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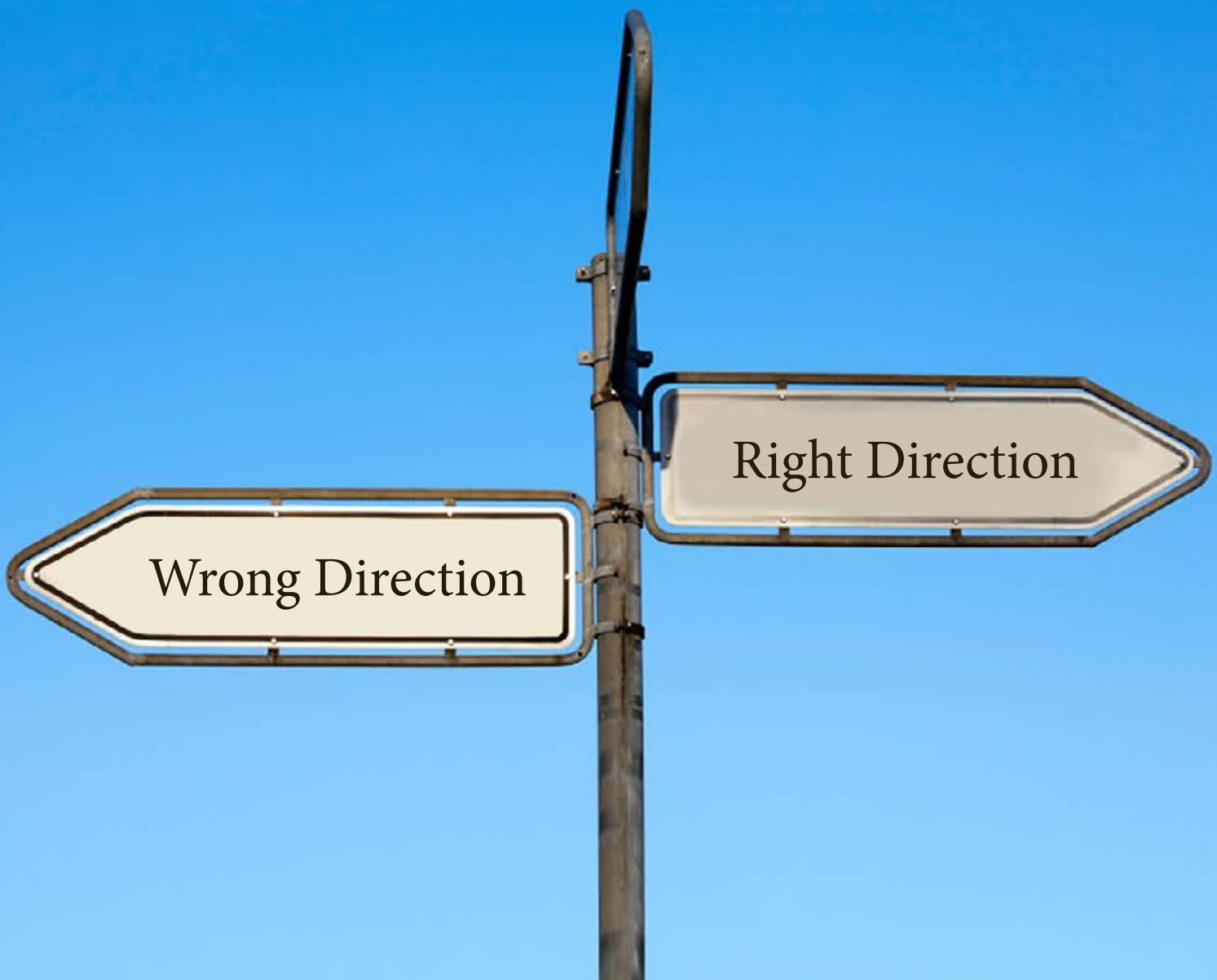
Best of Ohio Legal Ethics



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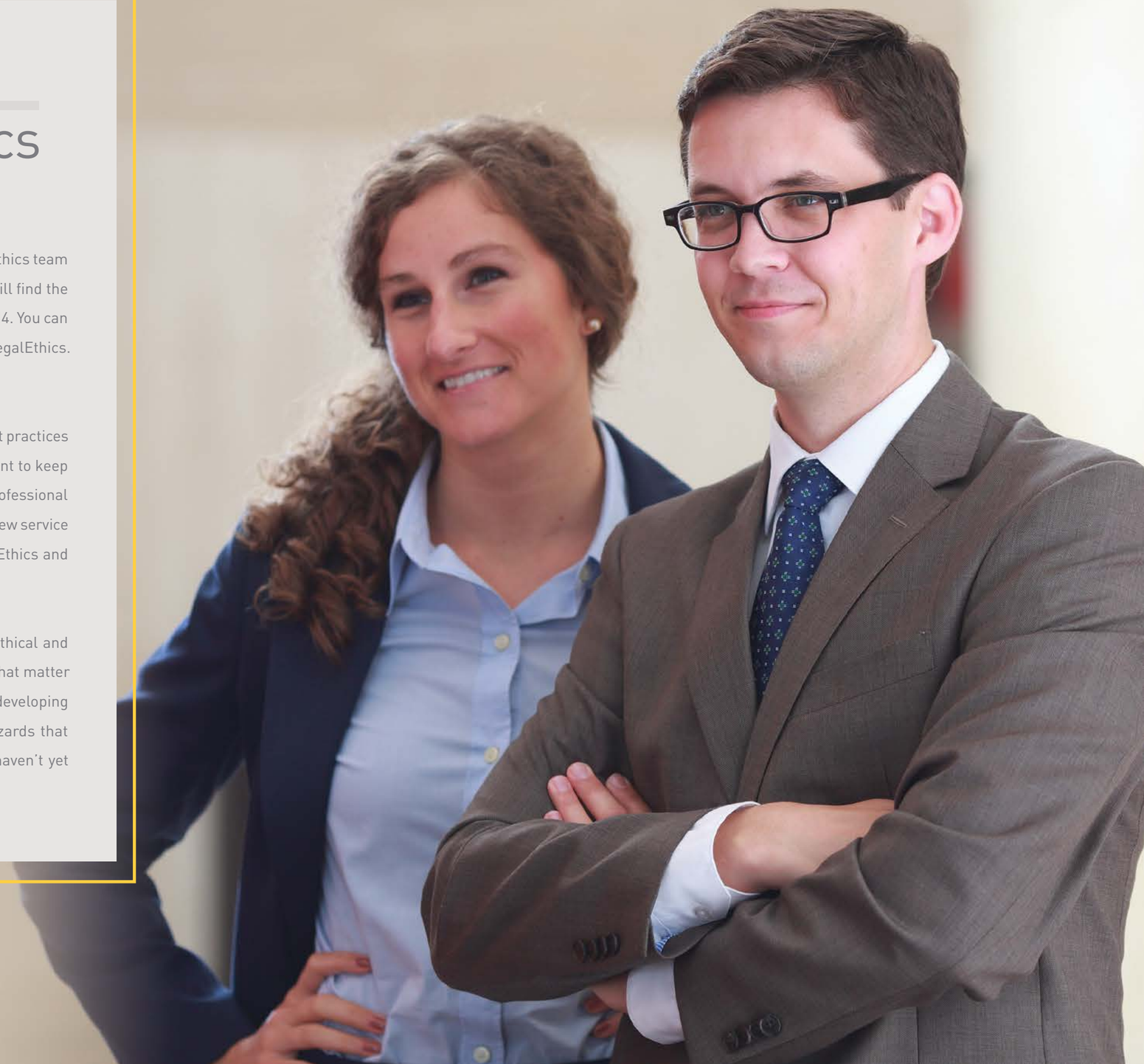
Ohio + Legal Ethics

Ohio Legal Ethics was launched in 2013 and in honor of the one-year anniversary, the Legal Ethics team is taking a moment to reflect on the past year's breaking news and happenings. Inside you will find the news, disciplinary opinions and legal commentary that made the top headlines from 2013-2014. You can find all these articles plus more at ohiolegalethics.com and follow all news on Twitter @OhioLegalEthics.

