

SOME BASIC ETHICS ESSENTIALS FOR OHIO'S NEW LAWYERS

Here are some *basic* ethics essentials for Ohio's new (and for that matter, veteran) lawyers. The rules that are referenced are not printed in their entirety and the coverage of these issues are not exhaustive. This is a *basic* look at these topics. But you already knew that.

1. Know the Ohio Rules of Professional Conduct and respect them. Failure to comply with a rule is a basis for invoking the disciplinary process.

2. Rule 1.1: Competence. A lawyer shall provide competent representation to his or her client. Do not take on a case unless you are competent to handle it, or you will spend the time and effort to become competent to handle the case.

3. Rule 1.2: Scope of Representation And Allocation of Authority Between Client & Lawyer. It is strongly recommended that you have a written contract for each of your client's and for each matter in which you represent a client. Generally, a good non-contingent fee contract will:

- A. Be in writing;
- B. Clearly identify the parties to the contract;
- C. Clearly state the scope of representation;
- D. Clearly state how the lawyer's fees and expenses will be calculated;
- E. Clearly state when the fees and expenses will be due;
- F. Clearly place reasonable, legal and fair restrictions on the client, for example, the Client will provide the Lawyer will full cooperation at all times;
- G. Tell the client to promptly notify the lawyer in writing of any change in the client's address, phone number, email or other important contact information;
- H. Encourage the client to promptly tell you if the client is not satisfied with your services.

A lawyer shall abide by the client's decisions regarding the objectives of the representation so long as they are legal.

Practice Pointer: The following is a false statement: A lawyer's primary ethical duty is always to his or her client. This statement is false because a lawyer's primary ethical duty is *never* to his or her client. It is to the law, such as the law of legal ethics.

A lawyer shall consult with his or her client as to how the objectives of the representation will be pursued.

A lawyer shall abide by the client's decision as to whether to settle a case

A lawyer shall not engage in illegal or fraudulent conduct and shall not counsel or assist the client to do so. But see, *Anatomy of a Murder*. Both the book and the movie take a different approach to this rule. The book, written by a former Justice of the Michigan Supreme Court is very good and the movie is outstanding. The courtroom contest, in the movie, is between a prosecutor played by George C. Scott and a defense lawyer played by Jimmy Stewart. In both the book and the movie, the defense lawyer gives his potential client "The Lecture," which is an outline of what the potential client must say to have a chance at winning the case. If you have not seen the movie, you are missing something special.

Also see just about every episode of *Law and Order*, when the Assistant District Attorney meets with the criminal defendant and his or her lawyer. Often, the client will lie to the ADA. The ADA will then say something, and the defendant's lawyer will nod to his or her client signifying it is time to tell the truth. Always remember, most "lawyer" movies, plays, TV and most books are fantasy, not reality. Many of your clients will probably not understand this distinction. It is your job to explain reality to them.

4. Rule 1.3: Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

5. Rule 1.4. Communication. A lawyer shall keep the client reasonably informed about the status of the client's case and shall promptly inform the client whenever the client's informed consent is needed. Informed consent is defined in Rule 1.0 (f).

A lawyer shall inform the client if the lawyer does not maintain malpractice insurance of at least \$100,000 per occurrence.

6. Rule 1.5: Fees & Expenses. A lawyer shall not charge an illegal or clearly excessive fee.

Flat fees, fees that are due in full at the start of the case, earned upon receipt fees and similar fees, whatever they might be called, are disfavored in Ohio. This rule addresses how you may and may not use such fees.

The reasonableness of a fee should be determined by the factors set out in Rule 1.5(a).

Except for contingent fees, there is no Ohio legal ethics requirement that a lawyer's fee agreement be in writing. Nonetheless, I strongly suggest that you have a separate written fee agreement for each matter in which you represent a client. If you represent client X in 10 different matters, I strongly suggest that you have 10 separate written fee agreements.

Practice Pointer: Your fee agreement should be written in plain, modern day English. Your fee agreement should look physically good. It does not need to be fancy, but it should not look as if it was scribbled out by a chicken that was high on crack. Mr. Leslie Chow, in the movie *Hangover III* raised chickens. All he fed them was crack, and

chicken. You do not want your contract to look as if one of Mr. Chow's chickens wrote it down on paper. If somebody needs to read your contract in a legal ethics matter, or other legal matter, the Chow Chicken Contract will cause you to lose credibility right off the bat. Please don't ever use this kind of contract.

There are specific requirements for contingent fee contracts, and they are contained in Rule 1.5. There are also specific requirements for lawyers, who are not in the same firm share legal fees. Again, these are in Rule 1.5.

