



OHIO
ASSOCIATION for
JUSTICE
TRIAL LAWYERS HELPING PEOPLE

2016 Annual Convention

Professional Conduct Session

Friday May 6, 2016



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JUSTICE
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Professional Conduct Session

Legal Ethics: Exploring the Many Shades of Gray

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LEGAL ETHICS:

Exploring the Many Shades of Gray

Alison De Villiers, Esq.
Beckman Weil Shepardson LLC

Ohio lawyers are governed by:

Supreme Court Rules for the
Government of the Bar of
Ohio

The Rules of Professional
Conduct (Amended 3/15/16)

The Attorney's Oath of Office

Topics Covered in the Ohio Rules of Professional Conduct

- | | |
|---|--|
| 1. Client-Lawyer Relationship | 5. Law Firms and Associations |
| 2. Counselor | 6. Public Service |
| 3. Advocate | 7. Information About Legal Services |
| 4. Transactions with Persons Other than Clients | 8. Maintaining the Integrity of the Profession |

Can lawyers keep a buffer of firm money in the IOLTA/Client Trust Account?





Opposing counsel is consistently rude/disrespectful to you and your client. Ethical violation?

Let's talk about:

Solicitation of Clients!

Can I present a legal seminar and distribute information, including brochures with my law firm contact information, at the exit?

Can a lawyer stay after the presentation to answer specific legal questions of attendees?



Other Solicitation Examples:

Text messages?

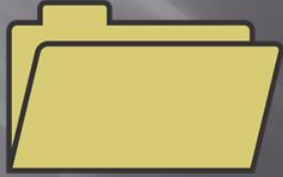
Recorded telephone messages from lawyers?

\$100 to a referral source?



Can I notarize a signature over Skype?

The case has concluded. Can I pitch the file?



Your case settles, and defense counsel is now requesting that you sign a release that indemnifies the Defendant against any liens or subrogation claims. OK?





Defense counsel fails to cite a controlling case which supports their side in a MSJ. Let it go?

Annie and Betty are involved in an accident with another vehicle driven by Charlie. Both Annie and Betty are injured. Betty was Annie's passenger and there is some question as to whether Annie is at fault.



Can you represent both Annie and Betty?

What should I do if I am confronted with a legal ethics problem?

- Stay calm
- Do not take any immediate or rash action
- Do not try to cover up or hide the problem
- Do not ignore the problem
- Promptly address the problem
- Seek independent counsel, if necessary

How can I avoid ethical problems before they happen?

- Know the rules
- Trust your instinct
- Talk to other lawyers
- Call your local Bar Association
- Call a lawyer who specializes in ethics if you have a question
- Know when to ask for help

Don't make a problem worse!



Covering things up can
lead to an increased
sanction

Questions?
Stories to Share?



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OHIO RULES OF PROFESSIONAL CONDUCT

(Effective February 1, 2007; as amended effective March 15, 2016)

Sections of Rules Referenced in Presentation:

1.15: SAFEKEEPING FUNDS AND PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

- (1) maintain a copy of any fee agreement with each client;
- (2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:
 - (i) the name of the client;
 - (ii) the date, amount, and source of all funds received on behalf of such client;
 - (iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;
 - (iv) the current balance for such client.
- (3) maintain a record for each bank account that sets forth all of the following:
 - (i) the name of such account;
 - (ii) the date, amount, and client affected by each credit and debit;
 - (iii) the balance in the account.
- (4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;
- (5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.

- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying or obtaining a waiver of bank service charges on that account, but only in an amount necessary for that purpose.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- (d) Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, confirmed in writing, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

The Supreme Court of Ohio
Board of Professional Conduct
Opinion 2015-2 – Issued August 7, 2015

“A lawyer may present a legal seminar to prospective clients and may make brochures and law firm information available near the exit of the seminar. A lawyer may not meet contemporaneously with prospective clients who attend the legal seminar to answer legal questions, even in the attendees sign up to so in advance. An exception exists for lawyers providing pro bono legal services. Finally, the “prior professional relationship” exception under Prof. Cond. R. 7.3(a) does not apply to prospective clients who are employees of an existing organizational client of the presenting lawyer.”

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable 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.

RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay any of the following:
- (1) the reasonable costs of advertisements or communications permitted by this rule;

- (2) the usual charges of a legal service plan;
- (3) the usual charges for a nonprofit or lawyer referral service that complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio;
- (4) for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

(d) A lawyer shall not seek employment in connection with a matter in which the lawyer or law firm does not intend to participate actively in the representation, but that the lawyer or law firm intends to refer to other counsel. This provision shall not apply to organizations listed in Rules 7.2(b)(2) or (3) or if the advertisement is in furtherance of a transaction permitted by Rule 1.17.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless either of the following applies:

- (1) the person contacted is a lawyer;
- (2) the person contacted has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by division (a), if any of the following applies:

- (1) the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer;
- (2) the solicitation involves coercion, duress, or harassment;
- (3) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or an incompetent or that the person's physical, emotional, or mental state makes it unlikely that the person could exercise reasonable judgment in employing a lawyer.