About Ohio Legal Ethics

OhioLegalEthics.com is a platform for sharing information, news items, legal updates and best practices that matter to lawyers and judges throughout Ohio. The posts you'll find on this site are meant to keep you informed as to what is going on in the Ohio lawyer community and is edited by the Professional Responsibility and Lawyer Ethics team at Kegler, Brown, Hill + Ritter. According to the peer-review service *The Best Lawyers in America*, Kegler Brown is the "Top-Listed" firm in Ohio in the areas of "Ethics and Professional Responsibility Law" and "Legal Malpractice Law – Plaintiffs."

Our lawyers have been counseling and advising attorneys and judges throughout Ohio on ethical and disciplinary matters for decades, which has given us the insight to communicate the issues that matter most to our colleagues throughout the state. So, whether you're looking to keep tabs on developing attorney news in Ohio or hoping to learn more about your ethical obligations and the hazards that commonly exist, you've come to the right place. If you want to know about something we haven't yet touched on, just let us know.



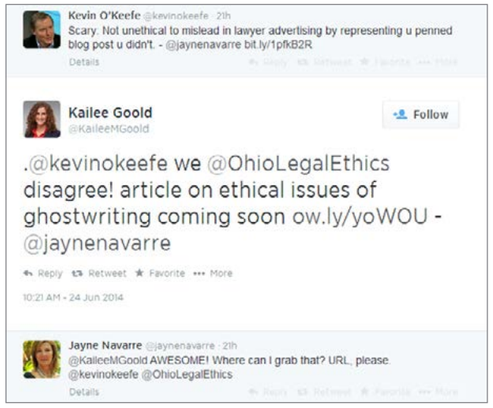
LEGAL
COMMENTARY

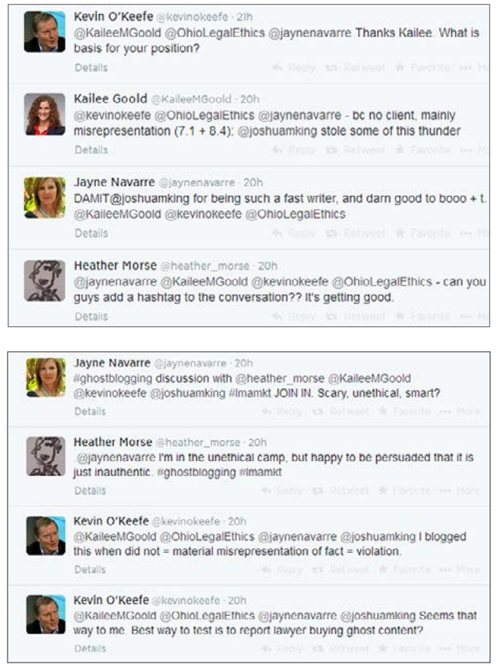
June 25, 2014

Ghost-Blogging (Still) Raises Ethical Concerns – Should We Do Something About It?

I read a thought-provoking article by Jayne Navarre (blogger of Virtual Marketing Officer) on the advantages of hiring a ghost-writer for legal content. Ms. Navarre's article argued that ghost-writing in general is an ethical practice. This got me thinking about ghost-writing for legal blogs. *Because I write all my own shtick*, the ethics component was most interesting to me.

My ethics wheels started spinning and spurred a lively twitter debate with some true heavy hitters in the field including Ms. Navarre herself.





I ended up aligning with the majority to conclude ghost-blogging does raise ethical concerns. But a question by Kevin O'Keefe (founder of LexBlog, Inc.) stuck with me: "What is the best way to test this theory?"

Kevin's thought? Reporting an attorney through the disciplinary process.

Because reporting is scary, I thought of petitioning for an advisory opinion. (They are non-binding and I am a squirrely attorney after all.)

Typically advisory opinions are issued when a supplied question raises a serious concern to the profession. Ghost-blogging has its pros and cons, but does it raise a serious enough concern that we—members of the bar—should find out what an advisory opinion would say? (Cue fear in ghost-bloggers everywhere.) But before the juicy stuff, a brief summary of the ethics of ghost-blogging.)

What are We Talking About?

The ghost-blogging I'm talking about is when an attorney pays someone else (a non-attorney) to write articles published under the attorney's name on the attorney or law firm's website. As a result, the world thinks the attorney wrote it when the attorney had little to no part in its creation.

What is the Problem?

Misrepresentation is the problem. As Josh King (General Counsel and Vice President, Business Development for Avvo and author of Socially Awkward – Social Media + The Law of Legal Marketing) correctly identifies two ethical rules are in play when an attorney pays for ghost-blogging – 7.1 and 8.4.

Advertising Rules

First are the advertising rules. Although there is debate over the extent to which the First Amendment protects attorneys' blogs, I believe most blogs are commercial speech and thus can be regulated. (Most practicing attorneys who blog do so to get business). Regardless, when you pay someone to write the content your blog is commercial speech.

Back to the point – ghost-blogging violates Prof.Cond.R. 7.1. The Ohio Rule states:

> 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.

Comment 1 clarifies: "Whatever means are used to make known a lawyer's services, statements about them must be truthful."

Placing your name as the author of a blog post on a post you did not author is a false **and** misleading communication about you **and** your services to the public at large. The false part doesn't need much analysis. You are simply saying you authored a post you did not author.

Let's talk about why it is misleading. Slapping an attorney's name on a blog post he or she did not write is a misrepresentation *about the attorney*. Kevin O'Keefe appears to agree. He points out via blog post:

So common sense rules here. You're claiming authorship of something you didn't author – a misrepresentation of fact.

> **"A reasonable person would presume a blog written by a newspaper columnist was written by the columnist. And a reasonable person would presume that a blog presented as written by lawyer was written by the lawyer."**

If you don't buy that, the author line switch can also be a misleading communication *about the lawyer's services*, including the lawyer's abilities. The ghost-written post may be better written, funnier, or just plain different than the attorney's own work product. Even worse, the post may have a completely different perspective or contain better ideas than what the attorney is capable of.

June 25, 2014

Ghost-Blogging (Still) Raises Ethical Concerns – Should We Do Something About It?

Either way, this mislabeling is material because attorneys' names carry weight. Attorneys have stricter ethical rules than other professions precisely because they are viewed differently. Thus—right or wrong—almost anything with an attorneys' name on it is subject to higher standards and reliance in the public's eye. Not to mention the fact that the clients rely on blog posts when selecting an attorney.

General Prohibition on Misrepresentation

The second ethical problem is the general prohibition of misrepresentation. In relevant part, Ohio Prof.Cond.R. 8.4(c) provides: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

For the same reasons discussed above, having someone's name appear as the author who did not in fact author the post is a misrepresentation or an act of dishonesty. In fact, it may be easier to argue that this Rule is violated because the misrepresentation need not be material to constitute misconduct under Prof.Cond.R. 8.4(c).

Sorry lazy attorneys.

Who Cares?

A quick scan of the blogosphere reveals that most attorneys agree that this practice violates the ethical rules and many marketing pros believe no blog is better than a ghost-written one. Yet here we are still discussing the matter. I think this is because attorneys are busy and many are not buying into the blogosphere. Most firms have blogs just to have one or to keep up with competitors. Thus, ghost-writers are in high demand and very useful to a subset of attorneys and firms. You can view the entire conversation previously mentioned on the Ohio Legal Ethics Twitter feed.

Should We Do Something About It?

The ethical nature of ghost-blogging has been discussed, but let's go one step further:

+ Does ghost-blogging pose a significant concern to the profession?
+ Is the misrepresentative nature of ghost-blogging sufficient to prohibit it?
+ Is there any value gained by non-attorneys writing content consumed by those who believe the named attorney wrote it?
+ Is some flow of information—albeit from a less-qualified source—better than none?
+ Would supervision over ghost-bloggers (as required for other non-attorney employees) cure these concerns?

