This is not to suggest that OLAP is the only source of good quality drug abuse treatment. However, OLAP probably has as good an understanding of lawyers and the legal profession as any source of treatment, and it is just a phone call away for Ohio lawyers.

OLAP's mission is to help Ohio's lawyers, judges and law students to obtain appropriate treatment for substance abuse, chemical dependency, addiction and mental health issues (including those that do not involve drugs or drug abuse). OLAP provides:

- Confidential advice about individual problems;
- Help in arranging and implementing formal interventions to overcome the "denial" that many drug abusers experience. "Denial" is an alternative reality that drug abusers frequently develop. In this alternative reality, the drug abuser convinces him or herself that he or she does not have a drug abuse problem ("I can stop drinking anytime I want to stop – no problem.")
- Help in deciding between outpatient, inpatient and other treatment programs.
- Monitoring and aftercare services to deal with the issue of relapsing, which was mentioned above.

Pursuant to Ohio Prof. Cond. R. 8.3, an exemption exists for OLAP and certain other similarly situated organizations, to report knowledge of ethical violations when that knowledge was obtained in the course and scope of OLAP's work. Further, Ohio Code of Judicial Conduct R. 2.14 provides that the information obtained by a member or agent of a bar of judicial association shall be privileged. Therefore, Ohio lawyers can contact OLAP about themselves, or about an attorney friend or colleague, and be assured that any information obtained by OLAP will remain confidential.

If you wish to contact OLAP you may do so by calling 1-800-348-4343 or 614-586-0621.

We made reference to the fact that nobody knows "the" cause of drug abuse. However, it is very well established that drug abuse is a medical problem, and has been long recognized by the medical community as a medical problem. Drug abuse is not – repeat, not – caused by weak morals, poor character and the like any more than cancer is caused by weak morals, poor character and the like. Therefore, if you have a drug abuse problem, or if you have a friend or a loved one who has a drug abuse problem, you should seek out appropriate professional treatment for the person suffering from the disease. Don't be detoured by a feeling that drug abuse is evidence of weak morals – it is not. It is a medical problem that requires medical attention.

In Ohio, OLAP, and several other quality drug abuse treatment options, are available to lawyers. If you need help, please get help. If you fail to get help, your drug abuse problem will almost certainly get worse and you, the lawyer, will significantly increase your chances of

experiencing legal malpractice/professional negligence problems, legal ethics problems, a reduction in professional productivity, and perhaps even serious criminal consequences.



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Legal Ethics Update

*William Mann, Esq.*

*Powell, OH*