2015 Annual Convention

Conflicts Magic – Now You See Them, Now You Don’t

Legal Ethics and Professional Conduct Committee
Professionalism Committee

1.0 Professional Conduct Hour

April 29 – May 1, 2015 ♦ Sandusky
Speaker Biographies

**Professor Jack P. Sahl**  
The University of Akron Law School  
Akron, Ohio  
Professor Sahl received his BA from Boston College, his JD from University of Vermont College of Law, and his LLM from Yale Law School. His professional memberships include the Ohio State Bar Association, Cleveland Bar Association, Scanlon Inn of Court, and American Bar Association Center for Professional Responsibility. Professor Sahl is a Professor of Law and the Faculty Director of the Miller-Becker Center for Professional Responsibility at The University of Akron School of Law. He teaches courses on professional responsibility, evidence, law, morals and professional responsibility, media reflections of lawyers and judges—myths and reality, sports law, and entertainment law. Professor Sahl also teaches a law course each summer at Yale University and a contracts and commercial seminar at the CEIDA Institute in Rome, Italy. He has served as a consultant and an expert witness in professional responsibility cases and has helped to investigate disciplinary matters for the state bar involving lawyers and judges. Professor Sahl is the author of numerous articles on professional ethics and discipline for lawyers and judges and frequently speaks on those topics both nationally and internationally.

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Mr. Toohey received his BS from Niagara University and his JD from Cornell University Law School. His professional memberships include the American Bar Association, Ohio State Bar Association, Cleveland Metropolitan Bar Association, and the New York State Bar Association. Mr. Toohey established his own law practice in January 2013. His practice is focused on defense of attorney malpractice claims and disciplinary charges. Mr. Toohey also advises lawyers and law firms, as well as lawyers’ professional liability insurers and brokers, on risk management issues. He is a frequent seminar speaker and writer on subjects of lawyer liability, legal ethics, and professionalism. Prior to starting his own practice, Mr. Toohey served as Jones Day's Claims Counsel for over 20 years. For additional information, please visit [www.bftoohey.com](http://www.bftoohey.com).
Conflicts Magic: Now You See Them, Now You Don't

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Table of Contents

I. Recent Developments.................................................................................................................. 1
II. Big Deals...................................................................................................................................... 1
III. Per Se or OK?.............................................................................................................................. 1
IV. Duty of Loyalty........................................................................................................................... 2
V. Waivers....................................................................................................................................... 2
VI. In-House Counsel “Conflicts”................................................................................................... 2
Screenshot of The Ohio State University Knowledge Bank............................................................ 5
Ohio Legal Ethics Law Under the Rules of Professional Conduct.................................................. 6
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I. Recent Developments

A. Proposed Prof. Cond. Rule 1.6(b)(7) and Comments 13 and 14 [disclosure of otherwise confidential information for lateral hiring, potential merger, and sale of law practice purposes approved, but . . . ].

B. OSBA Informal Advisory Opinion 2015-1 [secondment of firm lawyers to firm clients approved, but . . . ].

C. Disciplinary Authority Choice of Law, Prof. Cond. Rule 8.5 [proposed amendment to Comment 5 permitting client and lawyer to “reasonably specify” a particular jurisdiction].

II. Big Deals

A. 3M Co. v. Covington & Burling LLP, Complaint, No. 0:12-cv-01800-DSD-FLN (D. Minn July 24, 2012) [“side switching” allegations in federal court malpractice, breach of fiduciary duty and breach of contract case;] and State v. 3M Co., 845 N.W.2d 808 (Minn. 2014) [remand of disqualification order].

B. W. Sugar Coop. v. Archer-Daniels-Midland Co., Order, No. CV 11-3473 (C.D.Cal. Feb. 13, 2011) [Squire Patton Boggs disqualified despite 20,000 hours on case and $12 million in legal fees following merger and mistake in premerger planning for conflicts].

