THE MILLER BECKER 2018 SEMINAR

OCTOBER 19, 2018

Ohio State Bar Association
Columbus, Ohio

5.25/6.25 CLE hours

The 2018 Miller Becker Seminar is Sponsored by:

Ohio Board of Professional Conduct

David L. Dingwell, *Chair*

Richard A. Dove, *Director*

The University of Akron School of Law
Joseph G. Miller & William C. Becker
Center for Professional Responsibility

John P. Sahl, Faculty Director

Ohio State Bar Association

ACKNOWLEDGMENT

The University of Akron gratefully acknowledges attorney Joseph G. Miller, who established The Joseph G. Miller Center for Professional Responsibility at The University of Akron School of Law in 1993. The Center is a nonprofit national center devoted to serving the legal profession and the judiciary. Joseph Miller's generous support has allowed the Institute to achieve the goals Joseph envisioned when forming the Institute.

Joseph Miller and William Becker were distinguished lawyers, public servants, and community leaders. Both were highly respected in the legal community. Mr. Miller was a litigator specializing in Family Law and Land Use Development Law, and Mr. Becker was General Counsel and Vice President of BFGoodrich Chemical Group and Professor/Associate Dean/Chair of various committees at Akron Law. Their close friendship and shared interest in the growing fields of Professional Responsibility and Ethics led to Mr. Miller asking Mr. Becker to serve as Founding Director of the Institute.

Mr. Miller practiced law in the Akron community for 44 years. He chaired the Akron Bar Association's Committee on Unauthorized Practice of Law, as well as the Ethics and Professional Responsibility Committee. He was active on the Ohio State Bar Association Ethics Committee, and chaired its Opinions and Regional subcommittees. He passed away in 2005.

Mr. Becker had a long career as corporate counsel with BFGoodrich Chemical Group, culminating in his service as general counsel and vice president. He then joined The University of Akron School of Law as a Professor and later served as Associate Dean. He was active for many years on the Ohio State Bar Association's Ethics Committee, serving as vice chair. He also served as bar counsel to the Akron Bar Association. Even before the founding of the Institute, he was a respected and sought after speaker on lawyer ethics subjects. Mr. Becker passed away in 2003.

Upon Mr. Becker's death, Joseph G. Miller sought to recognize the valuable contributions of Mr. Becker and directed that the Center be renamed to include the name of his longtime friend and colleague, leading to its current designation as the Joseph G. Miller and William C. Becker Center for Professional Responsibility. Thanks to their legacy, we have learned much from them and continue to benefit from their many contributions.

THE MILLER BECKER
2018 SEMINAR

SEMINAR AGENDA

MILLER-BECKER SEMINAR AGENDA
Friday, October 19, 2018
Ohio State Bar Association Headquarters, Columbus

8:55 – 9:00 a.m.	**Welcome** ➢ David L. Dingwell, Board Chair
9:00 – 10:00 a.m.	**#Me Too In the Legal Profession** ➢ Hon. Ronald B. Adrine ➢ Hon. Jeffrey E. Froelich ➢ Janica Pierce Tucker ➢ Kim Vanover Riley, Moderator
10:00 – 10:15 a.m.	**Break**
10:15 – 11:45 a.m.	**Implicit Bias** ➢ Hon. Ronald B. Adrine ➢ Hon. Jeffrey E. Froelich ➢ Jack P. Sahl, Moderator
11:45 a.m.–12:30 p.m.	**Lunch**
12:30 – 1:30 p.m.	**Tips on Practicing Before the Board of Professional Conduct** ➢ Tim L. Collins ➢ Hon. Rocky A. Coss ➢ Robert B. Fitzgerald ➢ Richard A. Dove, Moderator
1:30 – 1:45 p.m.	**Break**
1:45 – 2:45 p.m.	**Board and Case Update** ➢ D. Allan Asbury ➢ Richard A. Dove ➢ Kristi R. McAnaul
2:45 – 3:30 p.m.	**Legal Malpractice vs. Lawyer Discipline** ➢ Richard C. Alkire ➢ Jack J. Mueller ➢ Monica A. Sansalone ➢ Scott J. Drexel, Moderator
3:30 – 4:30 p.m.	**Disciplinary Process Overview (Optional)** ➢ Scott J. Drexel ➢ Richard A. Dove
4:30 p.m.	**Conclusion**

CLE Credit—5.25 for the main program; 6.25 for those attending the optional process overview.

THE MILLER BECKER
2018 SEMINAR

#ME TOO IN THE LEGAL PROFESSION

Hon. Ronald B. Adrine
Hon. Jeffrey E. Frolich
Janica Pierce Tucker

Kim Vanover Riley, *Moderator*

The New York Times

Sexual Harassment Training Doesn't Work. But Some Things Do.

Traditional methods can backfire, but ideas like teaching bystanders to intervene and promoting more women have proved effective.

By Claire Cain Miller

Dec. 11, 2017

Many people are familiar with typical corporate training to prevent sexual harassment: clicking through a PowerPoint, checking a box that you read the employee handbook or attending a mandatory seminar at which someone lectures about harassment while attendees glance at their phones.

At best, research has found, that type of training succeeds in teaching people basic information, like the definition of harassment and how to report violations. At worst, it can make them uncomfortable, prompting defensive jokes, or reinforce gender stereotypes, potentially making harassment worse. Either way, it usually fails to address the root problem: preventing sexual harassment from happening in the first

place.

That's because much of the training exists for a different reason altogether. Two 1998 Supreme Court cases determined that for a company to avoid liability in a sexual harassment case, it had to show that it had trained employees on its anti-harassment policies.

But while training protects companies from lawsuits, it can also backfire by reinforcing gender stereotypes, at least in the short term, according to research by Justine Tinkler, a sociologist at the University of Georgia. That's because it tends to portray men as powerful and sexually insatiable and women as vulnerable. Her research has shown this effect no matter how minimal the training. "It puts women in a difficult position in terms of feeling confident and empowered in the workplace," she said.

Other research found that training that described people in a legal context, as harassers or victims, led those being trained to reject it as a waste of time because they didn't think the labels applied to them, known as an "identity threat reaction," said Shannon Rawski, a professor of business at the University of Wisconsin, Oshkosh. Training was least effective with people who equated masculinity with power. "In other words, the men who were probably more likely to be harassers were the ones who were least likely to benefit," said Eden King, a psychologist at Rice University.

Training is essential but not enough, researchers say. To actually prevent harassment,

companies need to create a culture in which women are treated as equals and employees treat one another with respect.

"Organizations often implement training programs in order to reduce their likelihood of being named in harassment suits or to check a box for E.E.O.C. purposes," Ms. King said, referring to the Equal Employment Opportunity Commission. "If we're actually trying to change or reduce the likelihood of sexual harassment, that's a different outcome altogether. That's not a knowledge problem, that's a behavior problem."

Here are evidence-based ideas for how to create a workplace culture that rejects harassment. Researchers say they apply not just to men attacking women but to other types of harassment, too.

Empower the Bystander

This equips everyone in the workplace to stop harassment, instead of offering people two roles no one wants: harasser or victim, Ms. Rawski said. Bystander training is still rare in corporate America but has been effectively used on college campuses, in the military and by nonprofits.

One study found that soldiers who received the training were significantly more likely than those who did not to report having taken action when they saw assault or harassment. Another found that it changed college students' attitudes regarding

sexual violence and individuals' ability to stop it, a change measurable both immediately after the training and a year later.

Lorraine Sorlet

Trainers suggest choices for what to do as a bystander. Most don't advise confronting the harasser in the moment, because it can escalate and put the bystander in jeopardy. If comfortable doing so, they suggest, a bystander can say something like, "That joke wasn't funny."

Another option is to disrupt the situation, such as by loudly dropping a book or asking the victim to come to the conference room. (Charles Sonder, referred to as Snackman in a widely shared video, defused a fight on the subway by standing between the combatants, eating chips.)

Observers can talk to the harasser later, by asking questions but not lobbing accusations: "Were you aware of how you came off in that conversation?" Researchers also suggest talking openly about inappropriate behavior, like asking colleagues: "Did you notice that? Am I the only one who sees it this way?"

One crucial element, researchers say, is for bystanders to talk to targets of harassment. They often feel isolated, and observers might not know if they thought the interaction was consensual or amusing. Colleagues could say: "I noticed that happened. Are you O.K. with that?" If not, they could offer to accompany the victim to the human resources department.

"So many victims blame themselves, so a bystander saying, 'This isn't your fault, you didn't do anything wrong,' is really, really important," said Sharyn Potter, a sociologist at the University of New Hampshire who runs a research group there for sexual violence prevention.

Bystanders are unlikely to be present when the most egregious offenses happen, but harassers often test how far they can go by starting with inappropriate comments or touches, said Robert Eckstein, the lead trainer at the research group. A good workplace culture stops them before the offenses get worse.