(c) Unless the recipient of the communication is a person specified in division (a)(1) or (2) of this rule, every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer reasonably believes to be in need of legal services in a particular matter shall comply with all of the following:

- (1) Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee;

(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;

(3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

(d) Prior to making a communication soliciting professional employment pursuant to division (c) of this rule to a party who has been named as a defendant in a civil action, a lawyer or law firm shall verify that the party has been served with notice of the action filed against that party. Service shall be verified by consulting the docket of the court in which the action was filed to determine whether mail, personal, or residence service has been perfected or whether service by publication has been completed. Division (d) of this rule shall not apply to the solicitation of a debtor regarding representation of the debtor in a potential or actual bankruptcy action.

(e) If a communication soliciting professional employment from anyone is sent within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death, the following "Understanding Your Rights" shall be included with the communication.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

RULE 1.4: COMMUNICATION

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

**See Rule 1.15 (page 1) for reference to "7 years" requirement provided in this slide.*

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:

(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.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may do either of the following:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly do any of the following:
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

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.

Attorney's Oath of Office¹

... hereby affirm that I will support the Constitution and the laws of the United States and the Constitution and the laws of Ohio, and I will abide by the Code of Professional Responsibility.

In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons. I will honestly, faithfully, and competently discharge the duties of an attorney-at-law.

¹ Ohio State Bar Association. (n.d.). *Law and You 13*. Retrieved April 4, 2016, from [www.ohiobar.org: http://downloads.ohiobar.org/conres/lawandyou/Law_and_You_13.pdf](http://www.ohiobar.org/downloads.ohiobar.org/conres/lawandyou/Law_and_You_13.pdf)



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2016 Annual Convention

Professional Conduct Session

Professionalism in the 21st Century

Corey Artim, Esq.
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2016 Annual Convention

Professional Conduct Session

Case Updates and Developing Trends in Ethics and Professional
Conduct

David Dingwell, Esq.
Canton, OH

THE ETHICS OF MODERN LITIGATION

May 6, 2016

David L. Dingwell

Tzangas Plakas Mannos Ltd

1. Overly “Zealous Representation” of clients (Old Code vs. New Rule)
 - a. Former Code of Professional Responsibility (in effect prior to March 2007):
 - i. DR 7-101 (“representing a client zealously”)
 1. EC 7-1:

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.
 - ii. ABA Model Rules of Professional Conduct – Preamble:
 - [8] A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
 - [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system, and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe rules for a lawyer’s conduct. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and

moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

iii. ABA Model Rule 1.3, Comment [1] (Diligence):

A lawyer should * * * take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. * * * The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

iv. Ohio Rule of Professional Conduct 1.3, Comment [1] (Diligence):

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.

1. In adopting the ABA Model Rule in 2007, Ohio did not adopt the language in Comment [1] regarding zealous representation. The code comparisons regarding Rule 1.3 note that the Model Rule's reference to "zeal in advocacy" was not adopted because "zeal" or "zealous advocacy" is often used as an excuse for unprofessional behavior. Likewise, Ohio did not adopt paragraphs [8] and [9] of the Preamble.

b. Ohio Cases Exploring the Limits of a Lawyer's "Zeal"

i. *Disciplinary Counsel v. Nicholson*, 80 Ohio St.3d 275, 1997-Ohio-317: Lawyer engaged in disruptive courtroom antics and referred to the female prosecuting attorney as "a scared, wimpy little girl lawyer." Court imposed a six-month suspension.

1. "Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of the proceedings."

ii. *Disciplinary Counsel v. Shimko*, 134 Ohio St.3d 544, 2012-Ohio-5694: Lawyer made statements about trial judge impugning the judge's qualifications and integrity, thus violating Rule 8.2(a). These included statements that judge acted with "absurdity," was "vindictive" and so prejudiced that the judge was "trying [the opposing party's] case for it, and that the judge "fabricated allegations of attorney misconduct to camouflage his own unreasonable and injudicious conduct." Court imposed a six-month, fully stayed suspension.

1. "Shimko could have and should have presented his allegations one at a time, pointing to the record and using words that were powerful, but less heated. It is his choice of language, not his right to allege bias in his affidavits and in his appellate briefs, that brought him before the disciplinary counsel. In *Gardner*, we held that "[u]nfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law." *Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048, 793 N.E.2d 425, at ¶ 36, citing *Disciplinary Counsel v. West*, 85 Ohio St.3d 5, 706 N.E. 2d 760 (1999). Here, we conclude that Shimko's comments are not equivalent to those in *Gardner*, even though his vigorous advocacy went too far. Such behavior by an attorney should not go without sanction." ¶35.

2. Dissenting opinion (garnering two other votes) would have imposed an actual suspension with no stay:

a. "I dissent because the majority ignores a long-standing, bright-line rule: "Unfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law."

iii. *Disciplinary Counsel v. Pollock*, 100 Ohio St.3d 280, 2003-Ohio-5752: Lawyer, in the course of representing multiple clients in real estate matters, filed 20 lawsuits, some of which were found to be meritless and repetitious. He also contacted insurance companies in an attempt to convince them to deny coverage to opposing parties, opposing counsel, and others, sought to have criminal charges filed against opposing counsel, and conducted depositions during which he posed irrelevant and disparaging questions that required further depositions to be conducted under court supervision. Court suspended lawyer for one year with six months stayed.