Disputes between lawyers under Rule 1.5 shall be decided per Rule 1.5(f). It is questionable whether 1.5 (f) is constitutional under the Federal and Ohio Constitutions. But that is a discussion for another day.

7. Rule 1.6: Confidentiality. A lawyer shall not reveal information relating to the representation of a client unless the lawyer has the client's express or implied authority to do so. Strive to maintain the highest confidentiality standards that you can.

There is a crime-fraud exception to this rule, and there are other exceptions to this rule. They are discussed in Rule 1.6.

A lawyer shall make reasonable attempts to prevent the inadvertent or unauthorized disclosure of client information.

A. Notice of confidentiality statements in emails.

B. Notice of confidentiality statements on certain standard documents.

C. If you don't know how to keep your mouth shut when dealing with client confidentiality, immediately learn to do so.

Practice Pointer: In the movie *The Firm*, the character played by Tom Cruise (a young lawyer who has been working at a Memphis firm that was secretly the sole representative of a major Chicago Mafia Family) meets with the Family Boss, played by Paul Sorvino, and his Family Consular played by Joe "Jelly" Viterelli. The Cruise character tells them they don't need to kill him because it is illegal for him to say anything about their business to anybody because of the attorney client privilege. The Mob Boss agrees. The Cruise character lives – for now. But in real life, as we have seen, there are exceptions to Rule 1.6, which rule is broader than the attorney client privilege, and who knows what changes in the law might happen in the future. The Firm was a superior movie, but again, it was fantasy, not reality. Don't make the mistake of thinking fantasy is reality.

8. Rules 1.7 – 1.11: Conflicts of Interest. A lawyer must be loyal to his or her client. A lawyer may not have divided loyalties, except when the clients properly waive a potential or real conflict of interest, in writing, with informed consent.

Any time you represent more than one client in a case, start thinking about the conflict of interest issue.

A lawyer shall not enter into a business transaction with an existing client or knowingly acquire an economic interest adverse to the client except as provided for by Rule 1.8(a).

Prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary rights to a client's case.

Practice Pointer: In one of the *Lincoln Lawyer* novels, The Lincoln Lawyer had his client sell her literary rights so that he could use the money she received to get paid and to help finance the defense of her case. If you have the rare case that has great public interest, you may finance the case this way provided the client gets the money and the Rule is followed. The chances of this happening in real life is probably 1 in 1,000,000 or more.

A lawyer shall not provide financial assistance to a client except in accordance with Rule 1.8 (E).

A lawyer shall not *solicit or engage in sexual activity* with a client unless a sexual relationship existed between them when the lawyer-client relationship commenced. For a contrary view, see just about every episode of *LA Law*.

9. Rule 1.13: Organization As A Client: A lawyer employed by an organization represents the organization acting through its constituents. The lawyer does not represent the constituents. Think possible conflict of interest if you elect to represent both an organization and one or more of its constituents.

Practice Pointer: Always keep the following in mind:

A. Who is your client;

B. Who is not your client; &

C. What is the scope of your representation of your client? What are you authorized to do and what are you not authorized to do?

10. Judge Judy is not a real judge and her TV program is a game show. Okay, just checking to see if you are still awake. Notwithstanding, I again remind you to distinguish between reality and fantasy. Many of your clients will probably have a difficult time making this distinction. Set realistic expectations for your clients based on the real facts and the real law, and not on a fantasy TV show, book, play or movie.

11. Rule 1.14: Client With Diminished Capacity. If you represent a client whose capacity to make adequately considered decisions in connection with your representation, check out this rule.

12. Rule 1.15: Safekeeping Funds (Money) And Property (Of A Client Or A Third Person.)

This is an especially important rule. Study it carefully. Then study it again.

A lawyer who is holding the funds of a client or a third party shall keep the money in his or her IOLTA account (Interest On Lawyer Trust Account). The lawyer shall not keep any of his or her money in the IOLTA, except for the minimum amount necessary for the sole purpose of obtaining a waiver of bank service charges on the IOLTA.

Never commingle your personal funds with those of a client or a third party except with the limited exception set forth in the rule regarding a waiver of bank fees on the lawyer's IOLTA.

All overdrafts of an IOLTA are reported by the bank to the Office of Disciplinary Counsel of the Supreme Court of Ohio. Even a 1 cent overdraft is reported.

13. Rule 1.16: Declining Or Terminating Representation. If you are going to decline or terminate representation, consult and carefully read this rule first.

