



Professionalism, Ethics, & Substance Abuse Seminar

Ethics

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OHIO LEGAL ETHICS: AN OVERVIEW¹

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1. INTRODUCTION:

The law of lawyering affects everything that a lawyer does from the first day of practice to the last. Viewed in practical terms, this body of law is more important to lawyers than any other subject ***. Cramton & Koniak, Rule, Story, & Commitment in the Teaching of Legal Ethics, 38 William & Mary Law Review (1996), 145, 158.

Ohio's legal ethics system is (basically) divided into two parts. The first part is found in Rule V of the Rules for the Government of the Bar of Ohio. This rule sets forth the structure of the system and the procedural rules it uses.

The second part is found in the Ohio Rules of Professional Conduct, effective February 1, 2007. These are based on the ABA's Model Rules of Professional Conduct, and represent significant change from the prior Ohio Code of Professional Conduct, effective October 1, 1970, and frequently amended between 1970 and 2007.

2. OHIO'S DISCIPLINARY SYSTEM: STRUCTURE – A SUMMARY:

The Ohio Constitution, Article IV, Section 2(B)(1)(g) provides the Ohio Supreme Court with jurisdiction over, "admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law."

¹ Due to limitations of time and space, the information contained in this presentation is necessarily in abbreviated form. This presentation is not intended to serve as a substitution for a consultation with a qualified lawyer.

THE BOARD

Rule V of the Supreme Court Rules for the Government of the Bar of Ohio establishes Ohio's disciplinary system and procedure. Rule V creates The Board of Commissioners on Grievances and Discipline of the Supreme Court. The Board is comprised of 28 members, 17 of whom are attorneys admitted to practice law in Ohio, seven are active or voluntarily retired judges of the State of Ohio and four are non-attorneys. The Board must meet in Columbus at least six times each year.

The Board has the power to receive evidence, preserve the record, make findings and submit recommendations to the Supreme Court of Ohio:

1. Concerning complaints of misconduct that are alleged to have been committed by a judge, an attorney, a person under suspension from the practice of law, or a person on probation.

2. Concerning the mental illness of any judge or attorney.

3. Relating to petitions for reinstatement as an attorney.

4. Relating to conduct by a judge or attorney affecting any proceeding under Gov. Bar R. V, where the acts alleged constitute a contempt of the Supreme Court or a breach of Gov. Bar R. V but do not take place in the presence of the Supreme Court. This power can only be exercised when the Supreme Court itself refers a specific matter to the Board.

The Board also has the power to issue informal, non-binding advisory opinions in response to prospective or hypothetical questions directed to the Board regarding:

1. The Supreme Court Rules for the Government of the Bar of Ohio.
2. The Supreme Court Rules for the Government of the Judiciary of Ohio.
3. The Rules of Professional Responsibility.
4. The Code of Judicial Conduct.
5. The Attorney's Oath of Office.

DISCIPLINARY COUNSEL

Gov. Bar R. V Section 3(B) creates the position of Disciplinary Counsel. Disciplinary Counsel is appointed by the Board with the approval of the Supreme Court. The Disciplinary Counsel serves a four year term and can only be removed "for just cause." The Disciplinary Counsel:

*** shall investigate allegations of misconduct by judges or attorneys and allegations of mental illness affecting judges or attorneys, initiate complaints as a result of investigations under the provisions of this rule and certify bar counsel designated by Certified Grievance Committees.

The Disciplinary Counsel works in The Office of Disciplinary Counsel, which is often referred to as ODC.

CERTIFIED GRIEVANCE COMMITTEES

Gov. Bar R. V Section 3(C) creates Certified Grievance Committees. Certified Grievance Committees:

1. Must consist of no fewer than 15 persons, a majority of which shall be attorneys licensed to practice law in Ohio, and at least three members or 10% of the committee, whichever is greater, must be lay people, that is, not licensed to practice in any jurisdiction.