1. “Respondent’s representation in the underlying cases became a personal crusade no longer driven by his clients’ interests. * * *[W]e view respondent’s “zeal” as blind determination to ruin those he seemed to consider his client’s oppressors.” ¶46.

iv. *Disciplinary Counsel v. Stafford*, 128 Ohio St.3d 446, 2011-Ohio-1484: Lawyer committed multiple ethical violations in the representation of clients in four domestic cases and one legal malpractice case. Misconduct included failing to respond to discovery requests and motions to compel discovery, continued to assert attorney-client privilege regarding his non-responsiveness to discovery requests even after the trial court determined the privilege did not apply, and intentionally mislead opposing counsel in describing the allegedly privileged documents. Court suspended lawyer for eighteen months with six months stayed.

1. “We emphasize that respondent is not subject to sanction here because he is a zealous advocate on behalf of clients * * *. It is that his lack of candor, his disrespect and discourtesy to fellow officers of the court, and his dilatory discovery tactics are unprofessional and interfere with the orderly administration of justice.” ¶83.

v. *Disciplinary Counsel v. LoDico*, 106 Ohio St.3d 229, 2005-Ohio-4630: Lawyer, in the course of three separate criminal trials, engaged in inappropriate, undignified, and discourteous conduct toward jurors, witnesses, and trial judges. In two of the three cases, the lawyer was cited for contempt of court and served jail time. The Court suspended lawyer for eighteen months with six months

stayed on conditions of practice monitor and psychiatric evaluation and treatment.

1. “The law demands that all counsel engender respect and dignity for the adjudication process. Though duty-bound to afford clients the most competent representation of which they are capable, counsel are equally constrained by the mandates of integrity and professionalism imposed on all counsel as officers of the courts in which they appear. No proper defense or strategy warrants the type of misconduct exhibited by respondent.

[W]e do not quantify the standards of civility that are imposed upon counsel or qualify the elusive boundary between zealous, aggressive advocacy and contemptuous, vituperative conduct. Nor do we reduce counsel to “obsequious sycophants in order to avoid offending the fragile sensitivities of judges.” [Citations omitted] * * * We simply reinforce the mandate that our attorneys advocate within the rules of law, in the light of rational thought and reason rather than innuendo and incivility. * * * ¶¶31-32.

- vi. *Columbus Bar Assn. v. Vogel*, 117 Ohio St.3d 108, 2008-Ohio-504: Lawyer was found in contempt for disrupting court proceedings and accusing the trial judge of colluding with the prosecutor’s office. In another case, he lied to the trial judge about the status of witness subpoenas and was found in contempt. In both cases, he gave newspaper interviews in which he impugned the integrity of the judge and prosecutors. The Court ordered a two-year suspension with one year stayed on conditions.

1. “The law demands that all counsel foster respect and dignity for those who administer and enforce the law. Conduct that is degrading and disrespectful to judges and fellow attorneys is neither zealous advocacy nor a legitimate trial tactic. Lying to a tribunal and making false accusations against judges and fellow attorneys can never be condoned. Attorneys must advocate within the rules of law and act with civility and professionalism.” ¶27.

2. Lawyer Misrepresentations (Rules 3.3, 8.4(c))

- a. *Disciplinary Counsel v. Greene*, 1995-Ohio-97: Respondent made an intentional misrepresentation of material fact to a court to benefit his client. Respondent received a one year suspension with ten months stayed.
 - i. “It is true that the vigorous and effective representation of a client is the responsibility for all attorneys. * * * While an attorney, as a zealous advocate, may characterize facts favorably to the attorney’s client, the attorney’s duty, as an officer of the court, is to uphold the legal process and demonstrate respect for the legal system by at all times being truthful with a court and refraining from knowingly making statements of fact or law that are not true. Respect for the law and our legal system through both an attorney’s words and actions, should be more than a platitude. The obligations of professional responsibility may not be overshadowed by either a desire to win a case or as a favor to any person. Respondent’s actions clearly were outside the realm of zealous representation of a client and amounted to a deliberate misrepresentation to a court.”
- b. *Toledo Bar Assn. v. DeMarco*, 144 Ohio St.3d 248, 2015-Ohio-4549: Respondent received a one-year suspension, with six months stayed for making a false statement of fact to the court and failing to correct the false statement.
 - i. Respondent was representing a client in a civil suit, entered into an agreement with defense counsel authorizing a computer expert to search the defendants’ electronic devices pursuant to a strict discovery protocol. Relevant documents were to be delivered to the trial judge for an in-camera inspection to determine what documents may be turned over to Respondent. The expert searched the computers of one of the defendants and placed the results of his search on a disc. The expert gave the disc to Respondent, who reviewed it and determined that none of the documents would be useful for his case. Respondent never submitted the disc to the trial judge. At a pretrial conference, defense counsel asked Respondent about the results of the computer search, and Respondent indicated that there was nothing of value in the documents. Respondent denied having possession of the disc containing the documents. After the conference, Respondent telephoned the expert and left a

voicemail essentially admitting that he had lied to the court about having the disc. Respondent then returned the disc to the expert. Respondent repeated multiple times, both in the judge's chambers and in open court, that he had never received the disc and that he had not reviewed the documents on the disc. The expert, however, then played Respondent's voicemail for the judge.