So the final question remains: What do YOU think? Tell us @OhioLegalEthics using #ghostblogging. You can find all professionals mentioned in this article on Twitter:

@KaileeGoold

@jaynenavarre

@kevinokeefe

@joshuamking

Written by Kailee Goold

614.462.5479

kgoold@keglerbrown.com

keglerbrown.com/goold

@KaileeGoold

February 26, 2014

Trust Account Basics: What Belongs in Your IOLTA?

Lawyers are required to keep certain funds and property separate from their own. Rule 1.15 lays out the requirements, but here are some highlights each practitioner needs to be cognizant of.

Lawyers are required to put client funds or third party funds in their IOLTA whenever the funds are held in connection with a representation, but not otherwise. For example, if a lawyer is working on a transaction for a client and that client asks the lawyer to put funds into the lawyer's trust account and those funds are completely unrelated to the transaction (read- money from soon to be ex-spouse), those funds do not belong in the lawyer's trust account.

Client funds that belong in the IOLTA include:

1. advances on fees;
2. retainers to be drawn down as work is performed; and
3. costs advanced by the client.

Once all or part of a retainer is earned, those funds no longer belong in the IOLTA. And more than just client funds belong in the IOLTA. For example, if the funds belong to a third person/entity (read – funds to pay medical providers), these also belong in the lawyer's IOLTA. As a fiduciary for the client, the lawyer holds third party funds in connection with the representation, maintains records and distributes the funds as though they are client property.

Not only are certain funds to be placed in the IOLTA, but the lawyer is required to (1) promptly notify the client of the receipt of the funds; (2) promptly deliver the funds upon demand (3) provide a full accounting upon request; and (4) maintain complete trust account records for seven years after the conclusion of the representation.

Whenever a lawyer is holding non-fungible property (stocks, bonds, etc.) for a client, Rule 1.15 requires the lawyer to create and maintain a record that identifies the property, the date received, the client associated with the property, and the date of distribution. These records must also be kept for seven years.

Mixing attorney funds and client funds in an IOLTA constitutes commingling. Nonetheless, lawyers are allowed to put their own funds into an IOLTA but only for one specific purpose – to cover the costs of maintaining the account. So, attorneys are allowed to deposit an amount sufficient to cover the costs of opening and maintaining the account. While a lawyer cannot keep funds in the IOLTA to cover overdrafts, it is permissible to maintain an amount that the financial institution requires for a waiver of bank costs.

The basic rule on what belongs in an IOLTA is simple – if it is someone else's money and it is related to a representation, it belongs in your IOLTA.

Written by Jonathan Coughlan

614.462.5455

jcoughlan@keglerbrown.com

keglerbrown.com/coughlan

September 12, 2013

Reporting Your Own Professional Misconduct – Should You Self Report?

As members of our honorable profession, we are held to a higher standard both personally and professionally. According to the Lawyer's Creed, our actions and demeanor reflect upon our system of justice and our profession. As a result, we are expected to conduct ourselves accordingly. So what happens when you think you may have failed in your obligation to follow the rules and stay on the straight and narrow? Should you self-report?

What are you required to self-report?

Most of us already know that our Rules of Professional Conduct require us to report certain ethical violations to a disciplinary authority. What you may not know is that this obligation applies even if you are the one who committed the ethical violation. But before you throw yourself on the mercy of the disciplinary system, you should carefully consider whether your conduct really requires this level of disclosure.

Under Rule 8.3(a), a lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct must notify an appropriate disciplinary authority if the violation raises a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer. This is the same rule and standard that requires lawyers to self-report. See RPC 8.3 Comment 5.

It is important to understand that we are not required to report all ethical violations. As explained in the rule, the duty to report others or yourself **only applies** if the lawyer has "unprivileged knowledge" of a violation and the violation raises a question as to honesty, trustworthiness, or fitness as a lawyer. Furthermore, there must be "actual knowledge" of a violation, not a mere suspicion.

There is no specific test to determine precisely what type of ethical misconduct must be reported. Unfortunately, the rule is pretty vague. The Board of Commissioners on Grievances and Discipline's Advisory Opinion 2007-1 instructs that lawyers are to use their own professional judgment and states that "a review of the disciplinary cases will provide ample guidance as to the types of misconduct that raise a question as to the lawyer's honesty, trustworthiness or fitness." Such a review will reveal that professional misconduct includes conduct that has nothing to do with a client or your law practice. Remember, personally and professionally, we are held to a higher standard than the rest of our community. Moreover, Advisory Opinion 2007-1 instructs that lawyers should err on the side of reporting.

Although there is no specific test to determine whether the conduct at issue implicates honesty, trustworthiness, or fitness, you are not required to report technical violations. For example, if you are dealing with a client who threatens to file a grievance because you failed to timely return one or two phone calls, failed to maintain a separate ledger for each of your clients, or accidentally let your malpractice insurance lapse without informing your clients, you probably do not need to self-report. Technical violations may constitute an ethical violation and may expose you to disciplinary liability, but does the violation "raise a question as to honesty, trustworthiness, or fitness as a lawyer?"

Regarding criminal conduct, the general consensus is that non-violent, misdemeanor offenses that do not involve fraud, dishonesty or theft probably do not need to be reported. For example, being charged with a first offense OVI or disorderly conduct would probably not trigger your duty to self-report. Similarly, if you have no criminal record and were arrested at a concert for smoking marijuana and possession of drug paraphernalia, you should not worry about your law license. However, if you have been charged with OVI for the third time in one year along with a hit-skip violation and lied about your identity to the responding police officer, you should seriously consider whether your conduct raises a question as to your honesty, trustworthiness and fitness as a lawyer.

If you have been convicted of any felony, you are obligated to self-report. If you are convicted for misdemeanor theft because you stole from a client, you are obligated to self-report.

Deciding whether to self-report can be very difficult if no one is likely to discover the misconduct. However, before you decide not to report because you believe no one will find out, understand that there are many, many ways that disciplinary violations can come to the attention of an investigator. Investigations into disciplinary violations can be initiated through a former client from long ago, opposing counsel, judge, local newspaper article, or even an anonymous tip.

Where and when to report?

Under Rule 8.3(a), a lawyer's duty to report is fulfilled by reporting to either the Office of Disciplinary Counsel or a certified grievance committee of a bar association. The duty is not fulfilled by reporting to a tribunal or to OLAP. Furthermore, although there is no specific time frame to report misconduct, you should do so within a reasonable time after learning of the violation. If you wait until someone else reports your misconduct, you will not receive any mitigating benefit for self-reporting.

Why should you self-report?

Even though we have been obligated to self-report since February 2007, no Ohio lawyer has been disciplined solely for failing to do so. The true advantage of self-reporting is mitigation. When the Board of Commissioners on Grievances and Discipline makes its recommendation to the Ohio Supreme Court on the appropriate sanction, it will consider all mitigating and aggravating factors in addition to the disciplinary violation. Self- reporting, cooperation, and acceptance of responsibility are all powerful mitigating factors. Indeed, the purpose of our disciplinary system is to protect the public. A lawyer who self-reports her misconduct arguably poses less of a threat to the public than a lawyer who remained silent.

Mitigating factors can sometimes mean the difference between receiving an actual suspension from the practice of law or just a stayed suspension. More importantly, if you are dealing with a mental health or substance abuse problem, self-reporting can be the first step in recovery. There is also something to be said for coming forward for the sake of preserving the integrity of our profession and one's own moral standards.

It should go without saying that considering whether and how to self-report should be discussed with independent counsel. By self-reporting, you are likely to initiate an investigation that may ultimately have an impact on your license to practice law. An attorney that is familiar with the disciplinary system can show you how the system works and advise you regarding the possible sanctions. He or she can also assist you with determining the timing and manner in which you self-report and whether you should also disclose to a client and/or your malpractice carrier.