2. Must meet at least once every third month.
3. Must maintain a full-time permanent office that is staffed by at least one permanent employee.
4. Must designate bar counsel to supervise the receipt, investigation and prosecution of grievances.
5. Must maintain permanent files and records.
6. Must establish written procedures for the processing of grievances that comply with the standard regulations promulgated by the Board.

Certified Grievance Committees have the power to:

*** investigate allegations of misconduct by judges or attorneys and initiate complaints as a result of investigations under the provisions of these rules.

Certified Grievance Committees may adopt and utilize written procedures for handling allegations of client dissatisfaction that do not constitute disciplinary violations.

These include:

1. Mediation.
2. Office practice monitoring.
3. ADR methods.

3. OHIO'S DISCIPLINARY PROCESS – A SUMMARY:

1. A grievance is filed with Disciplinary Counsel or a Certified Grievance Committee, i.e. a Prosecuting Authority, (PA).
2. The Prosecuting Authority investigates the matter.

A. The attorney under investigation is given an opportunity to respond.

3. The Prosecuting Authority makes a decision to dismiss the matter or to prosecute the matter.

A. If the decision is made not to prosecute, the complaining party and the target of the investigation are notified in writing. The complaining party may appeal the decision of a Certified Grievance Committee not to prosecute.

B. If the decision is made to prosecute the matter, a Probable Cause Complaint is filed with the Board.

4. A Probable Cause Complaint is filed. The Board assigns three of its members to review the complaint to determine if there is probable cause to believe that an ethical violation occurred. The complaint shall include any response filed with the PA by the target of the investigation.

A. If probable cause is found, the entire matter becomes public. Until such a finding, the process is confidential.

5. If probable cause is found, the Board appoints three different members to a Hearing (or Trial) Panel. One member serves as Chair. A trial date is set and discovery is conducted pursuant to the Ohio Rules of Civil Procedure.

6. A trial takes place with the three member Panel sitting as both judge and jury. The Ohio Rules of Evidence and The Ohio Rules of Civil Procedure generally apply. The burden is on the Prosecuting Authority to prove its case by clear and convincing evidence.

7. The Panel may:

A. Find no misconduct and dismiss the case.

B. Find no misconduct and refer the matter to the full Board.

C. Find misconduct, recommend a sanction and refer the matter to the full Board.

8. The Board then reviews any matter that has been referred to it. The Board may find no misconduct, or find misconduct and recommend a sanction.

9. The matter then proceeds to the Ohio Supreme Court which renders a final decision in the matter.

THE BOARD'S GUIDELINES FOR IMPOSING LAWYER SANCTIONS

Section 10 of the Rules & Regulations Governing Procedures on Complaints & Hearings before the Board:

A. Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors.

B. In determining the appropriate sanction, the Board shall consider all relevant factors; precedent established by the Supreme Court of Ohio; and the following:

1. Aggravation. The following shall not control the Board's discretion, but may be considered in favor of recommending a more severe sanction:

a) prior disciplinary offenses;

- b) dishonest or selfish motive;
- c) a pattern of misconduct;
- d) multiple offenses;
- e) lack of cooperation in the disciplinary process;
- f) submission of false evidence, false statements, or other

deceptive practices during the disciplinary process;

- g) refusal to acknowledge wrongful nature of conduct;
- h) vulnerability of and resulting harm to victims of misconduct;
- i) failure to make restitution.

2. Mitigation. The following shall not control the Board's discretion, but may be considered in favor of recommending a less severe sanction.

- a) absence of a prior disciplinary record;
- b) absence of a dishonest or selfish motive;
- c) timely good faith effort to make restitution or to rectify

consequences of misconduct;

- d) full and free disclosure to disciplinary Board or cooperative

attitude toward proceedings;

- e) character or reputation;
- f) imposition of other penalties or sanctions;

- g) chemical dependency or mental disability when there has been

all of the following:

(i) a diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor;

(ii) a determination that the chemical dependency or mental disability contributed to the cause the misconduct;

(iii) in the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment;

(iv) a prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.

h) other interim rehabilitation.