Practice Pointer: If you decline to represent a potential client who you have met face to face to discuss their potential case, or if they decline to hire you, I strongly suggest you promptly send a writing to the potential client. It should contain these general points:

- A. Thank you for meeting with me on (date) at (location).
- B. This will confirm that you have **not** hired me to represent you in the above referenced matter. Therefore, I am **not** doing any work on your behalf in this matter.
- C. I strongly suggest that you **immediately** hire another lawyer to represent you in this matter.
- D. Your failure to **immediately** hire another lawyer to represent you in this matter may harm (or damage) your legal position.
- E. Please be advised that **the law places very strict time limits on when certain legal actions must be taken**. These very strict time limits are just one of the reasons why I have strongly suggested that you **immediately** hire another lawyer to represent you in this matter.
- F. Another lawyer might have knowledge and/or opinions that are different from mine.
- G. If you need help finding another lawyer to represent you in this matter, you may wish to call the (Local) Bar Association Attorney Referral Service at [phone number].
- H. If you have any questions about this letter (email), please let me know.
- I. Thank you.

If a client asks a lawyer for a copy of their file, the lawyer must provide it at the lawyer's cost, in a declining or terminating representation situation.

Some Other Basic Essentials

14. Learn how to professionally present a case. A professional presentation might be different from what you learned in law school.

- A. Make a chronological statement.
- B. Start at the beginning.
- C. Work to the middle.
- D. Then work to the end.
- E. Only state facts that are relevant to the case/matter.
- F. Be accurate, clear and brief, but not brief at the expense of accuracy and clarity.
- G. Avoid jargon. If you can't avoid jargon, immediately state, in plain English, what your jargon means.
- H. Only state your opinions after you have made an accurate, clear and brief chronological statement.
- H. If you ever tell me "A Gary The Possum Story," be advised that a little-known codicil in the Patriot Act gives me the clear legal right to terminate your life functions. Okay, I totally made that last part up. Also, never say, "I will try to tell you what this case is about, but to really do that I would need two or three hours." If you need two to three hours to brief somebody about a case, you should probably check out another profession.

15. Learn how to talk in a professional fashion. Talking in a professional fashion may be very different from what you learned in law school.

- A. Speak in short sentences.
- B. Have only one thought or fact per sentence.
- C. Use plain English.
- D. Be direct.
- E. Be to the point.
- F. If asked a question, give a direct response to that specific question.
- G. If confronted with an opinion, give a direct response to that specific opinion.
- H. Do not "Gary The Possum," around.

16. Do not talk on the phone, even a hands-free phone, when driving, unless you are talking about a simple administrative matter. You need to be able to concentrate on phone calls involving clients and cases and be able to take notes of the conversation.

17. Don't talk about clients and cases when other people, not authorized to hear what you are saying, are within earshot. Go someplace where you have privacy to talk. This includes talking on your cell phone about cases and clients. Just because you are not talking to the person at the table next to yours at the restaurant, does not mean that person cannot hear every word you are saying.

18. Regarding the internet and social media, here are some guidelines.

A. The internet and social media are not a talisman in whose presence the Ohio Rules of Professional Conduct fade away and disappear. The rules still apply. The last sentence is important, so it shall be repeated: The rules still apply.

B. You are responsible for all postings of every kind that you make on the Internet and on social media.

C. Never use fraud to get into the restricted area of social media.

D. Only go to a restricted area of social media if you have gotten there honestly and in accordance with the rules.

19. The Ohio Rules of Professional Conduct can apply 24/7 to professional and non-professional situations. See, Preamble #3.

20. Don't stop, until you get enough. I Keed! I Keed! I have no idea what that means. But it sounds pretty good. Let's go with this, instead. Your primary ethical responsibility in a case is *never* to your client. Your primary ethical responsibility in a case is *always* to the law, particularly the Ohio Rules of Professional Conduct. I said this on page one, so I know that all of you were already aware of this basic ethics essential. But it is important so I wanted to say it again.

21. Legal ethics defenses and ideas that often don't work:

A. I did it to help my client;

B. Once I explain that what I did was reasonable, all will be forgiven;

D. The Office of Disciplinary Counsel, that is investigating or prosecuting me, is my friend;

E. The Certified Grievance Committee, that is investigating or prosecuting me, is my friend;

F. Nobody really wants to prosecute me;

G. I will handle the defense of my legal ethics case on my own and will only hire a lawyer if things get really bad.

H. [Take this one with several grains (or truck loads) of salt because I represent clients in legal ethics cases] I cannot afford to hire a lawyer to represent me in my legal ethics case when the proper questions might be “can I afford not to hire a lawyer?”

I. I have been doing it this way for 15 years, or everybody has always done it this way.

I will also talk about How To Handle A Legal Ethics Problem That Arises In Your Practice, and whether it is ethical to root for The University of Michigan (it is, but not if they are playing THE Ohio State University.)

I hope this presentation is of some help. Please let me know if you have comments (good, bad or ugly) about my presentation.

Good luck to you all!