The disciplinary system can be very intimidating and in many ways, unpredictable. The stakes are high because your ability to practice law is on the line. For this reason, careful planning, analysis, and obtaining independent counsel are a must.

Written by Rasheeda Khan

614.462.5481

rkhan@keglerbrown.com

keglerbrown.com/khan

May 7, 2014

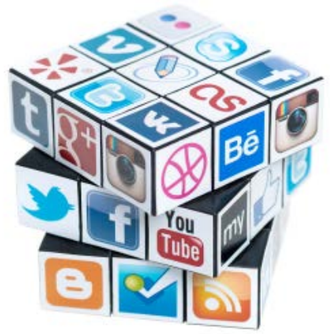
ABA Weighs In on Attorneys Viewing Juror Social Media

According to a recent ABA Ethics Opinion, how far lawyers can go with juror social media depends on the juror's privacy settings. Lawyers are free to mine the social media accounts of jurors but they may not request access to an account that is blocked by privacy settings.

Summed up nicely by the Wall Street Journal, the Model Rules "give lawyers a green light to scour a juror's Twitter feed, Facebook account or any other site where they posted comments, photos or videos about themselves for anyone to see. Everything that's public online is fair game. And the same goes for potential jurors during jury selection."

But lawyers are advised against sending an "access request" to a juror's social media – i.e., Facebook "friending" a juror, sending a Twitter follower or LinkedIn request to a juror who restricts access to their accounts. The ABA Opinion advises that this is an ex parte communication prohibited by ABA Model Rule 3.5(b) (restricting contact between lawyers and jurors not authorized by the court).

The Opinion analogizes: "This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."



While juror misconduct via social media is not the subject of the Opinion, the ABA also advises lawyers what to do if they stumble across content about a juror that they suspect may be evidence of improper behavior. Model Rule 3.3 obligates attorneys to take reasonable remedial measures (including disclosure to the tribunal) if the juror or a potential juror appears to be up to something that looks "criminal or fraudulent, including conduct that is criminally contemptuous of court instructions." But if lawyers encounter something more innocuous, like a juror tweeting about "the quality of food served at lunch", they don't have to tell anyone, even if the juror appears to be disobeying instructions about what she can say outside the courtroom.

So before you troll potential jurors' posts and feeds, make sure to read your state's professional rules and this ABA Opinion.

Written by Kailee Goold

614.462.5479
kgoold@keglerbrown.com
keglerbrown.com/goold
@KaileeGoold

May 14, 2014

Lawyer Gets 10 Years for Double Billing + Forging Judge's Signature

A Texas lawyer, Hilda Valadez, was accused of double billing Bexar County for her assigned counsel work and for forging a judge's signature on the payment forms she submitted. Valadez was the top billing appointed lawyer over the last three years, having billed more than $400,000 for working on 478 cases. She pled guilty to one count of forgery, one count of "securing execution of a document by deception" and was sentenced to 10 years.

Valadez, who was once the most frequent court-appointed counsel in Bexar County, faced a 46-count indictment. She initially insisted on her innocence and demanded a jury trial. Her attorney requested a competence hearing claiming she was suffering from post-traumatic stress disorder. The court found her competent and set the matter for trial. Valadez changed her plea during jury selection and received her sentence. She is eligible for probation after six months and while she repaid the county $40,000, she still owes another $39,000. My San Antonio carries the story.

Over the last 10 years, three Ohio lawyers have been disciplined for inaccurate and misleading records in connection with fee applications in assigned counsel matters:

+ In *Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510, the attorney was found to have engaged in deceptive practices for submitting extremely sloppy records, including records suggesting he worked more than 24 hours in a given day. The court also determined that his billing practices adversely reflected on his fitness to practice.

+ Two other Ohio lawyers were disciplined for repeatedly submitting the same hours on behalf of separate assigned juvenile clients on the same day. Theses fee applications were deemed to violate the rule against clearly excessive fees, now titled Prof. Cond. Rule 1.5. Disciplinary Counsel v. Holland, 106 Ohio St.3d 372, 200-Ohio-5322 and *Disciplinary Counsel v. Johnson*, 106 Ohio St.3d 365, 2005-Ohio-5323. While Holland was indicted for his conduct in connection with his fee applications, he was acquitted after a bench trial.

Written by Jonathan Coughlan

614.462.5455
jcoughlan@keglerbrown.com
keglerbrown.com/coughlan

August 13, 2013

It's Not You, It's Me... Okay, It's You: How to Withdraw from Representing a Client in Ohio

No lawyer wants to face the problem of withdrawing from representation of a client, but most will. Although many lawyers see withdrawal as a straightforward affair, the Rule 1.16 provides numerous ways for a lawyer to stumble.

When considering withdrawal for one of the reasons set forth in the rule, a lawyer should consider above all (1) the timing of the withdrawal, and (2) whether the client would suffer any harm or prejudice as a result.

On timing, a lawyer must seek and obtain any required permission of the tribunal, which obviously takes time. A court considering a motion for withdrawal must ensure that the Rules of Professional Conduct are followed. *Northern Eagle, Inc. v. Kosas*, Eighth Dist. No. 2007 CVF 024343, 2009-Ohio-4042, ¶ 32. Because filing a motion to withdraw can raise concerns about violation of the attorney client privilege, withdrawing lawyers may want to seek the assistance of ethics counsel in presenting such a motion.

Further, the withdrawing lawyer must protect the client's interest "to the extent reasonably practicable." That sounds like typical lawyer-speak, but there are numerous cases in which lawyers have been reprimanded (sometimes severely) for failure to adhere to Rule 1.16. As just one example, see *Cincinnati Bar Assn. v. Lawson*, 119 Ohio St.3d 58, 2008-Ohio-3340.

Heed the Rule and avoid jumping from the frying pan of a problematic client into the fire of an ethical violation.

Written by Chris Weber

614.462.5415

cweber@keglerbrown.com

keglerbrown.com/weber

May 29, 2014

Texas Prohibits Use of "Officer" in Title of Non-Lawyer Personnel in Firms

A recent Texas ethics opinion (#642) states that Texas law firms may not include the term "officer" or "principal" in the job titles of the firm's non-lawyer employees. The opinion relies on Rule 5.04(d) (Ohio's version is 5.4 (d)) that precludes lawyers from practicing in any for-profit law firm structure where "a non-lawyer is a corporate director or officer thereof."

The policy behind the rule is to prevent non-lawyers from ever directing, impacting or influencing the professional judgment the firm lawyers render on behalf of their clients. An analogous provision is found in Rule 5.4 (c) which states a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment...

The rub for law firms, especially larger ones, is that it is common for firms to utilize non-lawyer officers to manage, for example, firm finances, firm personnel or firm marketing. These non-lawyers, who are well trained and best suited to handle these responsibilities, typically have no role in rendering legal judgments. Yet to accurately designate them as "COO" or "CFO" potentially runs afoul of Rule 5.4.

The Texas opinion goes on to state that if these "officers" will not control operations nor own an interest in the firm, then the designation of "officer" or "principal" might be viewed as misleading in violation of Rule 7.02 (Ohio's version is 7.1) or even Rule 8.04 (Ohio's version is 8.4(c)) which prohibits "dishonesty, fraud, deceit, or misrepresentation." Conferring the title of "officer" on someone who will not control operations of the firm nor own an interest in the firm, could be a misleading communication about the firm.

The practical reality is that these non-lawyer "officers" perform vital functions at law firms across the country; functions that do not impact the legal judgment of the lawyers. And arguably, the fact that a firm has a "chief financial officer" does not mislead the public about whether that individual will have any say in how the lawyers represent their clients.

This issue has not been addressed in Ohio case law or ethics opinions.

Written by Jonathan Coughlan

614.462.5455

jcoughlan@keglerbrown.com

keglerbrown.com/coughlan

IN THE NEWS

June 2, 2014

Law School Admissions Council to Pay $7.73 Million Over Discriminatory LSAT Policies

On May 20th a consent decree was filed to resolve allegations that the Law School Admission Council (LSAC) engaged in widespread and systemic discrimination in violation of the Americans with Disabilities Act (ADA).

