



**OHIO**  
**ASSOCIATION for**  
**JUSTICE**  
TRIAL LAWYERS HELPING PEOPLE

2018 Winter Convention

October 24<sup>th</sup> – 26<sup>th</sup>

**Friday Professional Conduct Session**



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*Professional Conduct Session*

**Case Law Update**

*Charles Kettlewell, Esq.*



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## **Ohio's Discipline System for Lawyers and Judges**

*Richard Alkire, Esq.*

# **A TRIAL LAWYER'S PERSPECTIVE** **ON OHIO'S PROFESSIONAL DISCIPLINE SYSTEM**

The following outline is meant to briefly describe Ohio's disciplinary procedure applicable to lawyers and Judges licensed to practice law in the State of Ohio. This brief outline provides an overview of the discipline system as it relates to its structure, how grievances are treated and the basic proceedings leading up to a sanction.

## **I. DISCIPLINARY PROCEDURE**

### **A. INTRODUCTION**

Unless you have volunteered as a member of a Certified Grievance Committee of the Ohio State Bar Association or a local bar association, or have been the subject of a grievance from a client, the chances are you are unfamiliar with Ohio's handling of the discipline of judicial officers and attorneys practicing law. Ohio is among the vast majority of states in the country which provide for the discipline of lawyers and judges by the judiciary and mechanisms devised by that branch of government. However, a small minority of states have assigned the responsibility for disciplining the bench and bar to the legislature. For the Supreme Court to retain its constitutional jurisdiction over the bench and the bar, it is incumbent upon all the participants in the disciplinary system to hold paramount the goal of protecting the public and disposing of grievances fairly, effectively and efficiently.

Toward this end, Rule V of the Supreme Court Rules for the Government of the Bar (Gov. Bar R. V) sets forth the disciplinary procedures which apply to 1) grievances involving alleged misconduct by judicial officers or attorneys, 2) all proceedings with regard to mental illness, alcohol and other drug abuse or disorder, 3) all proceedings for the discipline of judicial officers, attorneys, persons under suspension, or on probation, and 4) all proceedings for the reinstatement as an attorney. See Gov. Bar R. V, Sec. 2(A).

This summary is meant to expose the procedure designed by the Ohio Supreme Court to dispose of grievances as set forth in Gov. Bar R. V.

### **B. THE STRUCTURE OF THE DISCIPLINARY SYSTEM**

The trial court for the disciplinary system is the Board of Professional Conduct (hereinafter "The Board"). Gov. Bar R. V, Sec. 1(A) sets forth its composition. Essentially, a panel of three of the members of The Board conducts a hearing for disciplinary Complaints which are filed with the Board and withstand probable cause review of a Probable Cause Panel of The Board.

The "prosecutor" may be Disciplinary Counsel, who is appointed by The Board with the approval of the Supreme Court and is charged with the responsibility of investigating allegations of misconduct of judges and attorneys, allegations of mental illness affecting judges and attorneys,

initiating Complaints as a result of investigations conducted under Rule V and to certify bar counsel designated by Certified Grievance Committees. See Gov. Bar R. V, Sec. 4(A) and 5(A). Disciplinary Counsel is appointed for a term of four years.

In addition to Disciplinary Counsel, Certified Grievance Committees are also “prosecutors” and may file Complaints with The Board when they find that there is probable cause to believe that misconduct has occurred or that a condition of mental illness exists. See Gov. Bar R. V, Sec. 9(C)(1).

Certified Grievance Committees may be an organized committee of the Ohio State Bar Association or may be comprised of a Committee of one or more local bar associations. When membership on joint Certified Grievance Committees consists of individuals from more than one bar association, the attorneys employed in each geographic area served by the bar association define the proportion applicable to membership on such Committee. See Gov. Bar R. V, Sec. 5(A).

Disciplinary Counsel and Certified Grievance Committees file Complaints in the name of the Committee or Disciplinary Counsel as Relator. See Gov. Bar R. V, Sec. 10(E)(1). The Grievant may also sign the Complaint.

The judicial officer or attorney who is the subject of a disciplinary Complaint is known as the Respondent, and many times is represented by counsel.

C. THE DISPOSITION OF A GRIEVANCE

All Complaints and any matters that The Board wishes to refer must be investigated by either a Certified Grievance Committee or Disciplinary Counsel. (Gov. Bar R. V, Sec. 9(C)) Additionally, the chair of a Certified Grievance Committee may direct a written request for assistance to Disciplinary Counsel, who then must investigate the matters contained in the request and provide a report concerning the results. See Gov. Bar R. V, Sec. 9(B). Certified Grievance Committees may not investigate allegations of misconduct against attorneys who are members of such Committees, but instead such allegations must be referred to the Director of The Board.