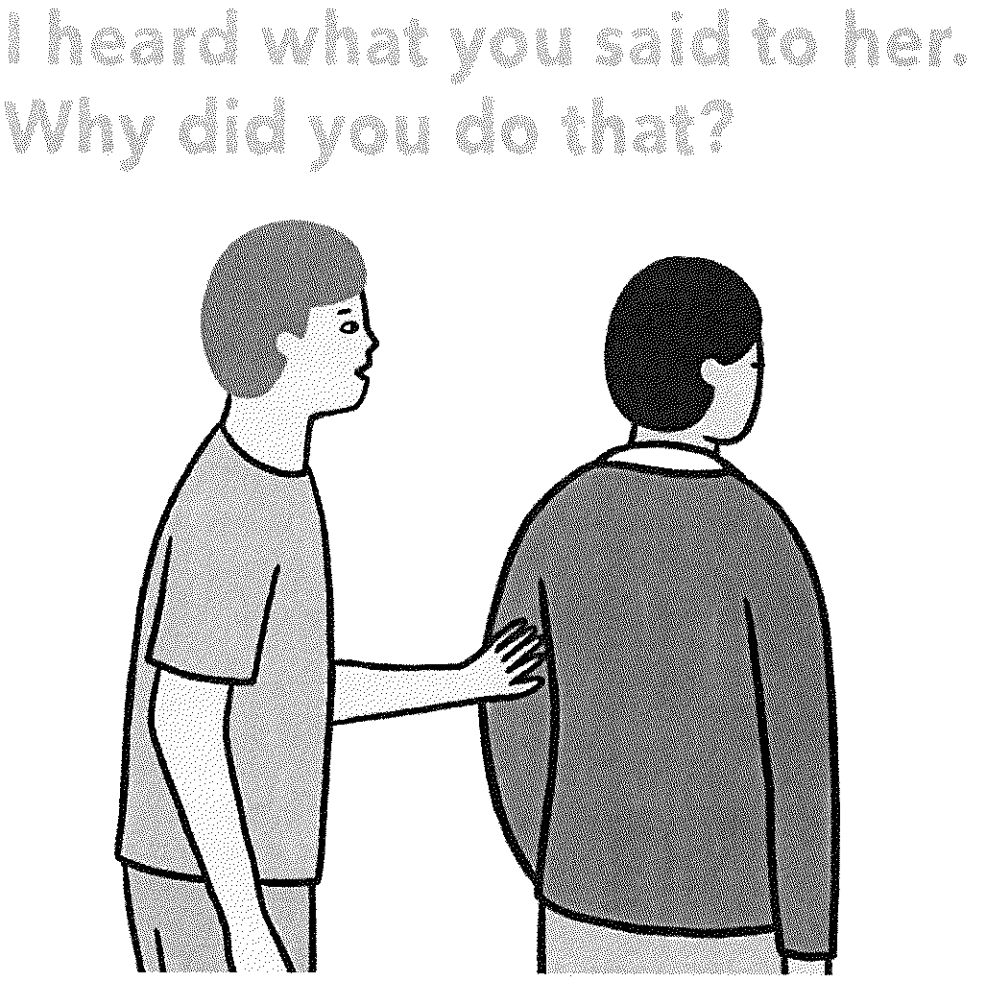
"Bystander intervention is not about putting on your cape and saving the day," he

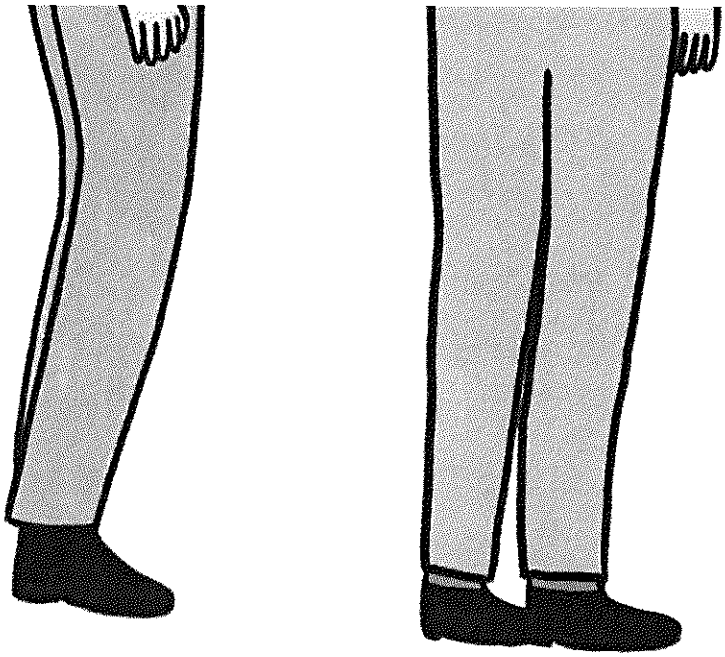
said. "It's about having a conversation with a friend about the way they talk about women."

Encourage Civility

One problem with traditional training, researchers say, is that it teaches people what not to do — but is silent on what they should do. Civility training aims to fill that gap.

Fran Sepler, who designed new training programs for the E.E.O.C., starts by asking participants to brainstorm a list of respectful behaviors. These often sound trivial, she said, but aren't common enough, like praising work, refraining from interrupting and avoiding multitasking during conversations. A big one is spotlighting contributions by people who are marginalized. A person could say: "She just raised that same idea. Would she like to expand on it?"





Lorraine Sorlet

Ms. Sepler gives people scripts for how to give and receive constructive feedback about rude behavior, so it can be dealt with in the moment. She teaches supervisors how to listen to complaints without being dismissive.

Train Seriously and Often

The most effective training, researchers say, is at least four hours, in person, interactive and tailored for the particular workplace — a restaurant's training would differ from a law firm's. It's best if done by the employees' supervisor or an external expert (not an H.R. official with no direct oversight).

It also seems to help if white men are involved in the training. A recent paper found that women and minorities are penalized in performance reviews for supporting diversity, while white men are taken more seriously when they do it. Another found a backlash against training when it was done by a woman but not a man.

Training shouldn't be infrequent, and the topic should come up in conversations about other things, whether strategy or customer service, said KC Wagner, a harassment

prevention trainer at Cornell's ILR School.

"We're talking about literally generations of people getting away with abusing power," Mr. Eckstein said. "Thinking you can change that in a one-hour session is absurd. You're not going to just order some bagels and hope it goes away."

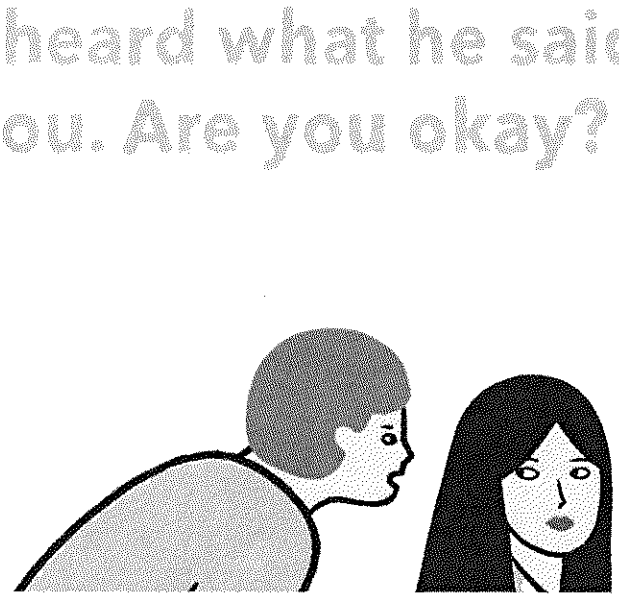
Promote More Women

Research has continually shown that companies with more women in management have less sexual harassment. It's partly because harassment flourishes when men are in power and women aren't, and men feel pressure to accept other men's sexualized behavior.

It also helps to reduce gender inequality in other ways, research shows, like paying and promoting men and women equally, and including both sexes on teams.

Encourage Reporting

Most women don't report harassment. Some don't want to take the risk alone; fear retaliation; don't know whom to report it to; or don't think anything will be done. They may not want to end someone's career — they just want to stop the behavior.



Lorraine Sorlet

The E.E.O.C. has suggested a counterintuitive idea: Reward managers if harassment complaints increase, at least initially, in their departments — that means employees have faith in the system. It also recommended giving dozens of people in the organization responsibility for receiving reports, to increase the odds that victims can talk to someone they're comfortable with.

Ian Ayres, a Yale professor of law and management, has written about using so-called information escrows for harassment reporting. Victims submit a time-stamped complaint against an abuser, and can request that it is reported only if another employee files a complaint against the same person.

Researchers also suggested proportional consequences: Harassers shouldn't be automatically fired; it should depend on the offense.

"If the penalty is someone's always going to get fired, lots of targets won't come forward," Ms. Rawski said. "But research suggests if you let the small things slide, it opens the door for more severe behaviors to enter the workplace."

Claire Cain Miller writes about gender, families and the future of work for The Upshot. She joined The Times in 2008, and previously covered the tech industry for Business Day.
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A version of this article appears in print on Dec. 13, 2017, on Page B1 of the New York edition with the headline: Traditional Workplace Education Doesn't Work. Other Methods Do.

U.S. Equal Employment Opportunity Commission

Promising Practices for Preventing Harassment

As many employers recognize, adopting proactive measures may prevent harassment from occurring. Employers implement a wide variety of creative and innovative approaches to prevent and correct harassment.[1]

The Report of the Co-Chairs of EEOC's Select Task Force on the Study of Harassment in the Workplace ("Report") identified five core principles that have generally proven effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.[2]

The Report includes checklists based on these principles to assist employers in preventing and responding to workplace harassment.[3] The promising practices identified in this document are based primarily on these checklists.[4] Although these practices are not legal requirements under federal employment discrimination laws, they may enhance employers' compliance efforts.[5]

A. Leadership and Accountability

The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated. This commitment may be demonstrated by, among other things:

- Clearly, frequently, and unequivocally stating that harassment is prohibited;[6]
- Incorporating enforcement of, and compliance with, the organization's harassment and other discrimination policies and procedures into the organization's operational framework;[7]
- Allocating sufficient resources for effective harassment prevention strategies;
- Providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies;
- Allocating sufficient staff time for harassment prevention efforts;
- Assessing harassment risk factors and taking steps to minimize or eliminate those risks;[8] and
- Engaging organizational leadership in harassment prevention and correction efforts.[9]

In particular, we recommend that senior leaders ensure that their organizations:

- Have a harassment policy that is comprehensive, easy to understand, and regularly communicated to all employees;[10]
- Have a harassment complaint system that is fully resourced, is accessible to all employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;[11]
- Regularly and effectively train all employees about the harassment policy and complaint system;[12]
- Regularly and effectively train supervisors and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, may rise to the level of prohibited harassment;[13]
- Acknowledge employees, supervisors, and managers, as appropriate, for creating and maintaining a culture in which harassment is not tolerated and promptly reporting, investigating, and resolving harassment complaints;[14] and
- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment and/or related conduct, such as retaliation, when it determines that such conduct has occurred.