Under the proposed consent decree LSAC will pay $7.73 million in penalties and damages to compensate for more than 6,000 individuals nationwide who applied for testing accommodations on the Law School Admission Test (LSAT) over the past five years.

How It All Began

The United States intervened in a suit originally brought on behalf of California test takers in the Northern District of California (*DFEH v. LSAC Inc.*). The Department of Justice's (DOJ) intervention expanded the case to claim nationwide relief under the ADA for individuals with disabilities who request testing accommodations for the LSAT – a required examination for anyone seeking admission to an ABA approved law school in the United States.

The Specific Complaints Against LSAC

The allegations in the complaint detail LSAC's routine denial of testing accommodation requests, even in cases where applicants have a permanent physical disability or submitted thorough supporting documentation from qualified professionals and demonstrated a history of testing accommodations since childhood. The lawsuit further alleged that LSAC engages in discrimination prohibited by the ADA through its practice of flagging the LSAT score reports of individuals who received extended time as a testing accommodation, thereby identifying to law schools that the test taker is a person with a disability.

The Penalty

While LSAC did not admit guilt or liability in its agreement with the DOJ and California Department of Fair Employment and Housing, LSAC has agreed to do the following:

+ Pay $7.73 million as compensation to individuals named in the United States' and other plaintiffs' complaints, and a nationwide victims' compensation fund
+ Cease flagging the LSAT scores of test-takers who received extra time to take the test
+ Automatically grant most test accommodations if the test-taker has gotten them for other standardized exams (e.g, SAT, ACT or GED)
+ Implement additional best practices for reviewing and evaluating testing accommodation requests as recommended by a panel of experts (to be created by the parties)

The resolution of this suit is just one piece of this disability-bar admissions puzzle. Other states are struggling to balance nondiscrimination with ensuring admission of "fit" students to the practice of law. But that is for another post. Until then, be glad you are not LSAC (or that you don't have to take the LSAT again…unless you could have used that extra time).

Written by Kailee Goold

614.462.5479

kgoold@keglerbrown.com

keglerbrown.com/goold

@KaileeGoold

February 20, 2014

Indefinite Suspension for Former Weston Hurd Managing Partner

After a 3-day hearing, the Board of Commissioners on Grievances and Discipline has recommended an indefinite suspension for Scott C. Smith, the former managing partner at Weston Hurd. The complaint alleged that Smith engaged in unethical billing practices with regard to three clients in five cases over the course of several years.

The specific charges included billing for (1) work performed by another member of the firm; (2) work that was never performed by anyone; and (3) time in excess of the time actually expended. Finally, the complaint alleged that Smith "billed identical charges in the same amount of time on the same day to multiple cases and clients."

The matter will now be taken up by the Ohio Supreme Court, which has the authority to increase, decrease or dismiss the proposed sanction. As aggravating factors, the Board found Smith acted with a dishonest or selfish motive, that he engaged in a pattern of misconduct and committed multiple offenses involving three clients over several years. Weston Hurd attorneys testified that the firm repaid its clients $350,000.

If the Supreme Court adopts the proposed sanction, Smith will be suspended for a minimum of two years and will thereafter have the burden to prove his fitness to be reinstated. If he fails in his first attempt, he will have to wait another two years to submit a second petition for reinstatement.

Written by Jonathan Coughlan

614.462.5455

jcoughlan@keglerbrown.com

keglerbrown.com/coughlan

January 13, 2014

Delaware County Magistrate Accused of Off-Color Misconduct

The Columbus Dispatch reports that a Delaware County magistrate has been accused of misconduct while handling a case involving the intimate photos and videos of a divorced couple.

The allegations arise from a 2006 case in which a woman sought to have her ex-husband held in contempt for violating a divorce agreement not to share intimate images. The complaint accuses Stephen E. Weithman, a 64-year-old common pleas magistrate, of displaying "unethical, undignified and discourteous behavior."

The woman sought a contempt finding and legal costs from her former husband after claiming she found images of herself and her ex-husband's then-girlfriend on "pornographic websites." Among other things the complaint alleges Weithman once "slowly ogled (the ex-wife) from head to toe in a demeaning and degrading fashion." In his response, Weithman recalled no such incident saying he is "nearsighted and absent-minded."

He also is charged with refusing to sign an order until a lawyer in the case turned over a CD containing the intimate photos of the ex-husband's current girlfriend. The lawyer said she gave the magistrate a blank CD and he then signed the order. Weithman did not recall such an exchange, saying he did not want to see the photos and previously had ordered them sealed.

Weithman is charged with offering a dollar to the ex-husband's lawyer if he made the man's former wife cry during questioning at the 2008 trial on the complaint. Weithman admitted placing a $1 bill on his bench, saying it was an attempt to break tensions and that he tried to apologize when he saw that it upset the woman.

As for the merits of the underlying case, Weithman ultimately found insufficient evidence to hold the ex-husband in contempt (a ruling upheld twice on appeal). The ex-husband committed suicide, and the case was settled in 2010 after an appeal to the Ohio Supreme Court.

The complaint also charges Weithman with dealing unprofessionally with lawyers. For example, Weithman was suspended for five days without pay in 2011 by Delaware County Common Pleas Judge W. Duncan Whitney after a county employee complained that Weithman had made an undetailed "inappropriate gesture."

Weithman is scheduled to answer the charges in a Jan. 24 hearing before the Ohio Supreme Court's disciplinary commission.

Written by Kailee Goold

614.462.5479

kgoold@keglerbrown.com

keglerbrown.com/goold

@KaileeGoold

August 20, 2013

Indiana Lawyer Guilty of Voyeurism with Client

In our blog last week, we noted the significant negative consequences, disciplinary and otherwise, arising from sex with clients and/or colleagues.

The ABA Journal reported that the Indiana Supreme Court last week accepted a resignation from the practice of lawyer William Wallace III. The disciplinary investigation indicated that Wallace told an incarcerated woman that he could obtain her release if she agreed to have sexual relations with him after that release. That sexual act(s) occurred after her release in September 2009. In March 2010, the client learned that Mr. Wallace had secretly taped the sexual encounter with her.

In a clear display of self-defeating responses to an investigation, Mr. Wallace attempted to hide a computer hard drive and some DVDs in his trousers; that tactic failed.

Ultimately Mr. Wallace entered a guilty plea to a charge of voyeurism related to the secret taping and was sentenced to 15 months in prison. The Indiana Supreme Court accepted his resignation from the practice; in Indiana both resignation and disbarment are permanent. At one time, Mr. Wallace had been an unsuccessful candidate for Gibson County Prosecuting Attorney.

Written by Geoffrey Stern

614.462.5457

gstern@keglerbrown.com

keglerbrown.com/stern

May 22, 2013

Sad Downfall of Iowa Lawyer Ends with License Revocation

On May 10, 2013, the Iowa Supreme Court revoked the law license of an Iowa attorney with a story as strange as it is sad. The court disbarred Brian L. Stowe for a number of violations of Iowa's ethical rules. Stowe's story is an unusual one. The court stated that his life "mirrors that of Dr. Jekyll and Mr. Hyde," and recounted in detail Stowe's claim that his career imploded as the result of psychological damage that resulted from a 2007 trip to Belize with his family. Stowe claimed he was abducted, beaten, sexually abused, and ransomed on the trip, although other accounts suggest Stowe was arrested during the trip for possession of cocaine. The court found the truth about the Belize incident irrelevant to its disposition of Stowe's case, which involved a conviction for drug possession, a conviction on felony forgery counts, excessive fees, improper fee splitting, neglect of client matters, trust account violations, and conversion of client funds.

In a harsh (and somewhat moralizing) opinion, the Iowa Supreme Court excoriated Stowe for stealing two checks from his housemate and client, and forging the housemate's signature so he could deposit the checks in his own account. Finding, among other things, that "A license to practice law is not a license to steal," the court revoked Stowe's license as a necessary measure to deter such conduct, protect the public, and maintain the reputation of the bar as a whole.

