



MALPRACTICE ALERT!

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Ohio Bar Liability
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COMING FEBRUARY 1ST: OHIO RULES OF PROFESSIONAL CONDUCT

Ohio has recently joined the vast majority of states in adapting a modified form of the ABA Model Rules of Professional Conduct. The Ohio Rules of Professional Conduct, replacing the Ohio Code of Professional Responsibility, became effective on February 1, 2007. The Rules apply to conduct occurring on or after February 1, 2007.

This Alert will summarize some of the new Rules that maybe of interest because they contain changes from the existing Code. This Alert is selective, and is not and should not be considered an exhaustive or complete summary of all of the changes made regarding attorney conduct in Ohio. We suggest that our readers consider attending a seminar specifically discussing the changes made by adoption of the Rules.

Rule 1.8(h) states that a lawyer cannot prospectively limit his/her liability to the client for malpractice, which clarifies DR6-102, or require arbitration in a fee agreement unless the client is independently represented when the agreement is made. A lawyer may settle a claim or potential claim with a client under 1.8 (h) (2) if the settlement is not “unconscionable, inequitable or unfair,” the client/former client is advised in writing and given a reasonable opportunity to seek the advice of independent legal counsel, and the client gives “informed consent” as defined in Rule 1.0(f).

Rule 1.8: Conflict of Intents: Current Clients: Specific Rules contains, among other topics, new requirements for counsel paid by an insurer to

represent its insured’s. 1.8 (f) (4) states “if a lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following statement of insured Client’s Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer” with the specific “Statement of Insured Client’s Rights”. Lawyers representing such clients will have to provide this statement pursuant to the Rule.

Rule 1.15: Safekeeping Funds and Property may address or resolve some questions regarding file retention. For files involving IOLTA account funds or client trust account funds, or where a lawyer has safeguarded other client property, records of such property shall be preserved for a period of seven years after termination of representation, or the appropriate disbursement of such funds or property, which ever comes first. The Rule contains additional requirements regarding the specific items to be retained.

The seven-year requirement may provide some guidance regarding retention of client files when held by a lawyer, although the Rule does not prohibit file retention for a lesser period of time.

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers states that a lawyer can be responsible for *another* lawyer’s violation of the Rules if the lawyer orders or ratifies the conduct involved, or the lawyer has managerial authority in a firm, or government agency, but fails to take reasonable steps to avoid or mitigate the conduct involved once it is discovered. This Rule strikes new ground in Ohio, as the Code contained no such provision.

Rule 5.2: Responsibilities of a Subordinate Lawyer is another new provision. A subordinate lawyer is bound by the Rules notwithstanding such lawyer acted at the direction of another person. The Rule also states that a subordinate lawyer does not violate the Rules if she/he acts in accordance with a supervisory lawyer's reasonable resolution of a question of professional duty.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants discusses the fact that a lawyer individually, in a firm or governmental agency, shall take reasonable steps to insure that the conduct of nonlawyer employees is compatible with the professional obligations of the lawyer.

Similar to the duty imposed upon supervisory lawyers in Rule 5.1, actual knowledge or ratification of conduct by a nonlawyer that violates the Rules will result in a violation of the Rules by the lawyer.

Rule 5.7: Responsibilities Regarding Law-Related Services is new, although the topic had been addressed in Advisory Opinion 94-7 of the Board of Commissioners on Grievances & Discipline. This new rule discussed limitations on lawyers who also provide law-related services to clients, and safeguards that such lawyers should provide to clients to whom law-related services are provided. Such services may include title insurance, other forms of insurance in conjunction with estate planning, accounting services, lobbying, tax preparation, and other services. A

lawyer cannot require a client to use a law-related service, nor can a lawyer require a client to use a law-related service in order to obtain legal advice or services.

Law-related services are defined in part (e) as "services that might *reasonably* be performed in conjunction with the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

Rule 7.5: Firm Names and Letterheads does not appear to break much new ground from DR2-102, except that the prohibitions contained in DR2-102(E) regarding statements about a lawyer's other business or profession have been removed. The Comparison provided of the former Code states that "The Rules of Professional Conduct should not preclude truthful statements about a lawyer's professional status, other business pursuits, or degrees."

For example, if a lawyer is also a licensed real estate agent, a truthful statement on a letterhead in that regard presumably is no longer a disciplinary violation. This change follows the decision of the U.S. Supreme Court in *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136 (1994), where the use of the CPA designation on a lawyer's law firm publicity could not be sanctioned by the accounting board in Florida without some compelling state interest in prohibiting such speech.

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