In addition, we recommend that senior leaders exercise appropriate oversight of the harassment policy, complaint system, training, and any related preventive and corrective efforts, which may include:

- Periodically evaluating the effectiveness of the organization's strategies to prevent and address harassment, including reviewing and discussing preventative measures, complaint data, and corrective action with appropriate personnel;[15]
- Ensuring that concerns or complaints regarding the policy, complaint system, and/or training are addressed appropriately;

- Directing staff to periodically, and in different ways, test the complaint system to determine if complaints are received and addressed promptly and appropriately; and
- Ensuring that any necessary changes to the harassment policy, complaint system, training, or related policies, practices, and procedures are implemented and communicated to employees.

To maximize effectiveness, senior leaders could seek feedback about their anti-harassment efforts. For example, senior leaders could consider:

- Conducting anonymous employee surveys on a regular basis to assess whether harassment is occurring, or is perceived to be tolerated;[16] and
- Partnering with researchers to evaluate the organization's harassment prevention strategies.

B. Comprehensive and Effective Harassment Policy

A comprehensive, clear harassment policy that is regularly communicated to all employees is an essential element of an effective harassment prevention strategy. A comprehensive harassment policy includes, for example:

- A statement that the policy applies to employees at every level of the organization, as well as to applicants, clients, customers, and other relevant individuals;[17]
- An unequivocal statement that harassment based on, at a minimum, any legally protected characteristic is prohibited;[18]
- An easy to understand description of prohibited conduct, including examples;
- A description of any processes for employees to informally share or obtain information about harassment without filing a complaint;[19]
- A description of the organization's harassment complaint system, including multiple (if possible), easily accessible reporting avenues;[20]
- A statement that employees are encouraged to report conduct that they believe may be prohibited harassment (or that, if left unchecked, may rise to the level of prohibited harassment), even if they are not sure that the conduct violates the policy;
- A statement that the employer will provide a prompt, impartial, and thorough investigation;
- A statement that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible and permitted by law, consistent with a thorough and impartial investigation;
- A statement that employees are encouraged to respond to questions or to otherwise participate in investigations regarding alleged harassment;
- A statement that information obtained during an investigation will be kept confidential to the extent consistent with a thorough and impartial investigation and permitted by law;[21]
- An assurance that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred; and
- An unequivocal statement that retaliation is prohibited, and that individuals who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation.[22]

In addition, effective written harassment policies[23] are, for example:

- Written and communicated in a clear, easy to understand style and format;
- Translated into all languages commonly used by employees;[24]
- Provided to employees upon hire and during harassment trainings, and posted centrally, such as on the company's internal website, in the company handbook, near employee time clocks, in employee break rooms, and in other commonly used areas or locations;[25] and
- Periodically reviewed and updated as needed, and re-translated, disseminated to staff, and posted in central locations.

C. Effective and Accessible Harassment Complaint System

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

For example, an effective harassment complaint system:

- Is fully resourced, enabling the organization to respond promptly, thoroughly, and effectively to complaints;
- Is translated into all languages commonly used by employees;[26]
- Provides multiple avenues of complaint, if possible,[27] including an avenue to report complaints regarding senior leaders;
- Is responsive to complaints by employees and by other individuals on their behalf;[28]
- May describe the information the organization requests from complainants, even if complainants cannot provide it all, including: the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the

location(s) of the alleged harassment; and a description of the alleged harassment;[29]
- May include voluntary alternative dispute resolution processes to facilitate communication and assist in preventing and addressing prohibited conduct, or conduct that could eventually rise to the level of prohibited conduct, early;
- Provides prompt, thorough, and neutral investigations;
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;
- Includes processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;
- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and
- Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and, where appropriate and consistent with relevant legal requirements, the preventative and corrective action taken.[30]

We recommend that organizations ensure that the employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system, among other things:

- Are well-trained,[31] objective, and neutral;
- Have the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;
- Take all questions, concerns, and complaints seriously, and respond promptly and appropriately;
- Create and maintain an environment in which employees feel comfortable reporting harassment to management;
- Understand and maintain the confidentiality associated with the complaint process; and
- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

D. Effective Harassment Training

Leadership, accountability, and strong harassment policies and complaint systems are essential components of a successful harassment prevention strategy, but only if employees are aware of them. Regular, interactive, comprehensive training of all employees may help ensure that the workforce understands organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.

Harassment training may be most effective if it is, among other things:

- Championed by senior leaders;
- Repeated and reinforced regularly;
- Provided to employees at every level and location of the organization;[32]
- Provided in a clear, easy to understand style and format;
- Provided in all languages commonly used by employees;
- Tailored to the specific workplace and workforce;
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and
- Routinely evaluated by participants and revised as necessary.

In addition, harassment training may be most effective when it is tailored to the organization and audience. Accordingly, when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations.

Effective harassment training for all employees includes, for example:

- Descriptions of prohibited harassment, as well as conduct that if left unchecked, might rise to the level of prohibited harassment;
- Examples that are tailored to the specific workplace and workforce;
- Information about employees' rights and responsibilities if they experience, observe, or become aware of conduct that they believe may be prohibited;
- Encouragement for employees to report harassing conduct;
- Explanations of the complaint process, as well as any voluntary alternative dispute resolution processes;[33]
- Explanations of the information that may be requested during an investigation, including: the name or a description of the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;
- Assurance that employees who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation;
- Explanations of the range of possible consequences for engaging in prohibited conduct;
- Opportunities to ask questions about the training, harassment policy, complaint system, and related rules and expectations; and
- Identification and provision of contact information for the individual(s) and/or office(s) responsible for addressing harassment questions, concerns, and complaints.

Because supervisors and managers have additional responsibilities, they may benefit from additional training. Employers may also find it helpful to include non-managerial and non-supervisory employees who exercise authority, such as team leaders.[34]

Effective harassment training for supervisors and managers includes, for example:

- Information about how to prevent, identify, stop, report, and correct harassment, such as:
  - Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment;[35]
  - Easy to understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;
  - Clear instructions about how to report harassment up the chain of command; and
  - Explanations of the confidentiality rules associated with harassment complaints;
- An unequivocal statement that retaliation is prohibited, along with an explanation of the types of conduct that are protected from retaliation under federal employment discrimination laws, such as:
  - Complaining or expressing an intent to complain about harassing conduct;
  - Resisting sexual advances or intervening to protect others from such conduct; and
  - Participating in an investigation about harassing conduct or other alleged discrimination;[36] and
- Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

To help prevent conduct from rising to the level of unlawful workplace harassment, employers also may find it helpful to consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training.[37] In addition, employers may find it helpful to meet with employees as needed to discuss issues related to current or upcoming events and to share relevant resources.

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[1] *See, e.g.*, EEOC, *Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/index.cfm. Promising practices may vary based on the characteristics of the workplace and/or workforce.

[2] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [hereinafter *Select Task Force Co-Chairs' Report*].

[3] *See Select Task Force Co-Chairs' Report*, *supra* note 2, at 79-82 (noting that the checklists are intended as a resource for employers, rather than as a measurement of legal compliance).

[4] This document focuses primarily on several practices identified in Select Task Force testimony and the subsequent Select Task Force Co-Chair Report. While EEOC believes that these practices may help employers prevent and address harassment, these practices do not represent an exhaustive list of promising preventative and corrective actions. We encourage employers to continue to develop, implement, and share additional promising practices.

[5] We note, however, that refraining from taking certain actions recommended here as promising practices may increase an employer's liability risk in certain circumstances. For example, failing to develop and implement an adequate anti-harassment policy and complaint procedure may preclude an employer from establishing an affirmative defense to a supervisory harassment complaint, or a defense to a coworker harassment complaint.

Moreover, state and/or local laws may impose certain harassment prevention-related responsibilities on covered employers that are similar to specific promising practices described in this Appendix; failing to comply with those laws may result in liability. *See, e.g.,* Cal. Gov. Code §§ 12950 - 12950.1 (West 2017) (requiring California employers to provide information to employees regarding sexual harassment, internal complaint procedures, and remedies; and requiring California private sector employers with at least 50 employees and all California public sector employers to provide sexual harassment training to supervisors); Conn. Gen. Stat. Ann. § 46a-54(15) - (16) (West 2017) (requiring Connecticut employers with at least three employees to prominently post information about sexual harassment prohibitions and remedies, requiring Connecticut employers with at least 50 employees to provide sexual harassment training to supervisors, and requiring Connecticut public sector employers to provide discrimination training to supervisory and nonsupervisory employees);Me. Rev. Stat. tit. 26, § 807 (2017) (requiring Maine employers to prominently post information about sexual harassment and the external complaint process, and to annually provide employees with a written notice regarding sexual harassment and internal and external complaint processes; and requiring Maine employers with at least 15 employees to provide sexual harassment training to employees and supervisors); Mass. Gen. Laws Ann. ch. 151B, § 3A (West 2017) (requiring Massachusetts employers with at least six employees to develop a written sexual harassment policy and to provide the policy to new employees upon hire, and to all employees annually).

[6] For example, in addition to regularly disseminating the organization's harassment policy and complaint procedure, senior leaders could notify employees about relevant policies and resources in response to high profile events.

[7] *See, e.g.*, Patti Perez, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/perez.cfm [hereinafter *Perez Task Force Testimony*] (observing that companies that are committed to preventing inappropriate conduct develop, implement, and incorporate "robust" and "creative" programs into "the fabric of their being").

For example, leaders could direct human resources staff to request information from supervisory and managerial applicants and/or their references about applicants' demonstrated commitment to and experience with enforcing harassment policies and other EEO policies, practices, and procedures. Leaders could also instruct HR to ensure that employee orientation and training material includes information about the organization's harassment policy, complaint procedure, and any related rules, policies, and expectations. In addition, leaders could ensure that enforcement of, and compliance with, the organization's harassment policy and related policies and procedures is included in executive competencies and performance plans for employees with supervisory or managerial responsibilities.