Certified Grievance Committees and Disciplinary Counsel are required to conduct their investigation within 60 days of their receipt of the grievance. The disposition of a grievance must then be decided upon within 30 days after the investigation is over. See Gov. Bar R. V, Sec. 9(D) Extensions of time to complete investigations may be granted by the Director of The Board, in which event such investigation must be completed within 150 days from the date of receipt of the grievance. See Gov. Bar R. V, Sec. 9(D)(2). The Director may provide extensions beyond 150 days for good cause as set forth in the Rule. Good cause may consist of pending litigation, appeals, unusually complex investigations, the investigation of multiple grievances, time delays in obtaining evidence or testimony of witnesses or for other reasons. Should such time limits not be met, the Director of The Board may refer the matter to another geographically appropriate Certified Grievance Committee or to Disciplinary Counsel, who then must complete the investigation within 60 days. Investigations, under no circumstances, should extend beyond one year from the date of the filing of the grievance. See Gov. Bar R. V, Sec. 9(D)(2). Adherence to time limits, though, is not jurisdictional. See Gov. Bar R. V, Sec. 9(D)(3).

Attorneys and judicial officers have a duty to cooperate with the Board, Disciplinary Counsel, and president, secretary, or chair of a certified grievance committee to assist in an investigation. See Gov. Bar R. V, Sec. 9(G).

During an investigation, the chair of the Certified Grievance Committee, the president of a bar association or Disciplinary Counsel may direct a written inquiry concerning procedural questions to the Director of The Board, who then must consult with the chair of the Board and provide a response. See Gov. Bar R. V, Sec. 9(H).

Certified Grievance Committees may devise their own procedures for disposing of grievances. These procedures must provide a method to notify Grievants that they also have the option to file a grievance with Disciplinary Counsel rather than the Certified Grievance Committee. Certified Grievance Committees frequently have several levels of review which screen grievances to determine whether Complaints should be filed with The Board. Generally speaking, a trial committee of the Certified Grievance Committee will vote on whether a Complaint should be filed with The Board upon the completion of an investigation. In any event, the Grievant is informed of the results of the investigation and recommendation concerning further discipline. Any Grievant who is dissatisfied with a Certified Grievance Committees disposition of a grievance not resulting in the filing of a Complaint may, in writing within fourteen days after receiving notice of the disposition of the grievance, request the Director of The Board to refer a request for review to Disciplinary Counsel. Disciplinary Counsel must conduct such a review within 30 days and notify the Grievant of the results. Again, extensions of time may be granted for such review upon the showing of good cause. There is no appeal from Disciplinary Counsel's determination. See Gov. Bar R. V, Sec. 10(D)

Once a grievance has made its way to a formal Complaint, the Complaint is filed with the Board. See Gov. Bar R. V, Sec. 10(E).

Upon the filing of a Complaint, the Ohio Rules of Civil Procedure apply which govern the time for filing an Answer, Motions under Rule 12, Briefs and Affidavits. See Gov. Bar. R. V, Sec. 27(A)

Once a Complaint is filed alleging misconduct<sup>1</sup>, the Director of The Board assigns the Complaint and the necessary investigation materials which accompany it at filing (See Gov. Bar R. V, Sec. 11(A) to a probable cause panel comprised of three members of The Board which had been appointed by the chair which then reviews the Complaint and investigation materials to determine whether probable cause exists for the filing of the Complaint. This panel may dismiss the Complaint. See Gov. Bar R. V, Sec. 11(C)(3). A dismissal may be appealed to the full Board by filing a written appeal with the director of the Board. If the Board affirms the dismissal, there is no further appeal. See Gov. Bar R. V, Sec. 11(D).

Upon passing probable cause muster, the Director assigns the Complaint to a hearing panel composed of three members of the Board. Either an attorney or judge member of the panel is

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<sup>1</sup> **(1) Misconduct.** "Misconduct" means any violation by a judicial officer or an attorney of any provision of the oath of office taken upon admission to the practice of law in this state or any violation of the Ohio Rules of Professional Conduct or the Code of Judicial Conduct, disobedience of these rules or of the terms of an order imposing probation or a suspension from the practice of law, or the commission of an illegal act or conviction of a crime that reflects adversely on the lawyers' honesty or trustworthiness. See Gov. Bar R. V, Sec. 35(I).

assigned to serve as chair of the panel, whose responsibility is then is to rule on motions and interlocutory matters and ultimately draft the panel's report and present it to The Board. See Gov. Bar R. V, Sec. 12(C).