**OTHER SIGNIFICANT ASPECTS OF
OHIO'S DISCIPLINARY SYSTEM AND PROCESS: RESPECTFUL CRITICISMS**

1. Rights of Attorney Accused of Ethical Violation:

A. Right to Counsel. No right to counsel in disciplinary cases.

2. The system sometimes calls upon non-lawyers to make legal decisions.

3. The system does not distinguish between "felony" and "misdemeanor" cases, and as a result, easy "misdemeanor" cases tend to be pursued while more difficult "felony" cases tend to be avoided.

4. The system tends to target lawyers who lack the means to vigorously defend themselves and tends to shy away from prosecuting lawyers who can and will mount a vigorous (and well-funded) defense.

5. The system seems to contain several lawyers who do not regularly engage in the active, clinical practice of law. As a result, they tend to have an “ivy covered walls” view of the practice, and the legal system, and they seem to have a low “street IQ”.

6. Some members of some certified grievance committees totally lack any expertise in the field of legal ethics.

7. The system spends too many resources prosecuting lawyers and not enough resources helping lawyers with manageable problems.

8. Some members of the Board of Commissioners sometimes see themselves not as neutral judicial officers, but as investigators empowered to “get to the bottom of things.” At least one lay person member of the Board has publicly said that she does not feel compelled to follow the law when making decisions on cases that are before the Board.

9. The system is sometimes used to try to improve the public’s image of the legal profession.

10. The decisions of the Board and the Supreme Court often fail to contain a clear identification of the ORPC or other law that has been violated, and an explanation and analysis of how the ORPC or other law was violated.

11. The decisions of the Board and the Supreme Court sometimes fail to contain a clear identification of the relevant aggravating and mitigating circumstances, and an explanation and analysis of how those circumstances were applied with regard to sanctions.

12. The rules make the use of Alternative Dispute Resolution methods very difficult.

13. In my opinion, perhaps the most serious problem with the system is the lack of guidance it gives to prosecuting authorities as to when not to prosecute lawyers who have violated an ethical regulation. I propose this Preamble to the Ohio Rules of Professional Conduct to address the problem:

PROPOSED PREAMBLE TO THE OHIO RULES OF PROFESSIONAL CONDUCT

This Preamble is intended to be used as a guide for ethics prosecutors who are charged with the responsibility of enforcing Ohio's legal ethics rules.

The decision to institute formal legal ethics proceedings should be the responsibility of the ethics prosecutor.

Prosecutors should only pursue a formal ethics prosecution if, after reviewing all of the relevant facts, including all aggravating and all mitigating circumstances, and that in light of good judgment and common sense, the prosecutor believes that the potential target of a formal ethics prosecution represents a probable danger to clients, and/or the public, and/or the legal system.

Consistent with the above, prosecutors are not obligated to pursue every possible case, especially if the authorized punishment is likely to be disproportionate to the offense or offenses charged.

4. THE OHIO RULES OF PROFESSIONAL CONDUCT (EFFECTIVE 2/1/07):

The Ohio Rules of Professional Conduct are divided into these 10 categories:

- 0.0 Preamble**
- 1.0 Terminology**
- 1.1 – 1.18 Client – Lawyer Relationship**
- 2.1 – 2.4 Counselor**
- 3.1 – 3.9 Advocate**
- 4.1 – 4.4 Transactions With Persons Other Than Clients**
- 5.1 – 5.7 Law Firms and Associations**
- 6.1 – 6.5 Public Service**
- 7.1 – 7.6 Information About Legal Services**
- 8.1 – 8.5 Maintaining The Integrity Of The Profession**

Every lawyer in Ohio should have a solid command of these 10 categories, and a working knowledge of the 58 substantive rules that fall within them.

Given the complexity of the rules, it is recommended that every lawyer in Ohio read the Ohio Rules of Professional Conduct, from cover-to-cover, at least once each year, and once every other month, if reasonably possible.

5. VIGNETTES:²

1. Meritorious Claims And Contentions:

Facts: A negligently drives his car into B, a pedestrian. A admits to the police that his negligence was the sole cause of the accident. Two independent witnesses give the police the same information. B sues A, and A's lawyer files an answer denying any liability by A.