Written by Jason H. Beehler

614.462.5452

jbeehler@keglerbrown.com

keglerbrown.com/beehler

March 6, 2014

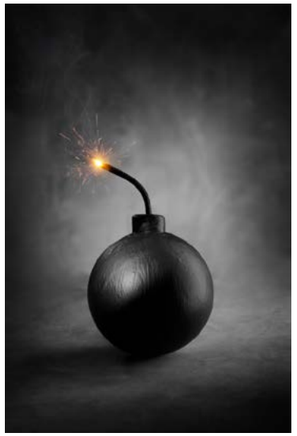
F-Bombs + Abortion Among Reasons Jury Form Was Most "Intentionally Disrespectful" Judge Has Ever Seen

A Pennsylvania judge cited 25-year-old Tina Keller and 23-year-old Drayke Jacobs-Van-Tol for sending back a jury questionnaire filled with profanity, crude language and racial slurs.

Ms. Keller allegedly asked her fiancé to fill out her jury summons form but failed to review it before turning it in. Big mistake. The responses include f-bombs, references to abortions, and comments like, "The NSA knows everything, ask them." The Times-Tribune provides the form.

The jury form led to a contempt citation for Ms. Keller and a court appearance in which both apologized. Judge Vito Geroulo dismissed the contempt citation but warned that the pair could have spent up to six months in jail for what he called the most "intentionally disrespectful" jury form he'd ever seen.

Ms. Keller completed another jury summons form before leaving the courthouse—presumably, without her fiancé's help.



Written by Kailee Goold

614.462.5479

kgoold@keglerbrown.com

keglerbrown.com/goold

@KaileeGoold

June 23, 2014

Prison for Paralegal Who Secretly Settled Cases + Got Boss Disbarred

The ABA reports: A longtime secretary, paralegal and office manager for a since-disbarred California lawyer has been sentenced to two years and three months in federal prison for embezzling $327,000 from the firm and its clients.

In addition to restitution in the mail fraud case, Ana Lissa Reyes must also pay $67,448 to the Internal Revenue Service concerning tax evasion between 2006 and 2011. Reyes begins serving her prison term in August.

According to the San Francisco Chronicle, Reyes worked for 17 under the supervision of California attorney Brian Ching. The California Bar disbarred Ching in 2012 for failing to supervise Reyes and allowing his clients to be victimized.

Prosecutors said Reyes contacted defendants who had been sued by Ching's clients, claimed to be acting for the firm in negotiating settlements, and kept the money. Clients started complaining to Ching about missing funds in 2009 and he confronted Reyes, who denied wrongdoing.

After more clients complained and the State Bar opened its own investigation, Ching fired Reyes in June 2011, but she continued contacting clients and taking their money.

Reyes pleaded guilty in April to mail fraud and tax evasion. Her public defender said that she is a church-going mother, active in community service, who offers no excuse for her conduct.

The bottom line: Be careful who you hire and actually supervise those who can get you into disciplinary trouble. See Ohio Prof.Cond.R. 5.3.

Written by Kailee Goold

614.462.5479

kgoold@keglerbrown.com

keglerbrown.com/goold

@KaileeGoold

July 7, 2014

Guilty Verdict for Ohio Lawyer Charged with Sex Crimes

The jurors in Ohio lawyer Javier Armengau's sex crimes trial came back this morning with bad news for Armengau. He was indicted on 9 of the 18 counts of sex crimes: one count of rape, one count of kidnapping, two counts of gross sexual imposition, and multiple counts of sexual battery. Franklin County Common Pleas Judge David Fais immediately revoked Armengau's bond and deputies took him in custody.

While Armengau was in trial, the Columbus Bar Association moved for an interim suspension of his law license, arguing that he was "out of control." Since the Supreme Court has not yet ruled on the motion, Armengau continued to represent his criminal defendant clients while his own case was pending. In fact, while the jury was deliberating this morning, Armengau appeared at pre-trial hearings on behalf of his clients.

Written by Rasheeda Khan

614.462.5481

rkhan@keglerbrown.com

keglerbrown.com/khan

November 25, 2013

Ohio Judge Apologizes for Halloween Costume

An Ohio state court judge who came under fire for his choice of Halloween costume has apologized. Judge Scott Nusbaum of the Ross County Common Pleas Court appeared at a Halloween party in blackface in October, apparently dressed as a servant while his wife dressed as Scarlett O'Hara from "Gone with the Wind." Nusbaum described the costume as "stupid" but said he didn't wear it maliciously, and felt "sorry I let my community down."

The Chillicothe Gazette story reports that Rick Dove, secretary of the Board of Commissioners on Grievances and Discipline, stated that such an incident could be grounds for an investigation of misconduct, but that such an investigation depends upon the circumstances.

The Washington Post reports that local NAACP President Olie Burton met with Nusbaum, and that Burton knows the costume was out of character for the judge, and that Burton has accepted Nusbaum's apology.

December 30, 2013

New Trend: Pass a Technology Audit or Lose Business

D. Casey Flaherty, corporate counsel for Kia Motors, is captivating the corporate world with his innovative "technology audit" of law firm associates to see how efficient they are when using different kinds of technology. Firms bidding for Kia's business must bring a top associate for a live test of their skills using basic, generic business tech tools such as Word and Excel for simple, rudimentary tasks. The audit should take one hour to complete; however, the average pace has been five hours. As this extra time means extra money, Kia takes five percent off of every bill until the firm passes the test. Flaherty's goal is not to embarrass, but to highlight that law firms' technological inefficiencies lead to larger legal bills for the client. Read one of Flaherty's articles. Law.com also carried the story.

More recently, The Digital Edge podcast featured Andy Perlman of Suffolk Law School in a discussion of the rising trend of these technology audits for lawyers. Suffolk's Institute on Law Practice Technology and Innovation has partnered with Flaherty to enhance and automate the audit.

Written by Jason H. Beehler

614.462.5452

jbeehler@keglerbrown.com

keglerbrown.com/beehler

Written by Kailee Goold

614.462.5479

kgoold@keglerbrown.com

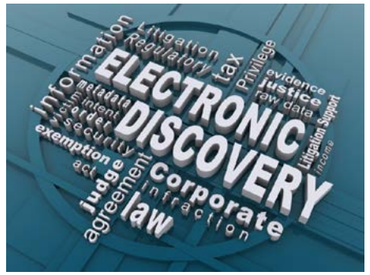
keglerbrown.com/goold

@KaileeGoold

April 15, 2014

Judges Voice Tech Concerns with Attorneys (Particularly in E-Discovery World)

Everywhere I look, I cannot avoid warnings from clients, judges and the media in general that lawyers need to shape up or ship out when it comes to tech. When this ABA article recapping a recent LegalTech panel discussion with four "cyberstar" federal judges came across my screen, I needed to share it. It begins, "Federal judges are becoming much more sophisticated about technology—and they're growing increasingly impatient with attorneys who are failing to keep up."



The panelists included U.S. District Judge Shira A. Scheindlin (SDNY); U.S. Magistrate Judge John M. Facciola (DC); U.S. Magistrate Judge Andrew J. Peck (SDNY); and U.S. Magistrate Judge James C. Francis (SDNY).

Stated most bluntly by Judge Facciola, ***"Why hire a lawyer who doesn't even have the technological competence to complete simple, everyday tasks like converting a Microsoft Word document into a PDF?"***

A few highlights:

+ **The lack of attorney knowledge irritates judges:** Judge Facciola hears arguments from e-discovery-ignorant lawyers regarding the prohibitive cost of a specific type of discovery. He is forced to endure the opening salvos of such arguments while already knowing the attorney has no idea what he or she is talking about, and already knowing that the e-discovery application in question is actually much more reasonably priced than the attorney is attempting to represent.

+ **Technological understanding is a competitive advantage:** Judge Francis sees technological advances like e-discovery as so critical to the courtroom that he views attorneys who are unaware of its nuances as essentially engaging in a slow career suicide.