Usually a pre-hearing conference is conducted within 40 days of the date upon which the assignment of the Complaint was made to a hearing panel. The panel chair conducts this pre-hearing conference usually by telephone. Time limits for the scheduling of such conference have been repealed.

Again, customarily the hearing date is assigned no more than 150 days following the date of the assignment of the Complaint to a panel. This hard deadline was repealed as well. This scheduled hearing date usually will not be continued, as all participants in this system are entitled to participate without conflict with any other imposed trial date by any other court in Ohio. See Rules of Superintendence for Courts of Ohio, R. 41(B)(2). Courts within the State of Ohio must grant priority to matters before the Board.

Once the hearing is conducted, the report of the panel which sets forth the panel's Findings of Fact, Conclusions of Law and Recommended Sanction usually is submitted to the full Board within 30 to 60 days of the filing of the transcript, at the next regularly scheduled meeting of The Board. The Board meets bimonthly in the months of February, April, June, August, October and December. This panel report is presented to The Board by the panel chair and then voted on by the entire Board.

A panel must determine by clear and convincing evidence whether the Respondent is guilty of misconduct. If such a finding is made, the panel may recommend a public reprimand, a suspension of six months to two years, probation, suspension for an indefinite period or disbarment. The panel may also dismiss a Complaint at the conclusion of a hearing. This may only be done if the hearing panel is unanimous. See Gov. Bar R. V, Sec. 12(G). If the hearing panel unanimously dismisses the Complaint at the conclusion of the Relator's evidence or of all the evidence, the panel chair then gives written notice of this action taken to The Board, Respondent, all counsel of record, Disciplinary Counsel, the affected Certified Grievance Committee and Ohio State Bar Association. Alternatively, the hearing panel may recommend dismissal and present that recommendation to The Board for its determination as well.

Once a matter is submitted to The Board and The Board makes a determination, a final Certified Report of Proceedings, including findings of fact and recommendations is filed with the Supreme Court. This report is accompanied by the transcript of the testimony taken. See Gov. Bar R. V, Sec. 12(K).

Once this final report of The Board is filed, the Supreme Court issues the Respondent an order to show cause why the report of The Board shall not be confirmed and a disciplinary order entered. The Respondent may file objections to the findings or recommendations of The Board and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued within 20 days after the issuance of this show cause order. This date may be extended another 20 days upon agreement of the parties. The objections are accompanied by a brief in support of them. An answer brief may be filed within 15 days after the objections are filed. The Supreme Court then conducts a hearing on the objection and enters an order that it finds proper. See Gov. Bar R. V, Sec. 17.

D. CONCLUSION

The foregoing discussion was simply meant to summarize the procedures applicable to grievances brought against judges and lawyers in the State of Ohio pursuant to the rules promulgated by the Ohio Supreme Court. Hopefully, this brief summary provides you basic information which will enable you to understand Ohio's disciplinary procedure. As you can see, great care has been taken to assure that the grievance of a client or member of the bar is taken seriously, properly investigated and disposed of in a fair and efficient manner.

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*Professional Conduct Session*

**Observations from the Bench**

*The Honorable Frank G. Forchione*

1 A. Currently.

2 Q. Currently.

3 What office did you sit in in 2012?

4 A. I believe I had an office upstairs in 2012.

5 Q. Okay.

6 A. On the second floor.

7 Q. All right. Do all phone numbers from that  
8 building come up

9 A. I have no idea.

10 : How is this in any  
11 way related to your lawsuit. I just want  
12 to make a record for the time when it comes  
13 that, thus far --

14 : You may not make a  
15 record. This is a discovery deposition.  
16 You do not have the opportunity to make a  
17 speech or present your side of the case.

18 : It's 11:40.

19 : It doesn't matter  
20 what time it is. It does not matter what  
21 time it is. Steve, I -- Steve, stop.

22 : Now --

23 : We're going to be in  
24 front of the judge tomorrow and this is  
25 sanctionable behavior, Steve. Please

Deposition

1 control yourself.

2 : This is going to be

3 in front of the judge. Not a single --

4 : No, Steve. No,

5 Steve.

6 : 11:04.