III. Per Se or OK?

A. Altana Pharma A.G. v. Teva Pharm. USA Inc., Order, No. 2:04 CV 02355 (D.N.J. Feb. 16, 2006) [concurrent representation in foreign office; disqualification can be avoided only in extraordinary cases; litigation in early stages].

B. Pioneer-Standard Elecs., Inc. v. Cap Gemini Am., Inc., Memorandum of Opinion and Order, No. 1:01 CV 2185, (N.D. Ohio Mar. 11, 2002) [concurrent representation in foreign office; no per se rule where wholly unrelated work and no evidence of improper disclosure of confidences].

C. UMG Recordings, Inc. v. Myspace, Inc., Order Denying Motion to Disqualify, No. 06-7361, (C.D.Cal. Dec. 10, 2007) [ethical duties “transgressed” but court fashions a remedy to achieve purpose of ethical rules without depriving party of right to select counsel].
IV. Duty of Loyalty

A. *Flatworld Interactives LLC v. Apple Inc.*, No. 12-CV-01956, 2013 U.S. Dist. LEXIS 111496 (N.D.Cal. Aug. 7, 2013) [plaintiff company’s founder is assisted in pursuing claims against Apple by her husband, a partner in a firm representing Apple; no disqualification despite ethical violation]; and *Flatworld Interactives LLC v. Apple Inc.*, No. 12-CV-01956, 2013 U.S. Dist. LEXIS 172453 (N.D.Cal. Dec. 6, 2013) [Apple’s motion to amend complaint to add claims for aiding and abetting tortious interference, and violation of state unfair competition law against husband and his former law firm granted].


C. *Bangor v. Amato*, 2014-Ohio-5503 (App. 7th Dist. Dec. 8, 2014) [counsel’s failure to disclose prior representation of divorce client’s ex-husband’s lawyer insufficient basis for fraudulent concealment claims].

D. *SAS Inst., Inc. v. Akin Gump Strauss Hauer & Feld LLP*, Findings of Fact, No. 5:10 cv 101 (E.D.N.C. Feb. 6, 2015) [disqualification triggered by counsel’s contingency fee interest in litigation that potentially also could be brought against client SAS].

E. *U.S.A. (Fair Lab. Practice Assocs.) v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013) [former in-house counsel’s disclosures of client confidences warrant broad dismissal of *qui tam* case].


V. Waivers


B. *Macy’s Inc. v. J.C. Penney Corp., Inc.*, 107 A.D. 3d 616, 968 N.Y. 2d, 64 1st Dep’t 2013) [waiver language enforced despite client’s failure to sign waiver form because of express negative consent provision].

VI. In-House Counsel “Conflicts”

A. *Yanez v. Plummer*, 221 Cal. App. 4th 180, 164 Cal. Rptr. 3d 309, (3d Dist. 2013) [where counsel’s representation of employer and employee at deposition results in termination of employee for dishonesty, malpractice claim survives dismissal].


Screenshot of The Ohio State University Knowledge Bank

This is a screen capture from the Ohio State University Knowledge Bank, which hosts the free online version of Ohio Legal Ethics Law Under the Rules of Professional Conduct.

There are additional links to this page from the Jones Day website and from the University of Akron Law School's Miller Becker Center for Professional Responsibility.

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OHIO LEGAL ETHICS LAW UNDER THE RULES OF PROFESSIONAL CONDUCT

2014 EDITION

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CONTENT-SUMMARY:

This treatise, *Ohio Legal Ethics Law Under the Rules of Professional Conduct*, analyzes the ethical obligations, and the related law of lawyering, applicable to those practicing law in Ohio. It includes discussion of the statutes and Ohio Supreme Court rules and procedures governing Ohio practice, together with their interpretation in disciplinary, malpractice, and disqualification decisions, advisory opinions, and commentary. The 2014 edition of the treatise is complete through December 2014 and thus does not reflect legal developments after that date. The treatise is updated annually.