[8] *See Select Task Force Co-Chairs' Report*, *supra* note 2, at 25-30, 83-88 (identifying select risk factors for harassment and proposing strategies to reduce the risk of harassment); *see also, e.g., Preventing Unlawful Workplace Harassment in California*, Soc'y for Human Res. Mgmt. (Apr. 16, 2016) (noting that human resources and information technology staff can monitor workplace communications for prohibited or unacceptable conduct, such as transmission of pornography, obscenities, and threats); Alexander et al., United States Army Research Institute for the Behavioral and Social Sciences, *Best Practices in Sexual Harassment Policy and Assessment* 29 (2005) [hereinafter *Army Research Institute Best Practices Report*] (explaining a practice at one company in which Human Resources staff and managers make unannounced visits during night shifts, which tend to have less managerial supervision and therefore greater opportunity for harassment).

[9] *See, e.g.*, Heidi-Jane Olguin, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm [hereinafter *Olguin Task Force Testimony*] (noting that senior leadership involvement is "crucial" in "set[ting] the tone for the entire organization" and describing an organization in which corporate executives were promptly notified of harassment complaints (assuming no conflict of interest), updated about investigation determinations, and involved in prevention analysis).

For example, organizations could include harassment prevention and corrective activity, as well as other equal employment opportunity-related information, in reports submitted to Boards of Directors or similar advisory or oversight entities. Employers should consult with legal counsel as necessary regarding any relevant legal considerations, such as confidentiality restrictions associated with complaints or disciplinary action.

[10] *See infra* section B for additional information about promising practices related to harassment policies.

[11] *See infra* section C for additional information about promising practices related to complaint procedures.

[12] *See infra* section D for additional information about promising practices related to training.

[13] *See infra* section D for additional information about promising practices related to training.

[14] *See Olguin Task Force Testimony*, *supra* note 9 (explaining that appropriate acknowledgement of well-handled complaints - such as by privately praising complainants and managers who promptly reported complaints - may help create a compliance-oriented culture, and noting that senior leaders' willingness to critically examine and "aggressively deal with" managers who participate in harassment or who refrain from properly reporting harassment may enhance workplace morale and productivity).

[15] *See, e.g., Perez Task Force Testimony*, *supra* note 7 (describing a company that tracked complaint trends, discovered multiple complaints of racial harassment and discrimination, and implemented a training program to address the perception of race-based conduct)*; Army Research Institute Best Practices Report*, *supra* note 8, at 30 (describing a company's efforts to measure the success of its sexual harassment policy, including tracking sexual harassment questions and allegations and conducting periodic employee surveys that included questions regarding sexual harassment).

When evaluating the effectiveness of harassment prevention and correction strategies, it may be helpful for organizations to carefully analyze complaint trends. A relatively high number of internal complaints may signify that harassment has occurred or was perceived to have occurred, but may also indicate employees' awareness of and confidence in the internal complaint process. *See, e.g., Perez Task Force Testimony*, *supra* note 7 (discussing a company that perceives increases in internal complaints positively as a "testament to the comfort and trust employees put in the [complaint] system"). A relatively low number of internal complaints may result from employees' lack of awareness or trust in the complaint process, or, alternatively, from the absence of harassing conduct in the organization. Organizations may find it helpful to solicit information from employees in anonymous surveys, harassment training sessions, or other settings in which employees may feel comfortable, regarding their awareness of and confidence in the organization's harassment policies and complaint procedures. Organizations could also solicit suggestions from employees about how to enhance employees' knowledge of and faith in the organization's harassment prevention and correction efforts.

[16] *See, e.g., Select Task Force Co-Chairs' Report*, *supra* note 2, at 33 (addressing the development and use of climate

surveys to assess perceptions of harassment among employees and members of the military).

[17] It may be helpful to explain and/or provide examples of the non-employees covered by the policy, who may include individuals who interact with the organization's employees during the course of business, such as delivery or repair workers, security guards, and food service workers, as well as individuals otherwise affiliated with the organization, such as members of Boards of Directors or similar advisory or oversight entities.

[18] Federal law prohibits workplace harassment based on race, color, national origin, religion, sex, age, disability, and genetic information. State and/or local laws may prohibit workplace harassment on additional bases. *See, e.g.,* Cal. Gov. Code § 12940(a) (West 2017) (prohibiting workplace harassment based on, among other things, marital status and military and veteran status); D.C. Code Ann. § 2-1402.11 (West 2017) (prohibiting workplace harassment based on, among other things, marital status, personal appearance, family responsibilities, political affiliation, and matriculation); Mich. Comp. Laws Ann. § 37.2202 (West 2017) (prohibiting workplace harassment based on, among other things, height, weight, and marital status); N.J. Stat. Ann. § 10:5-12 (West 2017) (prohibiting workplace harassment based on, among other things, marital status, civil union status, domestic partnership status, and military service); Wis. Stat. Ann. § 111.321 (West 2017) (prohibiting workplace harassment based on, among other things, arrest or conviction records, marital status, and military service). Employers may wish to consult with legal counsel as necessary to ensure that their harassment policies cover, at a minimum, all applicable legally protected bases.

[19] To encourage employees to share and obtain information about harassment, employers may find it helpful to provide a process, such as a phone line or website, that enables employees (anonymously or identified, at their discretion) to ask questions or share concerns about harassment.

[20] *See infra* note 27.

[21] For example, the National Labor Relations Act restricts the circumstances under which employers may require employees to keep information shared or obtained during ongoing disciplinary investigations confidential. *See, e.g.,* Banner Health System d/b/a Banner Estrella Medical Center, 362 NLRB 137, 2015 WL 4179691, at *3 (2015) (holding that employers may restrict employee discussions regarding discipline or ongoing disciplinary investigations involving themselves or their coworkers only if employers can establish a "legitimate and substantial business justification that outweighs employees' Section 7 rights"), *enforced in part*, 851 F.3d 35, 40 (D.C. Cir. 2017) (describing employees' right to discuss investigations with coworkers as "settled Board precedent" (quoting *Inova Health Sys. v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015))).

[22] *See, e.g.,* EEOC, *Facts About Retaliation*, https://www.eeoc.gov/laws/types/retaliation.cfm (last visited Nov. 20, 2017).

[23] Small businesses may be able to prevent and correct harassment without the use of formal, written harassment policies, though they may develop and use such policies at their discretion. For example, small business owners may verbally inform employees that harassment is prohibited; encourage employees to report harassment promptly; advise employees that harassment may be reported directly to the owner; conduct a prompt, thorough, impartial investigation; and take swift and appropriate corrective action. For additional information about how small businesses can prevent and address harassment, *see* EEOC, *Frequently Asked Questions #5: How can I prevent harassment?,* https://www.eeoc.gov/employers/smallbusiness/faq/how_can_i_prevent_harassment.cfm (last visited Nov. 20, 2017); EEOC, *Tips for Small Businesses: Harassment Policy Tips,* https://www.eeoc.gov/employers/smallbusiness/checklists/harassment_policy_tips.cfm (last visited Nov. 20, 2017).

[24] It may also be helpful for employers to periodically determine whether to translate the policy and complaint system into additional languages as a result of any changes in workforce composition and employees' linguistic abilities.

[25] *See, e.g., Army Research Institute Best Practices Report, supra* note 8, at 35 (noting the importance of a coordinated communications campaign to disseminate information about the harassment policy to employees, including policy distribution and strategic, sequenced use of a variety of communication methods and strategies, including bulletin board postings, newsletter and magazine articles, training sessions, and internal website postings); *Olguin Task Force Testimony*, *supra* note 9 (suggesting that distributing pens or magnets with the complaint hotline phone number or website address may help remind employees about their complaint filing options); *cf. Perez Task Force Testimony*, *supra* note 7 (describing a company that posted the diversity program mission statement in every elevator in the corporate office).

Employers may need to take additional steps to ensure that employees who work off-site or outside of regular business hours, or who otherwise may have limited access to the organization's employee handbook, internal website, or relevant officials, receive information about harassment policies and complaint systems, participate in harassment training, and are able to communicate with relevant officials. For example, employers could include information about the policy and complaint procedure with employees' schedules or paychecks; schedule training at a time and location convenient for these employees, if possible, or offer online training; provide contact information for appropriate individuals and/or offices;and ensure that employees receive prompt responses to questions, concerns, and complaints.

[26] *See supra* note 24.

[27] *See, e.g., Olguin Task Force Testimony*, *supra* note 9 (describing a "multifaceted" complaint system as "critical," and recommending that organizations provide multilingual complaint hotlines and online complaint systems, in addition to traditional management and Human Resources Department complaint options). Smaller organizations may have fewer avenues of complaint available, due to their size, but may still consider designating multiple individuals to receive harassment complaints, if possible.

[28] *See, e.g.,* HR Specialist, *Preventing and Handling Workplace Harassment of Teen Workers*, Ill. Emp't Law 7, 7 (2012) (observing that teenagers may not be comfortable discussing harassment and recommending that employers train supervisors to be receptive to harassment complaints from teenage workers' parents).

[29] Organizations that allow employees to submit anonymous complaints telephonically, online, or through some other process, may find it helpful to include a summary of this information in an introductory message for employees, while recognizing that anonymous complainants may not provide all of the requested information.

[30] To address potential Privacy Act concerns related to sharing corrective or disciplinary action with complainants, federal agencies may either: (1) maintain harassment complaint records that include information about corrective or disciplinary action by complainants' names; or (2) ensure that the agency's complaint records system includes a routine use permitting disclosure of corrective or disciplinary action to complainants.

[31] *See, e.g., Perez Task Force Testimony*, *supra* note 7 (describing a company that provides "comprehensive investigation and conflict resolution training" to internal investigators annually that includes, among other things, information about how to recognize and eliminate implicit or unconscious bias in investigations).

[32] To facilitate participation and communication and to ensure that relevant information is shared with the appropriate audience, organizations may find it helpful to train employees, managers, and Human Resources staff separately. *See, e.g., Olguin Task Force Testimony*, *supra* note 9 (noting that this approach may enhance participation and enable organizations to obtain information about potential compliance issues).