7 : It's 11:05.

8 Steve, you do not get the

9 opportunity to make this type of record.

10 You have the opportunity to depose

11 my client and when that opportunity comes,

12 you can ask whatever questions you want.

13 : Not a single

14 relevant questions has been asked. This

15 witness has been asked the names and ages

16 of her children, telephone number of a

17 building, yet not a single question has

18 been asked about the case.

19 : They're completely

20 relevant. I'm making my case.

21 : This is a note to

22 Judge Forchione for purposes of later

23 motions.

24 Go on with the questioning.

25 : I'm appalled at that

1 behavior.

2 I'm appalled at the  
3 deposition so far.

4 : Well, it's going to  
5 continue in this regard for quite some  
6 time.

7 : I know you're bent,  
8 I know.

9 Q. All right. Exhibit 8.

10 - - - -  
11 (Thereupon, Exhibit 8, Internet Website Page,  
12 was marked for purposes of identification.)

13 - - - -  
14 Q. , I handed you what has been identified as  
15 Exhibit 8. Exhibit 8 was also pulled two  
16 days ago. It's also a  
17 website tab. If you can identify at the top of  
18 the exhibit the phone number that's listed for  
19 the law firm.

20 A.

21 Q. And that number, does that ring true for you as  
22 the law firm's phone number for quite some time?

23 A. Yes.

24 Q. In fact, wasn't that also  
25 phone number for quite some time?

# OBSERVATIONS FROM THE BENCH: TOP 10 TIPS ON PROFESSIONALISM

- JUDGE FRANK FORCHIONE, STARK  
COUNTY COURT OF COMMON PLEAS

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# MAGISTRATES AND BAILIFFS ARE PEOPLE TOO!

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**BAILIFFS AND  
MAGISTRATES  
ARE PEOPLE  
TOO!**

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- Rule 3.5: Impartiality and Decorum of the Tribunal
  - (a) A lawyer shall not do any of the following:
    - (6) engage in undignified and discourteous conduct that is degrading to a tribunal
- Akron Bar Assoc. v. DiCato, 130 Ohio St.3d 394, 2011 -Ohio-5796
  - "the evidence demonstrates that during a telephone conversation with Judge \*\*\*\*\* bailiff about fee applications that were awaiting the judge's approval, [the attorney] called the judge a lying cheating bitch. As a result of [the attorney's] comments to the bailiff, [the Judge] issued an order directing him to appear and show cause why he should not be held in contempt of court. In an effort to resolve the conflict with the Judge, [the attorney] sent her a letter offering an explanation for his conduct. In his letter, [he] stated, "We are even on the same tea, as democrats and I should be supporting you, which I would certainly like to do."

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## DEADLY DEPOSITIONS

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## DEADLY DEPOSITIONS...

### Do:

- Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice.
- If, after scheduling, a postponement is requested, cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.
- Arrive on time.
- Be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.
- Turn off all electronic devices.
- Treat everyone with courtesy
- Recess the deposition and call the Court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the problem.

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## DEADLY DEPOSITIONS...

**Don't:**

- Attempt to beat your opponent to the punch by scheduling a deposition for a date earlier than the date requested by your opponent for depositions that he or she wants to take.
- Coach the deponent during the deposition when he or she is being questioned by the other side.
- Make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- Make rude or degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or when objecting to questions.
- Overtly or covertly provide answers to questions asked of the witness.

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## AVOID A BAD MARRIAGE WITH YOUR CLIENT

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## A BAD MARRIAGE...

### RULE 1.4 COMMUNICATION

- A. A lawyer shall do all of the following:
- 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;
  - 2) reasonably consult with the client about the means by which the client's objective are to be accomplished;
  - 3) Keep the client reasonably informed about the status of the matter;
  - 4) Comply as soon as practicable with reasonable requests for information from the client.
  - 5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law

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### WHAT CAN BE DONE TO IMPROVE THE MARRIAGE?

- 1. Have someone call clients regularly – even if nothing is going on
- 2. Deliver the bad news quickly!
- 3. If you're busy, tell your client
- 4. Don't create unrealistic expectations
- 5. Explain billing and fees

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TRICK  
OR  
TREAT  
AT  
TRIAL

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### TRICK OR TREAT CONT..