Question: Does A's lawyer have an ethical problem? If so, how big is the problem?

Answer: Yes. Rule 3.1 says a lawyer shall not bring or defend an issue in a proceeding unless there is a basis in law or fact that is not frivolous.

2. Candor Toward The Tribunal:

Facts: A sues B. A files a motion for summary judgment. B's lawyer notices that A failed to cite controlling legal authority that would substantially help A.

Question: Does B's lawyer have an ethical duty to disclose the controlling legal authority to the court?

Answer: Yes. Rule 3.3(a)(2) says a lawyer shall not knowingly 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.

² The Rules refer to the Ohio Rules of Professional Conduct, effective February 1, 2007. The primary purpose of the vignettes is to make you aware of relevant issues, and not to provide a detailed explanation of the law.

3. Expediting Litigation:

Facts: A sues B alleging a breach of contract resulting in damages. B's lawyer reviews the case and determines that B breached the contract, and that the breach resulted in substantial damages to A. B's lawyer decides to defend the case by using dilatory practices that will delay the date when B will be required to pay A.

Question: Do B's lawyers' dilatory practices create an ethical problem for her?

Answer: No, not in Ohio. Rule 3.2 of the ABA Model Rules of Professional Conduct states a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. This rule was not adopted in Ohio.

4. Candor Toward The Tribunal:

Facts: A sues B. Both parties are represented by counsel. During A's deposition, A gives an incorrect answer to a question of opposing counsel. A's lawyer immediately notices that his client has not given an accurate answer.

Question: Does A's lawyer have a duty to disclose his client's incorrect statement to opposing counsel?

Answer: Yes. Rule 3.3(a)(3) says a lawyer shall not knowingly offer evidence the lawyer knows to be false. If the lawyer's client makes a materially false statement, the lawyer must take reasonable remedial measures to correct the incorrect statement.

5. Candor Toward The Tribunal:

Facts: A sues B. Both parties are represented by counsel. B's lawyer holds an ex parte discussion with the court, and argues his client's case.

Question: Even if we assume that the ex parte discussion was proper, does B's lawyer have an ethical problem?

Answer: Yes. Rule 3.3(d) says that in an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, including adverse facts.

6. Fairness To Opposing Party And Counsel:

Facts: A sues B, claiming that B manufactured dangerously defective widgets. During discovery, A asks B to produce all quality control studies that B had regarding its widgets. B, by and through counsel, disclosed 200 studies that said the widgets were a safe product, but failed to disclose three studies showing that the widgets were defective and/or dangerous.

Question: Does B's lawyer have an ethical problem?

Answer: Yes. Rule 3.4(a) says a lawyer shall not unlawfully obstruct another party's access to evidence or conceal material having potential evidentiary value.

7. Rude Conduct:

Facts: While representing a client, Lawyer A acts in a rude fashion to all concerned, except his own client.

Question: Does Lawyer A have an ethical problem?

Answer: Yes. In Ohio, the oath of office for lawyers says, in relevant part:

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.

Ethical misconduct means any violation of a justice, judge or attorney of any violation of the Code of Professional Responsibility, any provision of the oath of office taken upon admission to the practice of law, disobedience of the Rules for the Government of the Bar of Ohio, or of the terms of an order imposing probation or a suspension from the practice of law, or the conviction of a crime involving moral turpitude. Gov. Bar Rule V, Section 6(A).

8. Truthfulness In Statements To Others:

Facts: While negotiating the possible resolution of a domestic relations dispute, A's lawyer tells B's lawyer that A has no criminal record, when A's lawyer knows that A has been recently convicted of perjury.

Question: Does A's lawyer have an ethics problem?

Answer: Yes. Rule 4.1 says that in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act.

9. Communication With Person Represented By Counsel:

Facts: A sues B. Independent Witness W has important information. W hires Lawyer W to represent him in the case of A v. B. Lawyer W communicates his representation to the lawyers for both A & B. B's lawyer gets upset by that communication and telephones W directly.

Question: Does B's lawyer have an ethical problem?