+ **This lack of knowledge poses ethical concerns:** The judges worry about lawyers who regularly leave behind unsecured laptops and similar computer devices in airports and other locations across the country. Those devices are often brimming with confidential data from perhaps dozens or even hundreds of clients.

The judges did not go so far as to say that lawyers' lack of technological capability is a problem under ABA Model Rule 1.1 (competence), but that is a clear implication of their statements on the subject.

Facciola added a powerful warning: ***"Lawyers better get crackin'. There's an awful lot to know."***

Written by Kailee Goold

614.462.5479
kgoold@keglerbrown.com
keglerbrown.com/goold
@KaileeGoold

August 12, 2014

New Philadelphia Ethics Opinion Addresses Social Media Presence

What can you do about your client's damaging Facebook posts?

Use of Facebook is ubiquitous. Most clients have a social media presence and it may contain damaging information. It is commonly accepted that asking about and/or searching our client's social media presence may now be required by our duty of provide competent representation under Ohio Prof. Cond. R. 1.1. This is particularly true in certain practice areas such as domestic relations or criminal defense.

Once damaging social media information is discovered, what can counsel do? Can you tell your client to delete the information? Do you have to disclose it in discovery? A recent ethics opinion by the Philadelphia Bar Association provides some guidance in one of the first attempts to address this thorny issue. (Phil. Bar Ass'n Prof'l Guidance Comm. Op. 2014-5)

As the opinion states, the inquiry focuses on an attorney's duty to preserve evidence. In Ohio, Prof. Cond. R. 3.4(a) states that a lawyer may not "unlawfully obstruct another party's access to evidence." According to the committee, Rule 3.4(a) prohibits counsel from altering, destroying or concealing relevant social media information. Nonetheless, Rule 3.4 is not interpreted as prohibiting counsel from advising a client to make social media profiles "private" or even "to delete information that may be damaging" from a social media page. The committee was clear that if counsel advises the client to delete information, Rule 3.4 requires the lawyer to "take appropriate action to preserve" the deleted information should it prove relevant and discoverable in the future.

Additional professional conduct rules are implicated by this issue. Rule 3.3(a) requires lawyers, as part of their duty of candor to the tribunal, to take reasonable remedial measures, if the lawyer learns that a client has destroyed evidence. Rule 4.1 imposes a duty to be truthful when dealing with others on a client's behalf. According to the committee, this requires lawyers to "make reasonable efforts to obtain" relevant evidence, including from social media "if the lawyer knows or has a reasonable belief that a client possesses" such evidence.

Ohio has not opined on this issue, but this opinion provides guidance that Ohio lawyers can utilize when wrestling with clients' social media.

Written by Jonathan Coughlan

614.462.5455
jcoughlan@keglerbrown.com
keglerbrown.com/coughlan

DISCIPLINARY OPINIONS

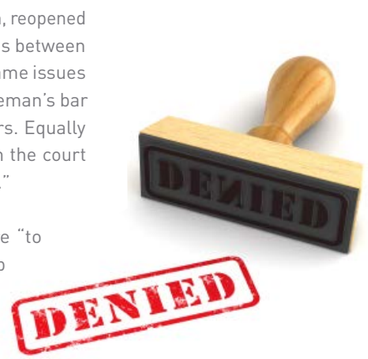
March 7, 2013

Ohio Supreme Court Disapproves Bar Application, Prohibits Re-Application

Decided: March 7, 2013
Attorney: Jay Michael Wiseman
Misconduct: Character and fitness—history of criminal conduct, lengthy pattern of traffic offenses and violation of fiduciary duties as a trustee weigh against approval of application for admission to the bar.
Citation: In Response to Application of Wiseman, Slip Opinion No. 2013-Ohio-763
Discipline: Application to register as a candidate for admission to the bar disapproved; re-application prohibited.

Jay Michael Wiseman, then a student at the University of Toledo College of Law, applied for admission to the Ohio bar. In 2011, the Columbus Bar Association recommended that Wiseman's character and fitness be approved, but exercised its investigatory authority to appoint a panel to review the matter. The panel reviewed Wiseman's past criminal conduct (underage drinking, destruction of property, public intoxication, disorderly conduct), his past-due debts, and his extensive record of traffic violations. On the basis of an affidavit Wiseman submitted, the panel found that Wiseman had addressed his traffic issues, and the board approved his character and fitness.

Before the bar exam, however, the board discovered additional criminal activity by Wiseman, reopened the matter and appointed a new panel. The second panel hearing revealed discrepancies between Wiseman's testimony before the Columbus Bar Association, and his testimony on the same issues before the Florida Board of Bar Examiners. It also revealed discrepancies between Wiseman's bar application and his documents submitted to the National Conference of Bar Examiners. Equally problematic to the panel and the court was Wiseman's attitude at the hearings, which the court described as "argumentative, misleading, contradictory, inconsistent, and not credible."



Finding that Wiseman believed he was "above the law" and demonstrated a failure "to recognize the significant deficiencies in his character," the court took the unusual step of not only disapproving his pending application, but prohibiting him from reapplying as a candidate for the Ohio bar.

Written by Jason H. Beehler

614.462.5452
jbeehler@keglerbrown.com
keglerbrown.com/beehler

January 3, 2014

More Trouble for Chris Cicero (aka the Ohio State Tipster)

During the same time that his well-publicized disciplinary case for disclosing confidential communications of a potential client to Coach Tressel was still pending, Ohio attorney Christopher Cicero managed to pick-up yet another disciplinary case. Only a few weeks after Cicero completed his one year suspension for "tattoo-gate," the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline is recommending that Cicero be permanently disbarred. This time (disciplinary case #3 for those who are counting), it was for trying to lie his way out of his own speeding ticket.

According to Relator's Complaint, back in November 2012, Cicero "obtained a blank, signed judgment entry from a Franklin County Municipal Court Judge, who unilaterally reduced his speeding charge to a headlight violation charge, caused the entry to be filed, and later falsely represented to the court and the prosecutor's office that a prosecutor had approved the reduction before the entry was filed." Apparently, Cicero had more than 50 speeding tickets and was facing a license suspension if he picked up another.

According to the board report, Cicero's story started to unravel when the judge demanded to know the name of the prosecutor who approved the reduction. Initially, Cicero refused to give a name and spent five days in jail for contempt. Then, after finally giving a name, the identified prosecutor denied ever approving such a deal. Unfortunately for Cicero, the panel didn't buy his side of the story.

The panel stated: "To accept respondent's version of the events, one must conclude that multiple individuals, including a sitting municipal court judge, the judge's bailiff and a former assistant prosecutor for the city, lied throughout these proceedings... The panel further finds that rather than admit his misconduct when it first came to light, respondent chose to further muddy the waters by claiming that he was simply refusing to disclose the name of the prosecutor involved... Even after multiple hearings, a warrant for his arrest and a five-day jail sentence, respondent refused to even acknowledge that he had caused a delay in the court proceedings."

The panel found that Cicero violated Rule 3.3(a) [making a false statement to a tribunal], Rule 8.4(d) [conduct prejudicial to the administration of justice], Rule 8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation], and Rule 8.4(h) [conduct that reflects adversely on a lawyer's fitness to practice law] and recommended to the Board that Cicero be indefinitely suspended. However, the Board decided to modify the recommended sanction and voted for permanent disbarment. The drastic recommendation was based on Cicero's prior disciplinary history, pattern of dishonesty and self-serving behavior, engaging in misconduct while another disciplinary case was pending, the Board's conclusion that he is no longer fit to practice and the conclusion that disbarment is necessary to protect the public.

The Supreme Court will have the final say on whether Cicero should be disbarred. Until then, Cicero has not yet sought reinstatement for his last suspension and is therefore not permitted to practice law.