[33] *See* EEOC, *Best Practices of Private Sector Employers* sections 2.B, 2.G, 3.F (1997), https://www.eeoc.gov/eeoc/task_reports/best_practices.cfm (identifying several creative dispute prevention and resolution strategies used by employers).

[34] *See, e.g., Army Research Institute Best Practices Report*, *supra* note 8, at 29 (noting a company that designated several workers with long-standing positive reputations who were perceived as trustworthy and good listeners as points of contact for their fellow employees, and trained those workers about how to refer sexual harassment complaints to Human Resources).

[35] *See supra* note 8.

[36] *See, e.g.,* EEOC, *Facts About Retaliation*, https://www.eeoc.gov/laws/types/retaliation.cfm (last visited Nov. 20, 2017).

[37] Broad workplace civility rules that may be interpreted to restrict employees' conduct and/or speech may raise issues under the National Labor Relations Act. Employers may wish to consult with legal counsel prior to implementing training and/or policies to ensure that they do so in a legally compliant manner.

See also Select Task Force Co-Chairs' Report, supra note 2, at 54-58 (describing workplace civility and bystander intervention training, and noting that such trainings "show[] significant promise for preventing harassment in the workplace"); Lilia Cortina, *Written Testimony for the June 20, 2016 Commission Meeting*, https://www.eeoc.gov/eeoc/meetings/6-20-16/cortina.cfm (describing and providing examples of workplace civility training); Dorothy J. Edwards, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace,* https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/edwards.cfm (describing bystander intervention training Green Dot); Melissa Emmal, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace,* https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/emmal.cfm (describing the successful implementation of Green Dot training in Anchorage).

THE MILLER BECKER
2018 SEMINAR

IMPLICIT BIAS

Hon. Ronald B. Adrine
Hon. Jeffrey E. Frolich

Jack P. Sahl, *Moderator*

Fairness and Implicit Bias

Unconscious Associations and Implicit Bias and their Implications for the Attorney and Judicial Disciplinary Process – and Life

Talking point—not a slide

Before we start, please take out a piece of paper or your phone (only you will see what you write), and indicate where you think you are, among attorneys, as far as being able to be fair and appear to be fair; for example, average would be 50% or maybe you are in the top 10% or bottom 10% or whatever.

Talking point—not a slide

Answer to yourself: Can you (or anticipate to) go a day in practice without seeing someone who looks different from you – because of race, ethnicity, large age difference, using a wheelchair, apparently of a specific sexual orientation, short stature, very heavy/thin, apparently of a different religion or faith?

Talking point—not a slide

Answer to yourself: Are you always **not biased** – defined for today as having a conscious or unconscious attribution of a particular quality to a member of a certain social group that may encompass both favorable and unfavorable assessments compared with another?

Talking point—not a slide

Answer to yourself: Do you acknowledge you believe you may have some biases, but they do not affect your actions as someone involved in the disciplinary process?

Talking point—not a slide

Ask yourself: Do you have no conscious or unconscious negative reaction to someone against whom a complaint has been made and appears at your interview or disciplinary hearing in a hoodie, pants to the thighs with underwear showing, combat boots, a cigarette behind each ear, half buzzed hair with the other half saying "screw the system" carved into the scalp, and multiple tattoos depicting the devil?

Talking point—not a slide

If you answered the previous question, are you blind, deaf, and in a coma?

Talking point—not a slide

Did you ever hear about the elephant that was stretched out on a therapist's couch saying, "I had this nightmare! There I was in the middle of the room and no one is talking to me!"

That's what we want to talk about with you.

Talking point—not a slide

So how do we talk about fairness and its evil twin, bias? I mean, 92% of judges say they are in the top 25% of judges who can actually be, and appear to be, fair and impartial and that have no biases that affect their decision.

Talking point—not a slide

Where did you rank yourself when we asked you to rank yourself among attorneys in your ability to be, and appear to be, fair an unbiased in your decision-making process?

In one poll of non-attorneys, when asked if they had confidence in the fairness of court proceedings, 70% of all those surveyed said yes, but only 52% of African Americans; when the survey was limited to those under 30, overall 57% said yes, but only 34% of African Americans.

Talking point—not a slide

Those are lousy stats – somewhere between 30 and over 40% of the people we exist to serve – even without the differential by race, do not have confidence in the fairness of court proceedings – theirs or anyone else's!

But why does a significant percentage of people, and even greater percentage of people of color, believe our system does not provide fair and impartial justice for all? And, do we care, as long as we each believe we are doing the best we can??

Spoiler alert: the goal today is – three A's – for you to be **aware** that there is such a thing as unconscious bias, to **acknowledge** that it does affect your behaviors and decision-making and the perception of fairness and that it is dangerous, and to **act** to eliminate or at least decrease both the reality and perception of implicit bias.

Learning Objectives

1. Be aware that implicit bias is inherent in the human condition, affecting your decision making.
2. Be able to acknowledge and recognize:
   a) the role that unconscious thought processes play with those who are charged with the responsibility of being involved in the attorney and judicial disciplinary process; and
   b) your own implicit biases,
3. Have the tools to act and effectively neutralize those biases to decrease the probability of partial adjudicatory decisions and outcomes.

Can you see what I see?

Do you see what I see?

BIAS

- A particular tendency, trend, inclination, feeling or opinion, especially one that is preconceived or unreasoned in favor or against a thing or person or group compared to another.
- A preference or inclination, especially one that inhibits impartial judgment.

IMPLICIT OR UNCONSCIOUS BIAS

- Bias, attitudes or stereotypes that affect our understanding, actions, and decisions in a sub or unconscious manner; activated unconsciously, involuntarily and/or without one's awareness or intentional control, that is not a product of intention, and is not consciously available, controlled or requiring mental resources.

Schema—Implicit Bias, Defined

EVERYONE HAS SCHEMA!

- Schema is how we view and group people we encounter (positively or negatively) based on the stereotypes and attitudes we hold.
- Often operate outside our awareness.
- These stereotypes and attitudes we hold tend to develop early in life.
- Tend to strengthen over time.
- In themselves, schema are not inherently right/wrong.

Implicit Bias is . . .

- A lens through which we view the world.
- It's a lens which automatically filters how we take in and act on information.
- It is a lens that is always present.

Implicit Biases . . .

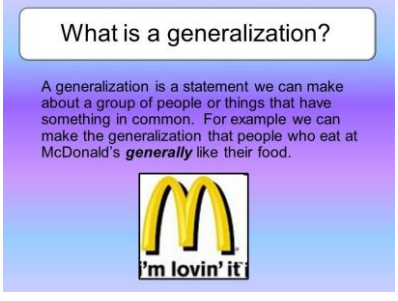
- do not necessarily lead to explicitly biased decisions or behaviors,
- but they may well predict discriminatory nonverbal, subtle behaviors.
- Just like schemas, implicit biases are not inherently right/wrong.

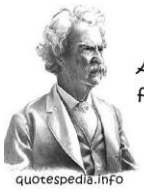
Implicit bias v. semi-acknowledged bias

- For instance, if asked, people holding negative attitudes against someone of another race are prone to say the "PC" thing, for fear of being labeled a bigot, or acknowledging it to themselves.
- Awareness of possible implicit biases and their information and nature can only help achieve more fairness in decision making.

Possible Biases

- Age
- Race or color
- Physical abilities, including height, weight, assistive devices
- Gender
- Sexual orientation
- Intelligence
- Health, physical, mental, emotional
- Personality
- Ethnicity, nationality, accent, language
- Appearance, physicality, grooming, hair style, clothing, attractiveness
- Education, other degrees, which law school
- Religion, spirituality
- Political affiliation, activity
- Geographic: urban, rural, part of city, county, state
- Parental or marital status
- Previous discipline
- Type of practice: full/part time, size of firm, government, private





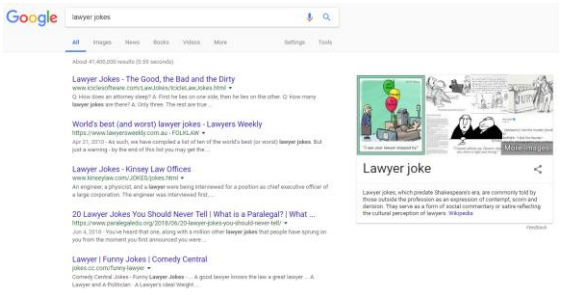
All generalizations are false, including this one.

Mark Twain

"OF COURSE I'M AGAINST GENERALIZATION, EXCLUSION AND DEFAMATION, YOU FAT, UNSHAVEN MORON!"

Stereotypes and Attitudes

- Stereotypes: traits associated with a particular group.
- Attitudes: warmth or coldness toward a particular group.
- We can have positive stereotypes and negative attitudes about the same particular group.
- Lawyers, for instance?


Google
lawyer jokes
All
Images
News
Books
Videos
More
Settings
Tools
Lawyer Jokes - The Good, the Bad and the Dirty
World's best (and worst) lawyer jokes - Lawyers Weekly
Lawyer Jokes - Kinsey Law Offices
20 Lawyer Jokes You Should Never Tell | What is a Paralegal? | What ...
Lawyer | Funny Jokes | Comedy Central
Lawyer joke
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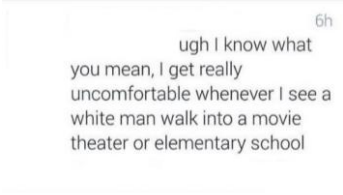
LawInfo
LAWYERS
The real root of all evil in America

Western Hypocrisy...



A group of teenagers shopping at a mall.

A man who appears to be feminine.

A woman who appears to be masculine.

A man who curses.

Someone who speaks with bad grammar.

A woman who is a housewife (does not work outside the home).

A man who is a househusband (does not work outside the home).

A woman over 50 who has never been married.