Answer: Yes. Rule 4.2 says that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the other lawyer consents, or the communicating lawyer has legal authorization to communicate.

10. Dealing With Unrepresented Persons:

Facts: A sues B. A's lawyer contacts Independent Witness W, and says, "Look, I don't really have anything at stake in the case of A v. B, but I'd sure like to know what you saw."

Question: Does A's lawyer have an ethics problem.

Answer: Yes. Rule 4.3 says that in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

11. Information About Legal Services:

Facts: A lawyer tells a prospective client, "You should hire me because I am a really good lawyer."

Question: Does this lawyer have an ethics problem?

Answer: Yes. Rule 7.1 states that, "A lawyer shall not make or use a false, misleading or non-verifiable communication about the lawyer or the lawyer's services." A communication is false or misleading if it omits a material fact.

12. Advertising And Recommendation of Professional Employment:

Facts: A PI lawyer receives referrals from a doctor. For each new client referred, the lawyer gives the doctor \$25.00.

Question: Does this lawyer have an ethics problem?

Answer: Yes. Rule 7.2 says that a lawyer shall not give any thing of value to a person recommending the lawyer's services, except for reasonable advertising costs.

13. Direct Contact With Prospective Clients:

Facts: Lawyer A sends direct mail solicitation letters to everyone in the lawyer's home county who has been in an automobile accident.

Question: Does the lawyer have a legal ethics problem?

Answer: No. Direct mail solicitation is permitted by Rule 7.3(e), which places some requirements on the direct mail solicitor.

14. Confidentiality Of Information:

Facts: Lawyer learns that it is reasonably certain that one of his clients intends to kill somebody in a few days. Lawyer promptly reports this information to the police.

Question: Does the lawyer have a legal ethics problem?

Answer: No. Rule 1.6 says that a lawyer may reveal privileged information, if the lawyer reasonably believes it is to prevent substantial bodily harm that is reasonably certain to occur.

15. Confidentiality Of Information:

Facts: Client hires lawyer to represent client against the charge of Aggravated Murder. Client tells lawyer that he is guilty of the murder, and of several other homicides, for which the lawyer does not represent the client. Lawyer promptly discloses the confession of the “other homicides” to the police.

Question: Does the lawyer have a legal ethics problem?

Answer: No. Rule 1.6 says a lawyer shall not reveal information relating to representation of the client. Of course, if the client believed that the client was making the statement, about the “other homicides,” for purposes of obtaining legal advice, the statement is privileged, and disclosure of privileged information is an ethics violation. R.C. 2317.02 dealing with the attorney-client privilege.

16. What Is A Conflict Of Interest:

Question: What is at the heart of the term “conflict of interest?”

Answer: Comment 1 to Rule 1.7 states:

The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer’s personal interest, the interest of other clients, nor the desires of third persons should be permitted to dilute the lawyer’s loyalty to the client. All potential conflicts of interest involving a new or current client must be analyzed under this rule.

17. Duties To Former Clients:

Facts: Lawyer represented A, five years ago, when A purchased a home. B now hires the lawyer to represent B in a personal injury case against A.

Question: Can the lawyer now represent B against A.

Answer: Yes. Rule 1.9(a) says that unless the former client gives informed consent confirmed in writing, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interest's of the former client.

18. Organization As Client:

Facts: Lawyer is hired by President Lincoln of the ABC Corporation to represent the corporation.

Question: Does the lawyer represent President Lincoln and/or the ABC Corporation?

Answer: The ABC Corporation is the lawyer's client. Rule 1.13(a) says, "A lawyer employed or retained by an organization represents the organization acting through its constituents."

19. Safekeeping Client Funds and Property:

Facts: Lawyer receives \$10,000.00 from a client, and promptly deposits it in the lawyer's personal checking account.

Question: Does this lawyer have a legal ethics problem?

Answer: Yes. Rule 1.15 says, “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 situation.” These are called IOLTA accounts.

20. Conflict of Interest: Current Clients:

Facts: Lawyer represents both A and B. There is a substantial risk that A and B have a conflict of interest between them.

Question: Can the lawyer continue to represent both A and B?