• RULE 3.5: Impartiality and Decorum of the Tribunal

- A. A lawyer shall not do any of the following:
  - 3. Communicate *ex parte* with either of the following:
    - a) A judicial officer or other official as to the merits of the case during the proceeding unless otherwise authorized to do so by law or court order
  - 5. Engage in conduct intended to disrupt a *tribunal*
  - 6. Engage in undignified or discourteous conduct that is degrading to a *tribunal*

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## TRICK OR TREAT...

### TRIAL PITFALLS

1. Show opposing counsel and Court any documents used for opening statements
2. Overzealous objections are not favored
3. Know the rule of voir dire
4. Are there time limitations on opening and closing statements? – If so, follow them!
5. Dirty looks and gestures are NEVER appropriate

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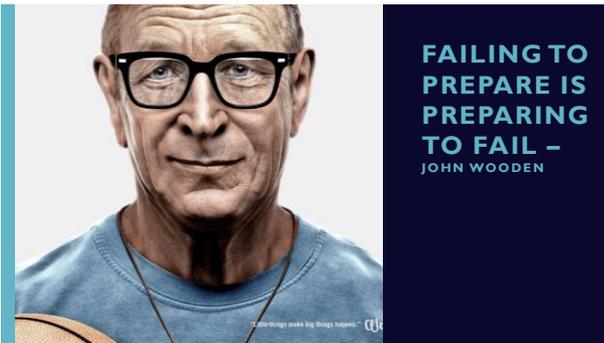
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## FAILING TO PREPARE...

### PROPER PREPARATION

- Be on time!
- Are your clients prepared?
- Mark exhibits prior to trial
- Are witnesses lined up?
- DO YOU KNOW YOUR CASE?

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## TECHNOLOGY TROUBLES...

### • RULE 1.1: COMPETENCE

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

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## TECHNOLOGY TROUBLES...

- Make arrangements for use of tripods, video recorders, Elmos, or other visual aids in advance
- Evaluate risks v. benefits in the use of technology
- Will it work? Plan for backup!
- Keep it simple
- Is Skype worth the hype?

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- Review American Bar Association Model for Professional Responsibility 7.0 – 7.3
  - False or misleading information on law firms
  - Testimonials, endorsements, recommendations
  - Disclaimers
  - Confidential client information
  - Supervision

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• **RULE 7.1: COMMUNICATION CONCERNING A LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

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### WORKING WITH OPPOSING COUNSEL & OTHER LAWYERS

**DO:**

- Do maintain a courteous and cooperative working relationship with opposing counsel and other lawyers
- Do wait 24 hours before deciding to respond to an intemperate, untrue, or exasperating communication from another attorney
- Do respond in a timely fashion to communications from opposing counsel and other attorneys
- Do keep your word
- Do identify the changes you made from previous drafts when exchanging document drafts

**DON'T**

- Don't serve papers at a time or in a manner intended to inconvenience or take advantage of opposing counsel, such as late on a Friday afternoon, on the day preceding a holiday, or when you know that counsel is ill.

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### THE NASTY EMAIL...

- Sets the tone for the case
- Would you say this to opposing counsel's face?
- You can't take away what you put down in writing
- Could this end up in the press or social media?
  - Judges HATE nasty emails!!!

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### **RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

- A. A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:
  1. The representation of that client will be directly adverse to another current client
  2. There is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.
- B. A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:
  1. The lawyer will be able to provide competent and diligent representation to each affected client;
  2. Each affected client gives informed consent, confirmed in writing;
  3. The representation is not precluded by division (c) of this rule.
- C. Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:
  1. The representation is prohibited by law;
  2. The representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

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### **CONFLICT OF INTEREST**

- Review Rule 1.7, 1.8, and 1.9 – conflicts of interest
- The fact that you came to see me gives you the best answer
- Is it worth it?
- Number one loyalty is to your client
- Test:
  - Clearly identify the client or clients
  - Determine whether the conflict of interest exists
  - Decide whether the representation is barred by either criteria of division (c)
  - Evaluate, under division (b)(1) whether the lawyer can competently and diligently represent all clients affected by the conflict of interest
  - If representation is permissible, consult with clients affected by the conflict and obtain the informed consent of each of them, in writing

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It sounds like English,  
but I can't understand  
a word you're saying.



your e cards  
someecards.com

**DO I  
UNDERSTAND  
WHAT YOU'RE  
SAYING?**

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## LEGAL WRITING

- Don't try to impress us with big words
- We know what summary judgment is
- Don't attack or ridicule opponent – keep it professional
- Make sure cases quoted in briefs actually apply to the case at hand
  - Humor is appreciated
- Attach critical cases – whether reported or not

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