



ETHICAL CONSIDERATIONS FOR OFFICERS OF THE COURT

Amanda A. Barreto & Mark M. Mikhael

Court News Ohio's website often presents cases that focus on ethical violations, and should remind practicing attorneys that we should always be mindful of the Ohio Rules of Professional Conduct (formerly the Ohio Code of Professional Responsibility). These Rules set the minimum ethical standards for lawyers in their relationship with their clients, obligations to the court and opposing parties, as well as their obligations to the public.¹ By adhering to the Rules, practitioners, their clients, and society at large will be well represented and protected by those of us who are Officers of the Court.

The ethical obligations of an Ohio lawyer to her client are to be competent, diligent and loyal, and to communicate with her client about the representation and the matter for which the lawyer was engaged, and to keep confidential and not to misuse information related to the representation, except as required or permitted by the Rules.² The Rules identify what ought to be done, what is fair, what is right, and what is best course of conduct. Absent the Rules, and without a regulatory framework to remind us that we are accountable for the judgments we make and actions we take, there could be a totally individualistic ethical standard while practicing law.

VIOLATION OF THE ETHICAL RULES MAY LEAD TO CLAIMS OF MALPRACTICE

A breach of the Rules of Professional Conduct may well give rise to a claim of legal negligence. The term "malpractice" refers to professional misconduct, i.e., the failure of one rendering services in the practice of a profession to exercise the degree of skill and learning normally applied by members of that profession in similar

circumstances.³ Malpractice occurs when an attorney fails to "(1) treat a case professionally; or (2) fulfill a duty implied into the employment law; or (3) exercise the degree of skill or care exercised by members of the same profession practicing in the same locality."⁴

The standard for legal malpractice is clear. To establish a cause of action for legal malpractice under Ohio law, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) the attorney breached that duty or obligation to the plaintiff and failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting loss.⁵

It is hornbook law that such "violations of the ethical rules may sustain a claim for malpractice, when supported by expert testimony. Expert testimony is required to support the allegations except where it is so patently obvious that a violation occurred."⁶ The violation of a rule of professional conduct, disciplinary rule, ethical standard, etc. is a fact like any other fact.⁷ To the extent that it caused damages, under Ohio law, it is a fact that would support a claim of legal malpractice.⁸ Where a rule violation causes damage, there exists legal negligence.⁹

Paragraph 20 of the preamble to the Rules, states in part: "The Rules do establish standards of conduct by lawyers. A lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct"

Yet the Ohio Supreme Court held that the professional rules are "relevant, but not determinative of, the propriety of an attorney's conduct for purposes of a [tort]." *Fred Siegel Co., L.P.A. v. Arter & Hadden*. Thus, violations of the Rules of Professional Responsibility constitute a basis for malpractice liability.¹⁰

THE GRIEVANCE PROCEDURE

When an aggrieved client has an attorney complaint, he or she can file an ethical grievance with either the certified grievance committee of the local bar association or with the Office of Disciplinary Counsel of the Supreme Court of Ohio. Regardless of whether a local bar committee or the Supreme Court is involved, the complaint will be investigated, and the governing body will decide whether to prosecute any ethical violations to the Supreme Court.

The CMBAs' Certified Grievance Committee is scheduled to meet twice a month to assign members with investigations, review submitted investigation reports, decide whether ethical violations occurred, and determine whether formal complaints should be made. Investigations are assigned to individual Committee members and can include witness interviews, requests for documents, and even depositions. The investigation details are then memorialized and presented to the Committee as a whole. If the Committee determines that there is substantial and credible evidence of an ethical violation, the Committee can prepare a formal complaint to the Ohio Supreme Court's Board of Professional Conduct. The Board then considers evidence presented at a hearing and makes a recommendation of sanctions to the Supreme Court.

It is not the purpose of the Committee to determine whether a lawyer is liable for legal malpractice, but only to investigate allegations of misconduct and make recommendations regarding whether the allegations should be referred for sanctions. The Committee serves an important purpose: to give clients a safe and confidential place to present grievances for review. While it is possible for a grievant to receive a benefit or settlement from his or her lawyer as a result of an investigation, the greater

purpose of the Committee is to ensure that the public is receiving ethical legal representation, and that attorneys in violation are held accountable for their actions.