How to Date When You're Over 50 & Never Married

by Maura Bonar

Dating, at any age, should be fun

Even though the number of single potential partners declines as you age, dating after age 50 can be less stressful in some ways. This can be in part because your criteria may no longer include finding someone who wants children or who is in the midst of focusing on growing a career or pursuing an education. Dating should be an enjoyable experience, no matter how old you are. Never having married can add to the enjoyment because there also may be experiences, like a trip down the aisle,

that you still have ahead of you.

For instance, recently, you've heard a lot of conversation about the American flag, football, and patriotism . . .

But how you react to that discussion all depends on your point of view . . .

Imaged by Heritage Auctions, HA.com

People are more easily able to ***differentiate or individualize*** among members of ***their own group***.

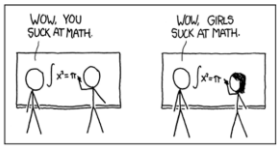
Along with or instead of negative associations toward an out-group, most people tend to hold favorable attitudes toward ***in-groups***.

"In-group" preference can explain how "racist" people can honestly feel they are not racist and don't agree with stereotypes.

"We need more people like you in our organization!"

They are also more likely to attribute ***negative*** behavior of a member of their own group to the particularities of ***the person or situation***,

but to attribute the ***same*** behavior of a member of an "out-group" to ***a characteristic of the group***.



Example of implicit bias

- When conductors were placed behind a screen, the percentage of female new hires for orchestral jobs increased 25% - 46%.

Does this mean we are racists/sexists?

Not necessarily.

Research suggests that the vast majority of all Americans consciously hold egalitarian norms.

The vast majority of us undoubtedly want to be fair.

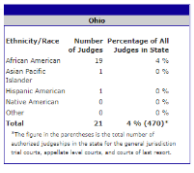
But . . . Frequently unacknowledged biases influence and distort our view and decisions.

Ohio Attorney Demographic Data, September 1, 2018

- White 92.9%
- Black 3.7%
- Male 66.0%
- Female 34.0%

National Attorney Demographic Information, 2018

- White 85%
- Black 5%
- Hispanic 5%
- Male 64%
- Female 36%



Ohio

Ethnicity/Race	Number of Judges	Percentage of All Judges in State
African American	19	4 %
Asian Pacific Islander	1	0 %
Hispanic American	1	0 %
Native American	0	0 %
Other	0	0 %
Total	21	4 % (470)*

*The figure in the parentheses is the total number of authorized judgeships in the state for the general jurisdiction trial courts, appellate level courts, and courts of last resort.

Disparity in Judicial Misconduct Cases: Color-Blind Diversity?

Mutua, Athena D.
Journal of Gender, Social Policy & Law
Volume 23, Iss. 1[2014], Article 2

Findings

- Judges of color (JOC) only constitute 8.3% of the state court bench:
  - Asian—1%
  - Black—4.4%
  - Latina/o—2.3%
  - Other—0.6%

Findings

- People of color comprise 8.3% of judges on state court benches, but their communities comprise 37% of the country's total population
- Thus, they are vastly *underrepresented* on state courts relative to their percentage of the population by about 78%.
- However, JOC are *over-represented* in disciplinary proceedings.
  - Judicial action involving judges of color relative to their presence on state court benches is 10.3%, significantly higher than those of White judges(7.0%).
  - In addition, once disciplined, the incidence of removal for JOC is 12.8%, as opposed to 9.1% for White judges.

Findings

- In state courts:
  - Judges of color are disciplined more often than are white judges relative to their presence on the bench.
  - Judges of color who are men have the highest incident of discipline relative to their presence on the bench.
  - Women judges of color have a higher incidence of discipline, relative to their presence on the bench than do white men and white women AND they are the most harshly sanctioned relative to their presence in the disciplinary pool of any group studied.

Findings

- Of the 71 black judges that the study found were subject to disciplinary action, 19.7% were removed, as compared to 1115 white judges similarly subject, of whom 9.1% were removed.
- A black judge who faced disciplinary action was more than twice as likely than a white judge so subject, to be removed.

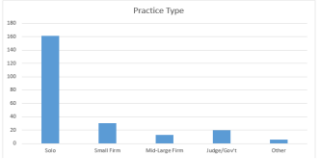
Findings

- Relating to female JOC:
  - Women of color represent a mere 3.15% of state judges.
  - Incidence of discipline relative to their representation on the state bench was 8.2%.
  - Higher incidence of discipline than for white women and white men.
  - Lower incidence of discipline than for men of color, relative to their presence on the bench.

Findings

- Significantly higher presence among those removed from the bench, in relation to the other groups disciplined.
  - 17.8% of women of color were removed.
  - This compares with an incidence of removal of 10.7% for men of color; 9.6% for white men; and 6.5% for white women.
  - A woman of color who faced disciplinary action was almost twice as likely to have her case end in removal, than were men and almost three times more likely than were white woman.
  - In addition, women of color have a high incidence of resignation.
  - It appears that it is the resignations of women of color that drives the removal disparity between judges of color and white judges.

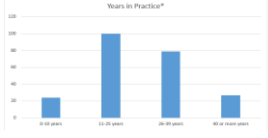
Discipline Demographics (2013-2017)



Percentages:

Solo—70%
Small firm (2-10 lawyers)—13%
Mid-to large firm—6%
Judicial/Governmental—9%
Other—3%

Discipline Demographics (2013-2017)



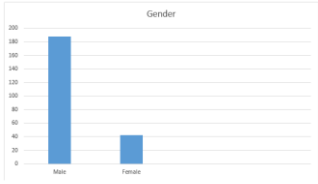
Mean—24 years
Median—23.5 years

Percentages:

0-10 years—10%
11-25 years—44%
26-39 years—34%
40 or more years—10%

*Years in practice is based on date of Ohio admission and date of the Supreme Court disciplinary order. Misconduct likely occurred a minimum of two years before discipline was imposed.

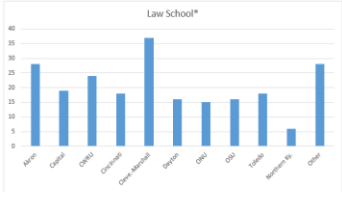
Discipline Demographics (2013-2017)



Percentages:

Male—82%
Female—18%

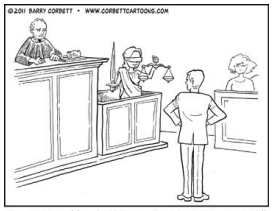
Discipline Demographics (2013-2017)



* Not adjusted to reflect number of graduates actively engaged in the practice of law.

Implicit bias can affect every decision point:

- Initial screen
- "Categorizing" complaint
- Assigning investigator
- Time allowance
- Requiring additional information
- Appropriate canon/code section
- Adjudication
- Discipline



"As a matter of fact, I AM putting the entire system on trial."

Strategies for Over-riding or Minimizing Implicit Bias

The Good News is that . . .

Motivation to be fair makes a difference!

Increase Your Motivation to be Fair

- The more motivated that you are to be fair, the greater the possibility that you actually will be fair!!
- *But motivation requires that you know there is an issue!*

'I beseech ye . . . , think that ye may be mistaken.' I should like to have that written over the portals of every church, every school, and every courthouse, and, may I say, of every legislative body in the United States. I should like to have every court begin, 'I beseech ye . . . , think that we may be mistaken.'

Learned Hand

The desire to be fair may be more effective at impacting bias than legal coercion might be.

Conditions that support this motivation include strong, unambiguous norms around bias, and leadership with positive examples.

How Do We Go About De-Biasing?

- *Education*
- *Exposure*
- *Approach*

Education

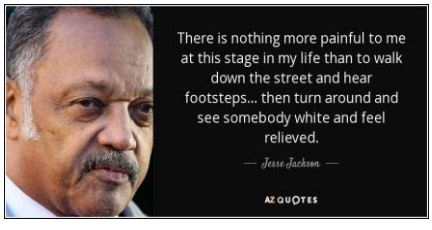
- Becoming aware of implicit bias is first an educational process.
- Take that which is implicit and often unknown and unspoken and shine a spotlight on it.
- Research suggests that even just increasing awareness is helpful.

Exposure

- Contact
- Positive exposure
- Perspective-taking

Approach

- Higher-level Processing – "Stare rather than blink." Think about your thinking!
- Reduce cognitive load – Slower decision-making; focus.



Acknowledge that every person or group is "different" than you and be conscious of any differences and your reaction to them.

Make a conscious effort to engage your intentional thought process – think about your thinking.

Engage in conscious self-vigilance.

PERSONAL SELF-ASSESSMENT OF ANTI-BIAS BEHAVIOR

"Fairness is what justice really is.

— *Potter Stewart, Supreme Court Justice (1915-1985)*

THE MILLER BECKER
2018 SEMINAR

TIPS ON PRACTICING BEFORE THE BOARD OF PROFESSIONAL CONDUCT

Tim L. Collins
Hon. Rocky A. Coss
Robert B. Fitzgerald

Richard A. Dove, *Moderator*

The following article is reprinted from the Summer 2018 newsletter of the Federal Bar Association, Northern District of Ohio Chapter.

THE MILLER BECKER
2018 SEMINAR

SOME LESSONS LEARNED: 33 YEARS AS A TRIAL LAWYER, AND 3 YEARS ON PANELS FOR THE BOARD OF PROFESSIONAL CONDUCT

By Tim L. Collins, Esq.
Collins & Scanlon LLP

After hundreds of proceedings, including jury and bench trials, and court annexed and private arbitrations, during more than three decades of civil trial practice for numerous business and individual clients, I have, for the past 3 years, been privileged to also serve as both a member and chair of hearing panels for the Board of Professional Conduct for the Supreme Court of Ohio. That experience, as a deliberative panel member, and serving as the chair and report writing member of those panels, in a quasi-judicial setting, has been eye opening as to my own advocacy in several ways. This article summarizes a few. Sitting on the other side of the table, as trier of fact, and author of reports impacting the ability of fellow lawyers to practice, is a new perspective for a career long advocate. It has taken time to know my role, and leave counsel for the parties to theirs. Several recent experiences as a panel chair, and numerous as a panel member, have caused me to consider how to better undertake advocacy beyond presenting my best case, limiting or blunting the scope of claims, and defenses, and the scope and effect of damaging evidence being submitted against my client. In sum, good advocacy requires delivering my client's case in the most usable form possible to the trier of fact, especially if that is a person or a panel who will use my materials and presentation to formulate a report and recommendation, or an opinion.

