LABOR LAW ETHICS

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I. THE OHIO RULES OF PROFESSIONAL CONDUCT

A. The Rules in Ohio

Effective February 1, 2007 all lawyers admitted in Ohio must practice in conformity with the Ohio Rules of Professional Conduct ("Ohio Rules").

B. Structure of Rules

The Ohio Rules follow the ABA Model Rules format which consists of binding provisions with few exceptions. In the Ohio Rules Scope, Paragraph 14 provides that mandatory rules are stated as "shall" or "shall not" and permissive rules are stated as "may," which makes the intent clear on the binding nature of the rule. No discipline should be taken when the lawyer uses his professional discretion under such a permissive rule. Id.

Ohio Rule 1.0 provides a starting point definitional section. The defined words are italicized throughout the actual Ohio Rules but note that unfortunately not all publications reprint them with the italics.

Two important definitions for this program are: 1) Ohio Rule 1.0(f) defining "informed consent" as agreement "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct, and 2) Ohio Rule 1.0(p) which defines a "writing" or something "written" as a "… tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio, or video recording, and e-mail. A 'signed' *writing* includes an electronic sound, symbol, or process attached to or logically associated with writing and executed or adopted by a person with the intent to sign the *writing*.

C. Malpractice Implications for Labor Lawyers

In *Vahila v. Hall*, 77 Ohio St.3d 421 (1997), the Ohio Supreme Court set forth the following syllabus law for the elements of legal malpractice:

> To establish a cause of action for legal malpractice based upon negligent representation, a plaintiff must show 1) that the attorney owed a duty or obligation to the plaintiff, 2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and 3) that there is a causal connection of and the resulting damage or loss. (Krahn v.

Kinney (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058, followed.)

Ohio courts have rejected the notion that a violation of attorney ethics codes amounts to malpractice *per se.* *Northwestern Life Ins. Co. v. Rogers,* 61 Ohio App.3d 506 (1989); *Palmer v. Westmeyer,* 48 Ohio App. 3d 296 (1988). Ohio takes the majority view that ethical code violations are only "some evidence" of negligence.

II. CONFIDENTIALITY

A. The Rule

The Ohio Rule on Confidentiality of Information in Rule 1.6 has three divisions. Divisions (a) contains the general rule that a "lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by" divisions (b) or (c) of the rule. Division (b) says a lawyer "may" reveal such information if the lawyer "reasonably believes" it is necessary to: 1) prevent reasonably certain "death or substantial bodily harm," 2) to prevent the commission of a crime by the client "or other person," 3) to mitigate "substantial injury" to the financial interest or property of another that has resulted from the client commission of an illegal or fraudulent act, in furtherance of which the client has "used the lawyer's services", 4) to secure legal advice about the lawyer's compliance with the Ohio Rules; 5) to establish a claim or defense for the lawyer in a controversy between the client or about the representation; 6) to comply with the law or court order. Further

Division (c) provides that an attorney "shall" reveal such information if the lawyer reasonably believes is necessary to comply with Ohio Rule 3.3 relating to disclosure to a tribunal of criminal or fraudulent activity or materially false testimony, or to third parties of materially false statements by the client to avoid assisting in "illegal or fraudulent acts" by the client.

B. Attorney-Client Privilege

In Ohio, the attorney-client privilege referenced in Ohio Rule 1.6 is found in RC 2317.02(A).

C. Organizational Clients

Ohio Rule 1.13 recognizes that when the client is an entity, as is so often the case in labor law, the lawyer represents the organization and owes allegiance to the organization and not to any constituent or other person connected with the organization. Ohio Rule 1.6 does not differentiate confidentiality rules on the basis of whether the client is an organization. The constituents include its owners, directors, trustees, officers, and employees. Rule 1.13(d) provides that in dealing with the organization's constituents, the lawyer shall explain the identity of the client when the lawyer *knows* or *reasonably should know* that the organization's interests are adverse to those of the constituent. Finally, Rule 1.13(e) provides that the lawyer representing the organization may also represent a constituent subject to the provisions of Rule 1.7 (Conflict of interest-current clients).

D. Modern Electronic Communication

Today, the labor lawyer is confronted with electronic technology that impinges on client information confidentiality. Ohio Rule 1.6 assuredly contemplates that the lawyer will have to choose wisely in safeguarding client information when communicating about the case. E-mail, cellular or cordless phones, instant and text messaging, and other electronic modes of communication demand that attorneys know functional limitations to avoid improper disclosures. See Ohio Rule 1.6 Comment [16].

III. CONFLICTS (INFORMED CONSENT)

A. The Rules

Ohio Rules 1.7 through 1.11 govern lawyer conflicts of interest which impact upon commencing, continuing or ceasing representation. Rules 1.7 and 1.8 deal with current clients. Rule 1.9 deals with former clients. Rule 1.10 deals with imputing conflicts to an entire firm. Rule 1.11 deals with government attorney conflicts.

B. What is a Conflict?

The conflicts addressed by the Rules are ones that jeopardize the lawyer's duties of loyalty and independent judgment. Rule 1.7 Comment [7].

Rule 1.7(a) explains that a conflict of interest occurs when a lawyer's acceptance or continuance of representation would be: 1) directly adverse to another client, or 2) there is a substantial risk that the lawyer's ability to consider, recommend or carry out an appropriate course of action will be materially limited by the lawyer's responsibilities to another client, a former client or third person, or by the lawyer's own personal interests.

C. Informed Consent in Writing

Under Division (b) of Rule 1.7, if such a conflict is created the lawyer should not undertake or continue representation unless informed consent is obtained in writing, advising of the material risks and reasonably available alternatives. Ohio Rule 1.0(f) and (p).

D. Per Se Prohibitions

Under Division (c) even if the client consents, a lawyer cannot accept or continue representation if prohibited by law or if it would involve assertion of a claim by one client against another in the same proceeding.

E. Lawyer Serving as a Neutral

A lawyer may serve as a third party neutral as long as neither party involved in the dispute is his client. Rule 2.4.

Disclaimer: This outline is not intended to provide legal advice on the topics discussed and therefore shall not be relied upon as legal advice.

WHO IS THE CLIENT IN LABOR RELATIONS?
– THE UNION LAWYER DILEMMA

FACT PATTERN for PANEL DISCUSSION

Union-side attorney is contacted by his client and asked to represent the Union during the grievance/arbitration of member who was fired for alleged theft at work. In preparation for the upcoming arbitration hearing, attorney meets with member to elicit the facts surrounding the allegations. During this questioning, member admits he stole from his employer. Attorney cautions the member that he must testify truthfully at hearing if he chooses to testify. Member insists that he wants to testify because if he doesn't it will be viewed as an admission of guilt but that he will not admit at hearing to the theft because he needs his job back to support his family. He tells the attorney that he cannot tell anyone about the theft.

What does the attorney do now? What is he legally required to do? Does the attorney have an obligation to disclose the admission to the Union; to the Employer; to the Arbitrator; to the law enforcement authorities? If the attorney discloses the admission is this a violation of the attorney-client privilege? What if anything should he have done before he started questioning the Grievant? Does your analysis differ if the employee is a police officer as opposed to a private sector employee?