3. Miscellaneous Issues

a. Cutting Corners

i. False notaries / forgeries (trend is public reprimand, but only if there are sufficient mitigating factors and little or no aggravating factors)

1. *Columbus Bar Assn. v. Craig*, 131 Ohio St.3d 364, 2012-Ohio-1083.
2. *Disciplinary Counsel v. Mezacapa*, 101 Ohio St.3d 156, 2004-Ohio-302.
3. *Disciplinary Counsel v. Wilson*, 142 Ohio St.3d 439, 2014-Ohio-5487.

b. Dismissals or settlements without client notice / approval

i. Rule 1.2 and Rule 1.4

1. *Lake County Bar Assn. v. Davies* 144 Ohio St.3d 558, 2015-Ohio-4904: Respondent permanently disbarred for multiple rule violations, one of which included settling a client's personal injury case without client authorization.
2. *Butler County Bar Assn. v. McGee* 142 Ohio St.3d 111, 2015-Ohio-973: Respondent received public reprimand for failing to keep clients apprised of case developments, including voluntarily dismissing included settling a client's personal injury case without client authorization.
3. *Lorain County Bar Assn. v. Nelson* 144 Ohio St.3d 414, 2015-Ohio-4337: Respondent received public reprimand for multiple violations, including voluntarily dismissing included settling a client's personal injury case without client authorization.

- c. Sex with clients (Rule 1.8(j)) / Sexual harassment (Rule 8.4(g))
 - i. *Disciplinary Counsel v. Hubbell* 144 Ohio St.3d 334, 2015-Ohio-3426: Respondent received six-month stayed suspension for soliciting a romantic relationship with a client.
 - ii. *Lake County Bar Assn. v. Mismas* 139 Ohio St.3d 346, 2014-Ohio-2483: Respondent received one year suspension (six months stayed) for sending sexually explicit text messages to a third year law student employed by him as a law clerk. These included conditioning her employment upon her performance of sexual favors.
- 4. A Lawyer's Duty to Report Misconduct (Rule 8.3)
 - a. If you possess **unprivileged** knowledge of a violation of the ORPC that raises a question as to any lawyer's **honesty, trustworthiness, or fitness as a lawyer in other respects**, you **shall** inform a disciplinary authority.
 - i. Rule 8.3(a) limits mandatory reporting to issues of honesty, trustworthiness, or fitness as a lawyer.
 - b. If you possess **unprivileged** knowledge that a judge has committed a violation of the ORCP or applicable rules of judicial conduct, you **shall** inform the appropriate authority.
 - i. Rule 8.3(b) contains no limiting qualifiers like Rule 8.3(a).
- 5. Threatening to Present Criminal Charges or Professional Misconduct Allegations to Gain Advantage (Rule 1.2(e))
 - a. A lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations **solely to obtain an advantage in a civil matter**.
 - b. Rule 8.3 vs. Rule 1.2(e): Report violations, but do it for the right reason and do it by avoiding the use of threats.
- 6. Direct Solicitation of Clients / Seminars (Rules 7.1, 7.2, and 7.3)
 - a. Direct Text Message Solicitations (Board Advisory Opinion 2013-2)

- i. Must follow requirements of Rule 7.3
- ii. E-mail / Text Message treated the same

b. Legal Seminars for Prospective Clients (Board Advisory Opinion 2015-2)

- i. Can present legal seminars to prospective clients and have law firm brochures available for prospective clients to pick up (lawyer cannot hand them out)
- ii. Lawyer should not answer client-specific questions at seminar and should direct prospective clients to make an appointment to respond to specific legal needs questions.

7. Litigation Funding for Clients (Board Advisory Opinion 2012-3)

- a. Lawyer may advise clients regarding non-recourse civil litigation financing.
- b. Lawyer must be careful to maintain independence and advise client regarding the terms of the financing.
- c. Lawyer must also realize the risks of disclosure of attorney-client confidential information. Get informed consent before providing narrative / case evaluation to litigation funding company.

8. Board of Professional Conduct Stats on Activity Recent Years

- a. The Board's largest five categories of cases:
 - i. Neglect (29%)
 - ii. IOLTA / Trust Account (12%)
 - iii. Excessive Fees (11%)
 - iv. Personal Misconduct (8%)
 - v. Practicing while under suspension (7%)

9. Disciplinary Counsel Stats on Activity

- a. Similar trends

10. IOLTA / Malpractice Certificate of Coverage / Rule 1.4 Waivers

- a. Always requested when a grievance is sent for investigation

- b. Bar Counsel / ODC will charge violation even if underlying grievance is dismissed (typically an automatic public reprimand depending upon other violations, mitigation / aggravation)

11. Lack of cooperation / failure to respond

- a. Bar Counsel / ODC will charge violation even if underlying grievance is dismissed or later found to be meritless

12. Ethics Resources on the Web under Ohio Supreme Court's site:

- a. Board's Advisory Opinions (with index)
- b. Ohio Supreme Court Decisions on Ethics cases 2008 - present
**provides multiple handbooks with index and case summaries of all decisions
- c. Client File Retention Guidelines (provided)



OHIO ETHICS GUIDE

CLIENT FILE RETENTION

Board of Professional Conduct of The Supreme Court of Ohio

Client File Retention

At some point, most lawyers face the question of “**What do I do with client files that are closed and dormant?**” How long should the lawyer retain a client file? What documents in the file are required to be maintained by the lawyer? Which contents of the file belong to the client? Can the contents of the file be electronically scanned and then destroyed? What do the Rules of Professional Conduct require?