Complaint, Petition or Arbitration Demand

Let's begin at the beginning: every form of civil litigation begins with an initializing statement or complaint. The Federal and Ohio Rules of Civil Procedure do not require specificity of pleadings, except in limited situations. Civil Rules 8-9, Federal and Ohio Rules of Civil Procedure. Likewise, an arbitration demand does not require more than a brief description of the dispute. See, e.g., American Arbitration Association Commercial Arbitration Rules Demand for Arbitration, www.ADR.org. In the case of the Board of Professional Conduct ("BPC"), complaints are to include more specifics then most civil complaints, e.g. allegations of specific misconduct including citations to rule violations, the nature and amount of restitution sought, a list of prior discipline, etc. Rule V, Section 10, E(1), Supreme Court Rules for the Government of the Bar of Ohio. Insofar as the matters before the BPC, the better Rule V is observed, the more useful the complaint is to the panel. With regard to civil litigation, sooner or later a judge, arbitrator or hearing panel member will want to reach into his or her file, extract a document that comprehensively sets out the claims, including the elements, and a rough description of how they are going to be factually demonstrated, to know what to look for as evidence is adduced during the course of the evidentiary hearing. If your case is not succinctly yet sufficiently set out, you have just forced the trier of fact to do your job for you on behalf of your client. Your initial pleading should be readily converted to a chart so as to allow the trier of fact to keep score. My father's favorite saying applies here: "If you want the job done right, you better do it yourself." "You" here should be counsel for the parties, not the trier of fact. While the Civil Rules do not require more than notice of the claims and defense to the opposing party, please consider the trier of fact in your initial pleadings or statement of the issues, and how useful your pleading, petition or demand will be through discovery and at trial.

Exhibits and Stipulations

At the conclusion of discovery and motion practice (where allowed), both parties will be intensely focused on the issues in play, and the evidence which tends to prove properly provable propositions. There will be volumes of information counsel for the parties will gather in discovery. Resist the urge to dump all of it on the trier of fact without sifting, probing the usefulness and attempting to organize it in a useful manner from the quantity you have assembled in discovery. I urge you to make every effort in consultation with opposing counsel as far as possible to arrive at a common set of exhibits. The trier of fact cannot possibly be as knowledgeable or focused as counsel for the parties on the universe of evidence which exists in a case. Similarly, counsel is in the best position to cull out poorly communicated, duplicative and irrelevant information to present a clean and persuasive record. To be certain that your evidence is making its way in its most crystallized form to the trier of fact, it is incumbent upon counsel to actively work with opposing counsel to, e.g., negotiate joint exhibit lists, exhibits and stipulated facts. Otherwise, the record created at trial could be so disaggregated as to leave the proofs you need to prevail as hard for the trier of fact to find as the proverbial needle in a haystack. In large document cases, hundreds of documents or lines of email make the hearing and the conclusions to be reached difficult if not overwhelming for a trier of fact, which is not necessary or helpful to your case. Of course, there is a transcript, which the trier of fact will read, but you may leave your best facts buried for the trier of fact to find. You cannot possibly think that is a plus for your client.

A recent experience in a multi-day hearing illustrates this problem. The hearing was held in Columbus involving tens of fact and expert witnesses, thousands of pages of emails and documents, and hotly contested issues with serious long-term consequences for the Respondent. The parties filed literally dozens of pretrial motions contesting every legal and factual matter possible, including dispositive motions, motions asking for orders requiring production of documents, demands for production of expert reports, notices of deposition of ten experts listed on preliminary witness lists (but who had not yet supplied expert reports) and motions in limine as to many of the fact and expert witnesses on both sides. Additionally, exhibit lists from both sides identified hundreds of documents, mainly emails, many of which were redundant upon further study, yet no effort was made to stipulate or agree on a list of joint exhibits. Ultimately, at trial the vast majority of the facts, while voluminous, proved to be essentially not at issue in the case. The parties, during the hearing, twice stipulated to major "liability" issues after several witnesses testified, and vigorous cross examination occurred. Instead, the legal consequences, and mitigation evidence as to the effect of the basic facts, became the focus of the remaining evidence which was the subject of dispute. The inability of counsel to meaningfully meet, confer, and seek to sift the disputed facts from the undisputed before the hearing, resulted in the expenditure of hundreds of hours of time not only by counsel, but also by the three panel members preparing to hear the facts of the case, and attending the hearing. Please talk among yourselves to find a scenario where either side benefitted from this lack of meaningful preparation in the delivery of the case to the trier of fact before the hearing commenced.

Trial Evidence and Argument

Every case has at least two sides, or there wouldn't be a trial or hearing. However, when presenting your case, the tendency of erring on the side of spreading everything on the record you have for your client's case must be balanced against overfilling the record, and the attention of the trier of fact, with too much back story and redundancy, including efforts exerted to introduce evidence that is just not relevant if thought through before trial. For example, if the subject of the claim has been in the public eye, indeed covered by news media, would the trier of fact need to read every article or transcript of every interview ever taken on the subject? Probably not. I suggest that counsel for the parties must learn their audience, focus on what is at issue in the case, provide facts cogent to those issues, and keep your presentation succinct, while still making your points at trial, as well as making, where necessary, your appellate record. You are not recreating news coverage; you are proving properly provable propositions.

Findings of Fact and Conclusions of Law

When a matter is heard by a non-jury trier of fact, whether a federal or state judge, a hearing officer or a hearing panel, a typical product at conclusion is an opinion, a report and recommendation, or a judgment entry. Rule 52 of the Federal Rules of Civil Procedure (Bench Trial) requires that findings of fact and conclusions of law be stated separately in an opinion, report or judgment entry. Rule 52 of the Ohio Rules of Civil Procedure differs in that findings of fact and conclusions of law are only required if one of the parties provides a written request, otherwise judgment may be general for the prevailing party. Further, under Rule 53 of the Federal and Ohio Rules of Civil Procedure, a magistrate's factual findings and conclusions of law must be reviewed and adopted by the court in order to be effective. That opinion, report or judgment entry rely on concisely presented and summarized evidence, and on well drafted findings of fact and conclusions of law from the parties. Extending the notion that a clear statement of claims, as comprehensive as possible set of stipulations and joint exhibits, and succinct live testimony focused on the nuts and bolts of the case best serve your client, the preparation of record supported, accurate findings of fact and conclusions of law are a must.

A recent hearing is an example of what not to do. The case presentation was of three live fact witnesses, hundreds of exhibits, including several important ones which had never before been surfaced by the proponent until trial. Further, the parties had stipulated to very little in the pre-hearing or hearing phases of the case. Despite propounding almost identical exhibits, of which only three were subject to objections when moved into evidence, the parties each submitted different exhibit lists amounting to different iterations of the same exhibits. Following the hearing, the panel chair (your author) was required to do the work for counsel of analyzing, collecting and identifying the differences, and similarities, of the parties' evidence. Lists were created, and exhibits were compared and indexed. The hearing transcript was then read, re-read, indexed and charted on each of the points required to prove the claims, the defenses, and mitigation by the panel chair. From those materials a comprehensive report was drafted, albeit with very little help from the submissions by counsel to the parties. While the trier of fact is required to sort through and decide which version of "the truth" is better supported by the evidence, advocacy for each party would be far more effective if that information were properly summarized and presented to the trier of fact by counsel for the parties, rather than making the trier of fact create its ruling from the shambles of an ever-changing set of exhibits and trial record out of whole cloth.

The Three Scotch Rule

An easy way to summarize the efforts counsel should undertake in aiding a trier of fact is to borrow the rule of Prof. J. Patrick Browne, late of the faculty of the Cleveland-Marshall College of Law, famously dubbed by him as the "Three Scotch Rule". Prof. Browne asserted that when a judge packs up a brief case at the end of a case, or when deciding a motion, with everything she/he needs to decide a case at home, she/he will invariably find the most comfortable spot in her/his residence to review those materials, and unpack the materials brought home. Solely for illustration purposes, Prof. Browne posited that the honorable trier of fact might then position three glasses of

Scotch next to the unpacked materials, perhaps next to a couch, perhaps at the dining room table, to begin work. The rule holds that, while the trier of fact is reviewing the materials toward arriving at a decision, she/he should not be required to move from the designated location until (1) a decision has been reached, or (2) the Scotch runs out.

It should be clear to all that the need to locate and plumb through additional materials, whether old fashioned paper, or new fashioned electronic materials of any description, only stands in the way of the trier of fact expeditiously reaching her/his conclusion. Put another way, please find one good reason why your client is better served by you failing to aid the trier of fact to arrive at and then report on a verdict in your case, by forcing that person to search for and find claims and proof thereof which you did not point out in readily available materials? If you take into account the Three Scotch Rule at every step of your case, even if the trier of fact is a teetotaler, your client will be better served. Prof. Browne, rest in peace.