Acknowledgments and Disclaimer:

This treatise on Ohio legal ethics law has been prepared by Marc L. Swartzbaugh, retired Jones Day partner, and Arthur F. Greenbaum, the James W. Shocknessy Professor of Law at The Ohio State University Moritz College of Law. The authors would like to thank Jones Day for its sponsorship of the initial version of this work, Jones Day retired partner Brian F. Toohey for his editorial assistance and Jones Day librarian Suzanne F. Young for her research help. The Treatise is transmitted for informational purposes only and not for legal advice. Users should not act upon this information without seeking the professional advice of an Ohio lawyer. Every effort has been made to provide useful information, but the authors do not warrant that the information is complete or accurate and disclaim all liability to any person for any loss caused by errors or omissions in the treatise.

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Many of the citation sources for this treatise can be found online at the following locations:

- **Ohio Rules of Professional Conduct:**
  
  [http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf](http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf)
  (which superseded the Ohio Code of Professional Responsibility
  [http://www.supremecourt.ohio.gov/LegalResources/Rules/professional/professional.pdf](http://www.supremecourt.ohio.gov/LegalResources/Rules/professional/professional.pdf))

- **Supreme Court Rules for Government of the Bar of Ohio:**
  

- **Advisory Opinions** issued by the Board of Commissioners on Grievances & Discipline:
  

- **American Bar Association Model Rules of Professional Conduct:**
  

- **Case law**
  
  - Ohio Supreme Court and Appellate Courts cases, 1992-present: [http://www.supremecourt.ohio.gov/rod/docs/](http://www.supremecourt.ohio.gov/rod/docs/)
  
  - U.S. Supreme Court cases (1791-present), federal appellate court cases (1950-present), federal district court cases (1923-present): [http://scholar.google.com/](http://scholar.google.com/)
  

- **Statutes**
  
  - Ohio Revised Code: [http://codes.ohio.gov/orc/](http://codes.ohio.gov/orc/)

For those materials not available for free online, consult your local library. A version of this treatise, with links to the materials cited, can be found at [www.lexis.com](http://www.lexis.com) (subscription required).
LexisNexis version:

Ohio Legal Ethics Law Under the Rules of Professional Conduct is available as a source on both Lexis.com and the newer Lexis Advance platform. Here are some screen shots from Lexis Advance. Notice that you may click on “Get documents” to open a list of 55 individual topics arranged by Rule number. You may also search within the title.
Here is an excerpt from the discussion of Rule 1.1 as it appears on Lexis Advance, showing hyperlinks to Ohio Rules and to case law opinions:

1.1:430 Assisting Unlawful Conduct [see also 1.2:600::630]

Ohio Rule 1.2(d) states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is illegal or fraudulent." See section 1.2:600. If the client insists that the lawyer engage in such conduct, the lawyer must withdraw. Ohio Rule 1.16(a)(1). See section 1.16:230. If the client "performs in a course of action involving the lawyer's services that the lawyer [does not know but] reasonably believes is illegal or fraudulent," the lawyer may withdraw. Ohio Rule 1.16(b)(2). See section 1.16:320. The lawyer is also obligated to disclose facts (including information protected by Rule 1.6) where necessary to avoid assisting a client's illegal or fraudulent conduct. Ohio Rule 4.1(b). See section 4.1:300.

1.1:440 Knowledge of Client's Breach of Fiduciary Duty [see also 1.13:520]

In Arpadi v. First MSP Corp., 68 Ohio St. 3d 453, 628 N.E.2d 1335 (1994), the Supreme Court reversed the lower courts' grant and affirmance of summary judgment in favor of the defendants, an attorney and his law firm who represented a limited partnership and its general partner, in a malpractice action brought against them by the limited partners. One of the bases underlying the Court's holding -- that the duty of due care owed by attorneys in providing legal services to the limited partnership and its general partner extends to the limited partners as well -- was that the general partner was a fiduciary with respect to its dealings with the limited partners.