Lawyers are required to comply with a number of ethical and legal obligations related to client files and property. Applicable Rules of Professional Conduct include:

- **Prof.Cond.R. 1.1**
A lawyer shall provide competent representation.
- **Prof.Cond.R. 1.3**
A lawyer shall act with reasonable diligence and promptness.
- **Prof.Cond.R. 1.4**
A lawyer shall communicate with a client and comply promptly with all of a client’s reasonable requests for information.
- **Prof.Cond.R. 1.6**
A lawyer shall keep a client’s confidences.
- **Prof.Cond.R. 1.15**
A lawyer shall safeguard the property of the client.
- **Prof.Cond.R. 1.16(d)**
A lawyer shall, upon termination of representation, take reasonable steps to protect a client’s interests including surrendering all papers and property to which the client is entitled.

Confidentiality of Files

What must be kept confidential?

Maintaining the confidentiality of client files is a duty imposed upon lawyers by Prof.Cond.R. 1.6. An important step toward complying with this duty is the maintenance of a paper or digital filing system with access limited only to authorized personnel.¹ Confidentiality is further ensured by the requirement in Prof.Cond.R. 1.15 to identify and segregate the client file from the lawyer’s property, and from the property of other clients and third persons. Equally important, a lawyer must use “reasonable efforts to prevent the inadvertent or unauthorized disclosure” or access to a client’s file regardless of whether it is maintained in paper or digital format.²

Ohio’s Client File Retention Requirements

How long must a lawyer maintain a closed client’s file?

The Rules of Professional Conduct do not prescribe a minimum period of time for the retention of client files, nor is a lawyer required to permanently preserve all files of current or former clients.³ It is nearly impossible to establish a minimum retention period for client files that applies in all circumstances. The decision of how long to maintain a client file always lies within the professional judgment of the lawyer, and may be influenced by the nature and subject matter of the representation, relevant statutes of limitations, and potential malpractice issues.

NOTE: Ethics Guides address subjects on which the staff of the Board of Professional Conduct receives frequent inquiries from the Ohio bench and bar. The Ethics Guides provide nonbinding advice from the staff of the Board of Professional Conduct and do not reflect the views or opinions of the Board of Professional Conduct, commissioners of the Board, or the Supreme Court of Ohio.

However, lawyers should always be mindful of two time periods for document retention required by the Rules of Professional Conduct:

- The notice signed by the client stating that the lawyer does not maintain liability insurance must be kept for *five years* after termination of representation (**Prof.Cond.R. 1.4**); and
- IOLTA/trust account records shall be kept by lawyer for *seven years* after termination of representation (**Prof.Cond.R. 1.15**).

Despite the lack of minimum file retention requirements in Ohio, other jurisdictions suggest client file retention periods that run concurrently with IOLTA/trust account recordkeeping requirements. In these situations, a lawyer maintains both the required trust account and financial records and the underlying client file for the entire IOLTA retention period, *i.e.* seven years.

Although maintaining client files for the duration of the IOLTA retention period may be appropriate in many cases, certain client matters may require a longer or possibly an indefinite period of retention. For example, files related to minors, probate matters, estate planning, tax, criminal law, corporate formation, business entities and transactional matters should be retained until the files no longer serve a useful purpose to the current or former client. Consequently, a careful and particularized review of each client file, and the establishment of a specific file retention period for the file, may be necessary with regard to some matters. See also *Client File Retention Policy*, page 4.

What are Client Papers and Property?

Certain documents in a client file are subject to surrender at the request of the client. Client property traditionally includes documents provided to the lawyer by the client.⁴ Although Prof.Cond.R. 1.16(d) applies to a situation in which the representation of a client is terminated prior to completion, whether by the client or the lawyer, the rule's definition of "client papers and property" can provide guidance useful in the context of client file retention. The rule states

that "client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."⁵

The Board also has further held that "papers and property to which the client is entitled" to receive includes, but is not limited to materials acquired or prepared for the purpose of representing the client and other materials that might prove beneficial to the client, such as significant correspondence, investigatory documents, reports for which the client has paid, and filed or unfiled pleadings and briefs.⁶

Are a Lawyer's Notes and Related Documents Considered Client Property?