Ethical violations are often the impetus in legal malpractice cases. A review of relevant cases shows that similar factual allegations based on issues of competence (Rule 1.1); diligence (Rule 1.3); confidentiality (Rule 1.6); conflict of interest (Rule 1.7); safekeeping of funds (Rule 1.15); and misconduct (Rule 8.4) are routinely used to support allegations of legal malpractice.¹¹

While Committee investigations are confidential pursuant to the Rules of the Supreme Court of Ohio, formal complaints to the Board of Professional Conduct become public record. Because public details of an ethical proceeding could be used in a separate legal malpractice case, lawyers who face an ethical investigation or formal complaint should seek their own counsel to help navigate the process. A lawyer's failure to cooperate with an ethical investigation can only hurt her legal malpractice case.

In this era of the proliferation of legal malpractice claims, based on the traditional concept of ordinary negligence, it is dangerous and unwarranted for an ethics committee to endeavor to determine legal liability arising from possible causes of action whose merits can be more accurately, properly and finally determined by formal legal procedures designed for the assessment of legal liability.

But to sit on an ethics committee, while often time-consuming, and sometimes painful to view the misbehavior by those who should know better, is a duty accepted by few but appreciated by all. For those who have done so, and those who will be tapped to do so in the future, we have just reviewed some of the basic Rules, and hope that this review will encourage others in our profession to be true officers of the Court.

¹ Every Ohio law student is required to take a professional ethics course as part of the curriculum. Further, every applicant to the Ohio bar must pass the MPRE prior to admission to the bar.

² See Preamble [2] to Rules.

³ See 2 Restatement of the Law 2d, Torts (1965), Section 299A.

⁴ *Wuerth*, 540 F.Supp.2d 900.

⁵ *Vahila v. Hall*, 77 Ohio St.3d 421, 421-422, (1997) (following *Krahn v. Kinney*, 43 Ohio St.3d 103 (1989)).

⁶ *DeMeo v. Provident Bank*, 2008-Ohio-2936, ¶ 44.

⁷ *Northwestern Life Ins. Co. v. Rogers*, 573 N.E.2d 159 (Ohio Ct. App. 1989).

⁸ *Krahn*, 43 Ohio St.3d 103.

⁹ *Sayyah v. Cutrell*, 143 Ohio App.3d 102 (12th Dist. 2001).

¹⁰ *Id.*

¹¹ "A conflict of interest fits squarely within the realm of malpractice." *Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis*, 5 F. Supp. 3d 922, 928 (S.D. Ohio 2014).



Amanda A. Barreto is an attorney at Schneider Smeltz Spieth Bell. Amanda is a member of the Firm's Litigation Department and primarily handles real estate and business litigation matters. She is a member of the CMBA's Women in Law and Real Estate Sections and was a member of the 2018 Leadership Academy. In 2019, she was appointed to the CMBA's Certified Grievance Committee. Amanda can be reached at (216) 696-4200 or abarreto@sssb-law.com.



Mark M. Mikhael is an attorney at Schneider Smeltz Spieth Bell. Mark has experience handling various aspects of commercial litigation, including shareholder, fiduciary and business tort litigation; probate litigation; and non-medical professional malpractice matters. Mark has been a member of the CMBA since 2014 and member of the 2019-2020 Leadership Academy. He can be reached at (216) 472-2401 or mmikhael@sssb-law.com.



OVER 25 YEARS OF
PERSONAL INJURY,
MEDICAL MALPRACTICE,
AND AUTO / TRUCKING
CASES

216.223.7535
ROBENALTLAW.COM

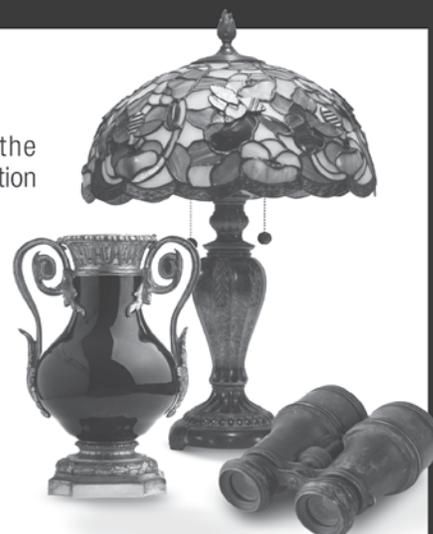
When You Need to Know The Right Value



Experts in the
Art of Valuation

Personal Property Appraisals & Estate Sales

Personal Property Appraisers
Equitable Distribution
Charitable Donation
Insurance - Estate Sales
Auction Coordination
IRS Compliant Appraisals



Lisa K. Lowy ISA AM 440.773.4664 - Lorie Hart ISA AM 216.470.7002
www.llestateliquidation.com Members of the International Society of Appraisers