Answer: Yes, provided the lawyer meets the mandates of Rule 1.7(b) which states, “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 client gives informed consent, and confirmed in writing; and 3) the representation is not prohibited by law or involve claims by one client against the lawyer.

Informed consent is an important concept. Rule 1.0(f) defines informed consent as:

*** the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

21. Fairness To Opposing Party And Counsel:

Facts: A sues B. Independent witness W has information adverse to B. B's lawyer tells W, "A is trying to subpoena you for a deposition. In order to avoid the subpoena, you may want to take a vacation for a week or so."

Question: Does B's lawyer have an ethical problem?

Answer: Yes. Rule 3.4(g) says a lawyer shall not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.

22. Candor Toward The Tribunal:

Facts: While arguing a motion to the court, Lawyer A mistakenly tells the court that the traffic light was red, when the truth is that the light was green. A week later, Lawyer A discovers his mistake.

Question: Does Lawyer A have an ethical duty to inform the court of his mistake?

Answer: Yes. Rule 3.3(c) says that a lawyer's duty not to make false statements of material fact or law to a tribunal continues to the conclusion of the case.

23. Dealing With Unrepresented Persons:

Facts: A sues B. During lunch, B's lawyer is approached by Independent Witness W. W says, "I am going to be a witness in the case of A v. B, and I think I will be called to testify. I need the advice of an impartial lawyer, so let me ask you some questions about that case."

Question: Does B's lawyer have a duty to tell W that she represents B?

Answer: Yes. Rule 4.3 says that when a lawyer reasonably should know that an unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

24. Fairness To Opposing Party And Counsel:

Facts: During closing argument, the Prosecuting Attorney tells the jury, "I have been doing this job for 10 years, and I have never seen somebody more clearly guilty than the defendant in this case. I know he is guilty. The defendant knows he is guilty, and you know he is guilty."

Question: Does the Prosecuting Attorney have an ethical problem?

Answer: Yes. Rule 3.4(e) says that during a trial, a lawyer shall not state a personal opinion as to the justness of a cause, or the culpability of a civil litigant or the guilt or innocence of an accused.

25. Advertising:

Facts: Lawyer A advertises for various types of cases, and after signing up new clients, the lawyer brokers out the clients to other law firms.

Question: Does this lawyer have an ethics problem?

Answer: Yes. Rule 7.2 says a lawyer shall not seek employment in connection with a matter in which the lawyer does not intend to actively participate. This rule does not apply to legal service plans or nonprofit lawyer referral services.

26. Fairness To Opposing Party And Counsel:

Facts: A sues B, alleging B negligently injured A's back. In response to a motion to produce medical records, A's lawyer accumulates 50 pages of medical records, and then "whites out" two small comments in the records that are adverse to A. A's lawyer then copies the records and send the copies to B's lawyer.

Question: Does A's lawyer have an ethical problem?

Answer: Yes. Rule 3.4(d) says that during pretrial procedure, no lawyer shall intentionally or habitually fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

27. Truthfulness In Statements To Others:

Facts: Lawyer A graduated from the prestigious ABC College. Lawyer A writes a letter of recommendation, to the college, on behalf of his best friend's son. In the letter, Lawyer A falsely claims that his friend's son did a substantial amount of volunteer work at his church.

Question: Does Lawyer A have an ethical problem?

Answer: Initially, the answer is no. Rule 4.1 says that in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact (or law) to a third person. However, Rule 8.4 says a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Further, Preamble #3 says that the Ohio Rules of Professional Conduct, or at least some of them, apply to lawyers "24/7" and not just when practicing law. So the answer is yes, the lawyer has an ethical problem.

28. Fairness To Opposing Party And Counsel:

Facts: During discovery, A Inc. tells its lawyer, “We will look for the information the other side has requested from us, but we won’t look too hard for information that is adverse to our case.” A Inc.’s lawyer responds, “Okay.”

Question: Does A Inc.’s lawyer have an ethical problem?