A client is not entitled to all materials possessed by the lawyer in the client file, such as the lawyer's work product. However, the lawyer's ethical obligations may "give [] rise to an entitlement to those materials that would likely harm the client's interest if not provided."⁷ For example, a lawyer's notes regarding facts about the client's case, as well as any notes regarding legal theories, strategies, and analysis, may be reasonably necessary to the client's representation.⁸

Among the items in a client file that may not be items reasonably necessary to a client's representation and thus not client files or papers are:

- ① A lawyer's notes "to himself or herself regarding passing thoughts, ideas, impressions, or questions will probably not be items reasonably necessary to a client's representation;"⁹
- ② A lawyer's notes, research, firm documents, internal memoranda generated for a lawyer's own purposes;¹⁰ and
- ③ "Internal office management memoranda such as personnel assignments or conflicts of interest checks."¹¹

Client File Retention Policy

A lawyer should adopt and consistently follow a client file retention policy. Such a policy should meet the needs of the lawyer's practice and comply with the Rules of Professional Conduct. A retention policy should include the step-by-step details necessary for the lawyer to close and store the client file, transfer the file to the client, a third party or subsequent lawyers, and eventually destroy the file. The policy also should address document review processes and procedures, IOLTA records, backup and archival procedures of digital and paper documents, the designation and duties of a firm client file custodian, and the creation of a destroyed client file register.

In developing a retention policy, a lawyer should consider the nature of his or her practice and the types of client materials that come into his or her possession. A different retention period may be required for each area of the lawyer's practice. For example, a corporate practice may require the retention of closed files for the life of the corporation; a collections practice may require a retention period until a judgment can no longer be revived; and a practice that includes cases involving minors may require retention beyond the age of majority. The separate retention period established for each practice area or matter type should be described in the firm's retention policy.

Even if a lawyer concentrates his or her practice in a single area of the law, the retention policy may need to distinguish between different case types within that area of practice. For example, a lawyer practicing domestic relations law would likely need to establish a longer file retention period for divorce cases involving minor children compared to the dissolution of a marriage with no children retention period until a judgment can no longer be revived; and a practice that includes cases involving minors may require retention beyond the age of majority. The separate retention period established for each practice area or matter type should be described in the firm's retention policy.

Notice to Clients

At the beginning of the representation, the lawyer should notify the client, in writing, of the general provisions of the firm's file retention policy. This is best accomplished through a statement in the initial engagement letter or fee agreement explaining when the file will be returned to the client. It is also acceptable and strongly advised that the lawyer provide the client with copies of correspondence, pleadings, deposition transcripts and expert reports during the representation to keep the client reasonably informed as well as to comply with requests for information as required by Prof.Cond.R. 1.4(a)(3)-(4).¹² The release of materials to the client during representation does not relieve the lawyer of obligations to maintain a complete client file or to turn over documents upon request.

The following is a sample statement in an initial engagement letter, regarding the final disposition of the client's file:

The firm will maintain your file for _____ years after the date of the file closing letter. After that date, the file and all of its contents will be permanently destroyed. You may request your file and all of its contents at any time before the date of destruction.

The closing letter at the conclusion of representation should include a recitation of the firm's file retention policy and the date when the file will be destroyed. The letter should allow the client a reasonable period of time to request a copy of his or her file before it is destroyed.

The file closing letter may contain language similar to the following:

Under the firm's file retention and destruction policy, your file will be kept for _____ months/years from the above date after which time the file will be permanently destroyed. You may retrieve your file and its contents at any time prior to the date of destruction.

A file retention policy, explained in both the initial engagement and file closing letters, gives the client sufficient notice of the length of time the file will be retained and that it may not be kept indefinitely by the lawyer. A retention period for the client file should take into consideration the statute of limitations to bring claims against the lawyer or any retention period required by the lawyer's malpractice carrier. Special attention should also be given to the Ohio's discovery rule and its application to legal malpractice matters when establishing a file retention policy.¹³

A retention policy may still be adopted even after lawyer has been in practice for a significant period of time. When implementing a policy after accumulating files for years or even decades, the lawyer should set a date for implementation and draft a letter to current and former clients detailing the retention policy, dates for file destruction, and the time period the client may request and obtain their file.

Closing and Transmittal of the Client File

A lawyer is required to take reasonable steps to protect the client's interest when a client file is closed at the end of representation.¹⁴ This duty applies regardless of the reason for the termination of the representation.

A lawyer should take certain steps when closing a client file:

- 1 Determine that the matter has concluded (*e.g.*, file contains a dismissal entry, satisfaction of judgment, lease termination, etc.) and personally inventory the file to determine its contents;
- 2 Determine which documents the client is entitled to receive;
- 3 Determine whether the file contains other client property, such as, items provided by the client and original documents: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, cash, bonds, negotiable instruments, deeds, official corporate or other business and financial records, and settlement agreements produced during the representation; and
- 4 Cull, at the lawyer's discretion, publicly available documents such as pleadings and briefs, hard copies of transcripts available digitally, and work product (*e.g.*, internal firm correspondence, drafts of documents, and lawyer's notes.)