Written by Rasheeda Khan

614.462.5481
rkhan@keglerbrown.com
keglerbrown.com/khan

July 16, 2013

Designer Jeans & Plagiarism Snare Bar Applicant

Decided: July 16, 2013
Attorney: Michele Yulana Worthy, Beavercreek, OH
Misconduct: Recent felony-theft conviction and failure to disclose academic misconduct on law-school and bar-admission applications
Citation: In re Application of Worthy, Slip Opinion No. 2013-Ohio-3018
Discipline: Application to take the bar exam disapproved—Applicant may apply to take the July 2014 bar exam

Finding that two incidents from a bar applicant's recent past cast doubt on her character and fitness to practice law, the Ohio Supreme Court denied the application of Michele Yulana Worthy of Beavercreek, Ohio to sit for the 2013 Ohio bar exam.

Worthy fully disclosed on her law school and bar exam applications an incident in which she and an acquaintance planned to shoplift designer jeans and sell them for extra cash. The pair was arrested, and Worthy successfully completed all restitution and community service she received as a result. However, Worthy failed to disclose on her bar application a second incident in which she was punished by her undergraduate university for submitting a partially plagiarized paper.

Worthy stated that she intended to supplement her bar application once she had obtained proper information about the incident and her punishment from her undergraduate institution, but then forgot to do so. The panel found this answer unconvincing, and the Court agreed.

Worthy had applied to take the February 2013 bar exam. The Court denied this application, and instead stated that Worthy would be allowed to reapply to take the July 2014 bar.

Written by Jason H. Beehler

614.462.5452
jbeehler@keglerbrown.com
keglerbrown.com/beehler

May 21, 2014

'Civil-Rights Advocate' Hit with $10,000 in UPL Fines

Decided: May 7, 2014
Attorney: Kimberley Bukstein
Misconduct: Unauthorized Practice of Law
Citation: Disciplinary Counsel v. Bukstein, Slip Opinion No. 2014-Ohio-1884
Discipline: Injunction + civil penalties

Kimberley Bukstein describes herself as a 'civil rights advocate' however she is not an attorney. Despite receiving no fees for her services, the Supreme Court of Ohio found that her activities on behalf of two women in their respective domestic-relations proceedings crossed the line into the unauthorized practice of law.

The Court determined that in these cases Ms. Bukstein 'held herself out as an expert and person worthy of trust in matters of law and this misrepresentation induced the pro se plaintiffs to rely on her unauthorized and unqualified legal advice—to their detriment and the detriment of other parties in the litigation.' Her involvement in one case lead to the withdrawal of the plaintiff's attorney.

Ms. Bukstein's actions in the two cases included:

+ providing legal advice
+ drafting motions for a party to sign pro se
+ sending communications on behalf of another in which she made legal arguments
+ demanding discovery
+ sending correspondence threatening to file disciplinary complaints or legal actions on behalf of other to coerce the recipients to cooperate (identified herself as a 'pro se attorney of record' and stated that opposing counsel in the matter had a duty to respond to her as 'opposing counsel')
+ appearance in court (sitting at counsel table and identifying herself to the judge as a civil-rights advocate)

The Court reiterated its well-settled precedent, 'The practice of law is not limited to appearances in court. It also embraces the preparation of papers that are to be filed in court on another's behalf and that are otherwise incident to a lawsuit.' *Toledo Bar Assn. v. Joelson*, 114 Ohio St.3d 425, 2007-Ohio-4272 ¶ 6.

The Court explained that her self-proclaimed title did not save her: 'These are not the actions of a person seeking systemic reform of the legal system—they are the actions of a person advising and advocating for another on issues of law.'

While the Board recommended Ms. Bukstein receive the maximum penalty allowed under Gov.Bar R. VII(19)(D)(1)(c): $20,000 ($10,000 for each matter), the Court found a total of $10,000 appropriate. The Court also prohibited Ms. Bukstein from engaging in any further acts that constitute the unauthorized practice of law in Ohio.

Written by Kailee Goold

614.462.5479
kgoold@keglerbrown.com
keglerbrown.com/goold
@KaileeGoold

April 9, 2014

Suspension for Mason Attorney Who Practiced While Suspended

Decided: January 14, 2014
Attorney: David Edward Troller
Citation: Disciplinary Counsel v. Troller, 2014-Ohio-60
Misconduct: Attorney misconduct, including continuing to practice law while under suspension
Discipline: Two-year suspension, with six months stayed on conditions

The Ohio Supreme Court has issued a term suspension for a Mason, Ohio attorney who continued to practice law following a suspension of his license.

Attorney David Edward Troller was suspended in 2005 for failure to register for the 2005-2007 biennium, and again in 2006 for failure to meet CLE requirements. In July 2012, the Disciplinary Counsel charged Troller with violations of the Rules of Professional Conduct based for practicing while suspended and engaging in conduct that adversely reflected on his fitness to practice.

Troller had been hired by a company called Clopay as senior corporate counsel in 1999. The charges resulted from Troller's continued use of his "chief legal officer" title, as well as Clopay stationery and business cards, from 2002-2012, including the period of his suspensions. The parties stipulated that Troller held himself out as being authorized to practice law, and did practice law, during his suspension. Specifically, Troller worked with outside counsel handling litigation matters, negotiated and drafted contracts for the company, and advised human-resources personnel regarding employment matters.

The board accepted the parties' stipulated sanction of a two-year suspension stayed on conditions, and the Court agreed, finding that Troller engaged in only limited practice during his suspension, cooperated with the disciplinary process, stipulated to alleged misconduct, and did not pose a great risk to the public going forward. Troller must extend his OLAP contract, pay outstanding attorney registration fees and engage in no further misconduct.

Written by Jason H. Beehler

614.462.5452
jbeehler@keglerbrown.com
keglerbrown.com/beehler

Geoffrey Stern

Recognized by *The Best Lawyers in America* as the "2015 Lawyer of the Year" in the area of Ethics and Professional Responsibility Law in Columbus, Geoffrey Stern provides to his clients preventative consultation, expert witness consultation and testimony, and representation in disciplinary matters. He is also the only person to have served as both Disciplinary Counsel of the Supreme Court of Ohio and Chair of the Ohio State Bar Association Committee on Legal Ethics and Professional Conduct.

Jonathan Coughlan

Jonathan Coughlan served the longest tenure in state history as Disciplinary Counsel for the Supreme Court of Ohio for 16 years. He is well-versed in all aspects pertaining to the ethical responsibilities of Ohio lawyers and judges, investigations of ethical matters, defense of misconduct complaints and complex ethical issues. In addition to having an active caseload during his 16-year tenure as Disciplinary Counsel, Jonathan was responsible annually for approximately 2800 grievances, 1400 investigations and 45 formal complaints.

Christopher Weber

Chris Weber has been representing lawyers and judges in disciplinary matters throughout his 20+ years in practice. He focuses on advising clients on professional responsibility and legal ethics issues, including advising lawyers concerning their ethical obligations under Ohio's Rules of Professional Conduct. He also advises non-lawyers, including individuals and corporations, concerning compliance with Ohio's regulation of the unauthorized practice of law (UPL).

Rasheeda Khan

Rasheeda Khan regularly advises lawyers and law firms on ethics and professional responsibility issues, including fee disputes, conflicts of interest, recordkeeping, confidentiality and chemical dependency or mental disability problems associated with professional misconduct. Her representative clients include lawyers throughout Ohio at every stage of the disciplinary process, from the initial investigation to the Ohio Supreme Court.

Jason H. Beehler

Jason Beehler has a formidable background in litigation and has drafted briefs for cases in Ohio trial and appellate courts, including several cases before the Ohio Supreme Court. He has first-chair trial experience and has secured favorable settlements in each of those cases. Jason also has extensive experience in electronic discovery; he recently managed the entire electronic discovery process in a $97 million matter in federal district court in Columbus.

Kailee Goold

Kailee Goold practices primarily in the areas of litigation and labor and employee relations but also advises clients on issues relating to professional responsibility and attorney discipline. She counsels clients on all aspects of litigation in both state and federal court and represents clients in a wide variety of disputes including trademark, breach of contract, and breach of fiduciary duty actions.