Answer: Yes. Rule 3.4(a) says a lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

6. TYPES OF MISCONDUCT IN GRIEVANCES OPENED FOR INVESTIGATION:

	<u>1997*</u>	<u>2000**</u>
1. Neglect/Failure to protect interests of client	47%	47%
2. Failure to account or turn over file	2%***	9%
3. Improper withdrawal (refusal to withdraw)		2%
4. Excessive fees	7%	16%
5. Personal misconduct	6%	7%
6. Misrepresentation/false statement/concealment	6%	9%
7. Criminal conviction	< 1%	1%
8. Failure to file income tax returns	< 1%	< 1%
9. Commingling of funds		< 1%
10. Conversion	2%	2%
11. Embezzlement	< 1%	2%
12. Failure to maintain funds in trust		1%

13. Breach of client confidence		1%
14. Conflict with lawyer's interest	4%	3%
15. Conflict with client's interest	(4%)	4%
16. Communication with represented adverse party	< 1%	2%
17. Trial misconduct		7%
18. Failure to register	< 1%	<1%
19. Practicing while under suspension		1%
20. Assisting UPL		1%
21. Advertising/solicitation	2%	2%
22. Judicial misconduct	5%	9%
23. Mental illness	< 1%	<1%
24. Substance Abuse		<1%
25. Other	18%	20%

*1997 Data derived from the categorizations of the 3265 grievances opened for investigation as reported in the 1997 Quarterly Reports.

**2000 Data derived from the categorizations of the 2485 grievances opened for investigation as reported in the 2000 Quarterly Reports.

***Failure to account.

Total percentage more than 100 due to multiple allegations in some cases.

7. WHAT TO DO IF YOU ARE CONFRONTED BY A LEGAL ETHICS PROBLEM:

Sooner or later, you will probably be confronted by a legal ethics problem. If you are so confronted, stay cool and calm, and try to figure out what your legal ethics problem is, and what it is not. Do not ever take any rash action in response to a legal ethics problem.

If your problem is of any significance, promptly consult separate and independent counsel. Take off your “advocate’s hat,” and put on your “client’s hat.” Explain your problem truthfully to your counsel, without minimizing or exaggerating the facts. If you are not sure whether or not your problem is of any significance, assume it is a significant problem.

Listen carefully to your counsel. Work to develop a specific plan as to how you will approach your problem. Then, execute the plan and try to solve the problem as best you can. Avoid the mistakes that many lawyers tend to make when confronted by a legal ethics problem. Those mistakes are:

1. Denying the problem exists.
2. Getting angry (even when anger may be justified) and allowing that anger to overcome reason and logic.
3. Failing to promptly get help from separate and independent counsel. By “prompt,” I mean rapid, swift and quick. Do not allow the problem to become exacerbated before seeking help from separate and independent counsel.
4. Forgetting the advice of Illinois Attorney Abraham Lincoln who (allegedly) said, “A lawyer who represents himself has a fool for a client.”
5. Developing in their own mind, highly creative and highly uncertain legal arguments that they incorrectly believe will make part or all of their ethics problems disappear.

6. Simply assuming that legal ethics prosecutors, especially those who work for certified grievance committees, will be fair and reasonable. Some members of some certified grievance committees seem to lack any expertise in the field of legal ethics and seem to get visceral enjoyment in taking a harsh attitude toward lawyers. (In fairness, it must be stated that many members of many certified grievance committees are very fair minded and very knowledgeable about the law of legal ethics).

8. **CAVEAT:**

Please remember that due to limitations of time and space, the information contained in this presentation is necessarily in abbreviated form. This presentation is not intended to serve as a substitute for a professional legal consultation. If you have a legal ethics problem, I strongly suggest that you obtain prompt professional help.

9. **CONCLUSION:**

Please let me know if you have any questions or comments about these materials, or my presentation. I am particularly interested in learning how I can make these materials, and my presentation, better for you. Thank you.

APPENDIX ONE: TABLE OF CONTENTS FOR THE OHIO RULES OF PROFESSIONAL CONDUCT (EFFECTIVE 2-1-07):

Preamble: A Lawyer's Responsibilities; Scope

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1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

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