When the client file is transferred to the client at the end of representation, a letter listing the general contents of the file should be prepared with a receipt to be signed by the client. Clients should be encouraged to pick up the file from the lawyer's office whenever possible. A lawyer should maintain a copy of the signed receipt with his or her copy of the client file. Files mailed at the client's direction should be sent by certified mail. If the client directs the lawyer to send the file to a third party or another lawyer, the request should be made in writing with a signed release to transfer the file. If the location of the client is generally unknown, it is advisable to withhold all original documents or client papers for transmittal until the client's address is confirmed or the client contacts the lawyer. A lawyer may not charge the

client for providing the file or making copies of the file.¹⁵ Charging a client a separate fee to store his/her file during any retention period is discouraged unless the expense was previously agreed upon in writing.¹⁶

Destruction of Retained Files

A file may be destroyed at any time with the client's consent. However, it is a best practice for a lawyer to retain either a paper or scanned copy of the file for the duration of the firm's file retention period. Even if the client previously has been advised of the file retention period, it is a best practice to send a final file destruction notice to the client before any client files are destroyed.

The file destruction notice should be sent to the last known address of the client. A lawyer is required to take reasonable steps, but not extraordinary measures, to locate missing clients.¹⁷ For example, contacting known family members, placing a notice in a newspaper of general circulation, or a search of commonly used electronic databases, social media, or the internet are considered reasonable efforts to locate a client. The lawyer should document all efforts undertaken to locate the client.

Lawyers are not required to send a file destruction notice by certified mail, but unique circumstances may warrant the use of this method. For example, the use of certified mail may be prudent when a client has made contact with the firm requesting to pick up a copy of the file prior to its destruction, but has failed to do so after a reasonable period of time.

A file destruction notice should inform the client when the file will be destroyed:

You are advised that your file will be destroyed any time after _____ pursuant to the file closing letter dated _____. You may request the file at any time before that date.

Each file that is scheduled to be destroyed should be reviewed again by the lawyer. A lawyer should use care not to destroy or discard information that the "lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired."¹⁸ This will require a lawyer to consider all relevant statutes of limitations, substantive law, and the nature of the client's case before destroying the client's file. If a client cannot be located, but the file contains property owned by the client, it should be "segregated and preserved."¹⁹

Although the Rules of Professional Conduct do not prescribe any particular method for the destruction of client files, a lawyer is obligated to maintain client confidentiality even after the representation terminates, including when disposing of a client's file.²⁰ Cross-hatch shredding or incineration of closed files are recommended methods of destruction of client files. If third party vendors are contracted to destroy records, the lawyer is primarily responsible to ensure the vendor uses methods that minimize the risk of disclosure of confidential information. Destruction of email and other digital records also requires the use of technologically secure methods to preserve confidentiality. Lastly, it is recommended that physical hard drives be wiped pursuant to National Institute of Standards and Technology guidelines prior to resale or disposal of electronic devices.²¹

After a file is destroyed, a lawyer should maintain a permanent record of a "destroyed client file register" in either paper form or an electronic database organized by client and matter number that includes:

- 1 The date of the opening and closing of the file;
- 2 The date of the termination of the representation;
- 3 A copy of the letter to the client notifying him or her of the pending destruction of the file;
- 4 The name of the lawyer that reviewed the file at closing, prior to destruction, and authorized the destruction; and

- 5 Receipt for a file transferred to the client or a subsequent lawyer at the end of representation.

Electronic Correspondence

Email messages constitute papers or property to which the client is entitled under Prof.Cond.R. 1.16(d). Like other forms of client papers and property, a lawyer's ethical obligation to retain and safeguard materials relating to the representation of a client depends on the facts and circumstances of each representation.²² A lawyer should retain emails that have a substantive impact upon the client's future representation. For example, a lawyer should retain an email that communicates and evaluates a settlement offer from an insurance company, but may discard a nonsubstantive email confirming a meeting or providing directions to a deposition.²³

The retention and maintenance of client related emails should be incorporated into the firm's file retention policy. A lawyer is responsible for following the firm's email policy and understanding the underlying technology that creates and stores the emails.²⁴ Failure to do so may cause the inadvertent loss of important lawyer-client communications that adversely affect the client's future legal needs. Consequently, a lawyer should undertake steps to collect and store emails by client and matter to ensure they are physically or electronically associated with the client file.

Digital Media and "Cloud" Storage of Client Files

As law firms adopt digital records as the primary method for producing and storing client papers and files, lawyers must ensure client information is securely stored. Lawyers who continue to handle paper documents may consider digital scanning as an alternative to traditional file storage methods. The Rules of Professional Conduct do not prohibit the scanning and simultaneous destruction of paper documents; however, there are instances when original paper records may constitute part of the client's file and will still need to be maintained. Client property or originals of legally significant documents in paper form should never be destroyed after scanning, and should be returned to the client.

When using technology a lawyer is required to use the requisite "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" including making decisions concerning the maintenance of digital client files.²⁵ The dual application of Prof.Cond.R. 1.6 and 1.15 requires that any internal or external digital file storage method employed by a lawyer must be secure, and that reasonable measures be taken to protect the confidentiality and security of the client property.

"Cloud" File Storage

Although not required to do so, a lawyer should inform clients regarding the use of "cloud" storage of all or part of the client's file.²⁶ Some clients may have legitimate concerns about the level of security employed by vendors selected by the lawyer. A lawyer must exercise due diligence in selecting a vendor that the lawyer has determined will provide services consistent with the lawyer's ethical obligations. Outside service providers hired for "cloud" storage of client files are considered nonlawyer assistants under Prof. Cond.R. 5.3(a), thus a lawyer must use reasonable efforts to ensure that a vendor's "conduct is compatible with the professional obligations of the lawyer."²⁷

The ABA has concluded that the Model Rules of Professional Conduct allow for the outsourcing of legal and nonlegal support services, if the lawyer ensures compliance with the rules relating to competency, confidentiality, and supervision.²⁸ A lawyer has a supervisory obligation to ensure compliance with professional ethics standards even if the lawyer has an indirect affiliation with the selected service.²⁹

The use of "cloud" storage systems should prompt the lawyer to consider a vendor's compliance with the same confidentiality standards set forth in Prof.Cond.R. 1.6. In selecting a vendor, the lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision or monitoring."³⁰ Consequently, a lawyer using the services of an outside service provider for digital "cloud" storage is required to undertake reasonable efforts to prevent the unauthorized disclosure of client information.³¹ This may require a reasonable investigation by the lawyer of the methods employed by the third-party vendor. Factors to be considered in

determining the reasonableness of the lawyer's efforts to safeguard information include, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, and the cost of employing additional safeguards.³²

At a minimum, the lawyer employing “cloud” storage methods should ensure that:

- 1 The vendor understands the lawyer's obligation to keep the information confidential;
- 2 The vendor is itself obligated to keep the information confidential; and
- 3 Reasonable measures are employed by the vendor to preserve the confidentiality of the files.

Client Files and Succession Planning

A lawyer's duty of competent representation includes safeguarding the client's interests in the event of the lawyer's death, disability, impairment, or incapacity.³³ This can be ensured through a firm succession plan that contains explicit instructions to a named successor lawyer for the handling of open client files and matters, as well as closed client files maintained pursuant to a file retention policy.³⁴ The instructions should include the location of the client files and, in the event the files are maintained electronically either locally or in the “cloud,” any necessary passwords or login information.

The retirement or resignation of a lawyer can also present client file issues if the lawyer has never implemented an adequate file retention and destruction schedule. A lawyer considering retirement or resignation should take certain steps to ensure the proper transfer of the files to a successor lawyer, or begin the process of inventorying and disposing of client files. The inventorying process should follow the aforementioned steps in this guide, including using reasonable efforts to contact former clients prior to the destruction of files.

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¹ See RESTATEMENT OF LAW III: THE LAW GOVERNING LAWYERS, Sec. 46.

² Prof.Cond.R. 1.6(c); “Reasonable” when used in relation to conduct by a lawyer means conduct of a reasonably prudent and competent lawyer. Prof.Cond.R. 1.0(i).

³ See ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1989).

⁴ *Sacksteder v. Senny*, 2nd Dist., Montgomery, 25982, 2014-Ohio-2678 (June 20, 2014); ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 471 (2015).

⁵ See *supra* n.2 for definition of “reasonable.”

⁶ Adv. Op. 1992-8.

⁷ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015).

⁸ *Id.*

⁹ Adv. Op. 2010-2; ABA Comm. on Ethics & Prof'l Responsibility, Informal Opinion 1376 (1977).

¹⁰ ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (interpreting former Model Code of Professional Responsibility DR 9-102(B)(4).)

¹¹ Adv. Op. 2010-2 (interpreting Prof. Cond. R. 1.16(d).)

¹² *Id.*

¹³ *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 528 N.E.2d 941; *Zimmie v. Calfee* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398.

¹⁴ Prof.Cond.R. 1.16(d).

¹⁵ Prof.Cond.R. 1.16, Comment [8A]; Adv. Op. 1992-8.

¹⁶ Prof.Cond.R. 1.5(b).

¹⁷ See *supra* n.3.

¹⁸ *Id.*

¹⁹ GEORGE CUNNINGHAM, JOHN MONTAÑA, THE LAWYERS' GUIDE TO RECORDS MANAGEMENT AND RETENTION, ABA (2006) at 117.

²⁰ Prof.Cond.R. 1.6. See also ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384; *Kala v. Aluminum Smelting & Ref. Co.*, 81 Ohio St.3d 1, 1998-Ohio-439 (1998); *Disciplinary Counsel v. Shaver*, 121 Ohio St.3d 393, 2009-Ohio-1385 (respondent disciplined for not properly disposing of client files and records in violation of Prof.Cond.R. 1.6(a) and 1.9(c)(2)); *Disciplinary Counsel v. Robinson*, 126 Ohio St.3d 371, 2010-Ohio-3829.

²¹ NIST Special Publication 880-88 Rev. 1.

²² See *supra* n.7.

²³ *Id.*

²⁴ Prof.Cond.R. 1.1, Comment [8].

²⁵ *Id.*

²⁶ See Prof.Cond.R. 1.4(a)(2).

²⁷ Prof.Cond.R. 5.3(b).

²⁸ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008).

²⁹ *Id.*; Adv. Op. 2009-06.

³⁰ Prof.Cond.R. 1.6, Comment [18].

³¹ See Prof.Cond.R. 5.3

³² See *supra* n.30.

³³ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 369 (1992).

³⁴ *Id.*