Conclusion

If asked why trial lawyers come up short in ways like those described herein, I, upon reflection, think it is because we tend to focus on learning the scope of our own role as an advocate: plaintiff's lawyer, defense lawyer, relator's counsel, or respondent's counsel. Our job in those roles is to make our own case as fully as possible, limit the scope of issues being presented by our opponent, limit the evidence our opponent introduces, or blunt it, and introduce our best evidence and arguments to support our client's claims or defenses to claims. We often consider we have served our role if we have executed on these tasks. However, to successfully complete the cycle of advocacy, I submit, also requires taking off the hat of the advocate, at least periodically donning the hat of trier of fact, and contemplating how the evidence and arguments are being delivered to and received by the trier of fact. If the trier of fact is inclined to find for your client, isn't it best to present your case in a complete yet concise statement of the claims or defenses, and in stipulated evidence including relevant exhibits? If done correctly, and if you win, you want the trier of fact to virtually drop your legal and factual positions into the body of a recommendation and report, or findings of fact and conclusions of law. The factual and legal issues that are genuinely in dispute in many cases are mostly modest in size. If you are focused in your presentation, and have stipulated the uncontested issues and facts, the trier of fact will have the contested, big factual and legal issues adequately isolated so as to spend time where it belongs, on those real disputes, to make a fair and reasoned decision. Then, be sure the trier of fact can, with little effort, find the record basis to reach your result. Thirty-three years as a civil trial lawyer, and, now, three years as a member and chair of hearing panels helping decide the professional fate of fellow lawyers, leads me to say, yes, you, and I, can do better in our presentations to aid the trier of fact in deciding cases, hopefully in favor of our clients.

Tim L. Collins is a litigation partner of Collins & Scanlon LLP. The firm is a general business practice involved in civil litigation and business transactions. Mr. Collins' practice has included business litigation, class action litigation, and acting in receivership matters. Clients have included real estate, hotel franchise relations, computer hardware and software, manufacturing, title insurance and other industries. He has handled cases in State and Federal Courts in Ohio, Pennsylvania, Michigan, Indiana, Texas, Massachusetts and California, among others. He has served as a Commissioner of the Ohio Board of Professional Conduct since 2015 through the present, where he serves on the Board's Probable Cause Committee, and on hearing panels. Mr. Collins may be reached at tcollins@collins-scanlon.com or (216) 696-0022.

THE MILLER BECKER
2018 SEMINAR

BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO

In re:

Complaint against **Case No. 2018-100**

Jonathan Richard James

Respondent

Disciplinary Counsel

Relator

ORDER

The panel chair will conduct a prehearing telephone conference on September 21, 2018 at 1:00 p.m. Call-in information is attached.

At the time of the telephone conference, the parties shall be prepared to:

1. Identify, clarify, and narrow the issues;

2. Address the need for any amendment to the pleadings;

3. Establish a discovery timetable;

4. Identify anticipated witnesses and the exchange of anticipated expert witness reports;

5. Identify and arrange for the exchange of copies of anticipated exhibits;

6. Discuss the possibility of (a) filing a consent to discipline agreement, (b) obtaining stipulations of fact, rule violations, aggravating and mitigating factors, and sanctions, (c) and obtaining stipulations regarding the admissibility of exhibits;

7. Agree to a date and time for final hearing;

8. Discuss any other matters that may expedite the resolution of the case.

Paul T. Davis
Panel Chair

_____ per authorization

THE MILLER BECKER
2018 SEMINAR

BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO

In re:

Complaint against **Case No. 2018-038**

Jonathan Richard James

Respondent

Disciplinary Counsel

Relator

ORDER

The panel chair conducted a prehearing telephone conference with counsel on September 21, 2018. As a result of this telephone conference the following dates were established:

1. The parties shall exchange fact and expert witness lists and expert reports on or before December 10, 2018.
2. The parties shall complete depositions and other discovery on or before January 7, 2019.
3. The parties shall exchange exhibits on or before January 14, 2019. Any objections to exhibits shall be filed on or before January 22, 2019, and any responses to objections shall be filed on or before January 28, 2019. Relator's exhibits shall be consecutively numbered, and Respondent's exhibits shall be consecutively lettered. Joint or stipulated exhibits shall be marked as such and consecutively numbered.
4. The parties shall file final witness lists, hearing exhibits, and stipulations on or before January 28, 2019. The parties are directed to review the language regarding stipulations set forth below.

5. This matter shall be scheduled for formal hearing on February 4-6, 2019 in Columbus. A notice of formal hearing is issued contemporaneously with this order.

Stipulations

The parties are encouraged to collaborate on the preparation of stipulations for consideration by the hearing panel. The parties are reminded that stipulations of fact regarding rule violations must be supported by clear and convincing evidence, and that neither the panel nor Board is required to accept stipulated rule violations that are not supported by sufficient evidence. Evidence presented at a hearing that contradicts a stipulation of fact or a stipulated rule violation will not be considered by the panel, unless a party timely moves to withdraw the stipulation for good cause, a party seeks and is granted leave to present additional evidence, or the panel *sua sponte* rejects a factual stipulation.

The parties may submit stipulations regarding aggravating and mitigating factors. However, because the existence of aggravating and mitigating factors bears directly on any sanction the panel will recommend, the panel is not bound by such stipulations. The panel will make findings regarding aggravating and mitigating factors based on the totality of the record, including evidence presented at the hearing. The parties may make a joint recommendation regarding sanction; however, the panel is not bound to accept any recommendation regarding sanction. The panel will make a sanction recommendation based on the totality of the record, applicable case precedents, and standards established by the Supreme Court that govern the administration of professional discipline.

Paul T. Davis
Panel Chair

_____ per authorization

BOARD UPDATE, CASE TRENDS, AND CURRENT DEVELOPMENTS

D. Allan Asbury
Richard A. Dove
Kristi R. McAnaul

Ohio Board of Professional Conduct

BOARD AND CASE LAW UPDATE

Ohio Board of Professional Conduct

BPC REGULATION AMENDMENTS AND e-FILING

PROPOSED AMENDMENTS

Subpoenas—BPC Proc. Reg. 6(A)

- Eliminate requirement that a party submit a praecipe to request a subpoena
- Board web site will include a signed, blank subpoena form
- Party will complete the form and serve the subpoena

PROPOSED AMENDMENTS

E-Filing—BPC Proc. Reg. 3

- Eliminate requirement to file paper copies for parties who submit pleadings via e-Filing portal
- For paper filers, number of copies is reduced from five to two
- **NO CHANGE** in number of exhibits provided for use at hearing
- Director must prepare and issue e-Filing guidelines and post on Board's web site

e-FILING

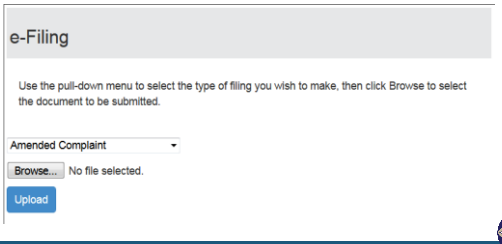
Steps to e-File pleadings with Board:

- Authorization to e-File
- Submission of pleading
- Review and approval/rejection of submitted pleading

AUTHORIZATION

- Email from Board with URL unique to that attorney and computer
- Must use URL to access e-Filing portal

e-FILING PORTAL



EMAIL ACKNOWLEDGEMENTS

- **Initial email**—acknowledging submission of pleading with reference number
- **Second email**—acknowledging acceptance (filing) or rejection of submission

GUIDELINES

- Naming of e-Filed documents (case name and number and document description)
- Separate pleadings; no cover letters
- PDF only—no photos, videos, audios
- No electronic and paper filings
- Email confirmations only; no phone or snail mail

Ohio Board of Professional Conduct

CASE LAW AND ADVISORY OPINION UPDATE

8.1(A) CASES- FALSE STATEMENTS OF MATERIAL FACT IN CONNECTION WITH A DISCIPLINARY MATTER

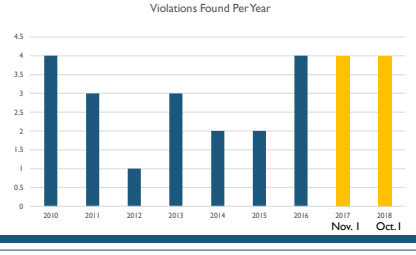
PROF. COND. R. 8.1(A)

In connection with a disciplinary matter, a lawyer shall not do any of the following: knowingly make a false statement of material fact.

PROF. COND. R. 8.1(A)

- Lying during depositions.
- Lying at hearing.
- Creation of false documents in response to request from relator.

PROF. COND. R. 8.1(A)



FALSE STATEMENTS

ODC v. Maney, 2017-Ohio-8799

- Respondent falsely stated that he had informed his client of the status of the case, given him the discovery requests, but never received a response.
- Admitted he had fabricated letters he had send to the client in response for information from relator.

FALSE STATEMENTS

Disciplinary Counsel v. Fuhry, 2017-Ohio-8813

- Respondent falsely stated to Relator that she did not know her license was suspended.

FALSE STATEMENTS

Disciplinary Counsel v. Smith, 2017-Ohio-2281

- Created draft appellate brief the day before response for information to relator.

FALSE STATEMENTS

Disciplinary Counsel v. Derryberry, 2017-Ohio-8767

- Multiple false statements during the investigation and hearing concerning notifying a client of his trial strategy and corresponding with opposing counsel.

FALSE STATEMENTS

Disciplinary Counsel v. Benbow, 2018-Ohio-2705

- In deposition omitted relevant information and affirmatively misrepresented facts regarding several issues.
- Errata sheet omitted relevant information and affirmatively misrepresented facts.

FALSE STATEMENTS

Columbus Bar Assn. v. Okuley, 2018-Ohio-3857

- Respondent's deposition testimony was "clearly false and contradicted by the testimony of all of the witnesses at the scene, as well as the video recording and the recording of [a witness's] 911 call."

FALSE STATEMENTS

Disciplinary Counsel v. Harter, 2018-Ohio-3899

- Admitted in a second deposition that he had lied in his first deposition, but during the hearing testified that his testimony in the first deposition had not been false.

FALSE STATEMENTS

Columbus Bar Assn v. Nyce, 2018-Ohio-9

- Lied about obtaining 1.4(c) signed notice from a client, flood in office that allegedly destroyed her notice and other client notices, then stated client had never returned notice.

SEXUAL HARASSMENT CASES

Ohio Board of Professional Conduct

WHAT IS HARASSMENT?

DEFINITION FOR TODAY

"Harassment" means:

- Conduct actionable under state or federal law;
- Any other conduct in which a judge or lawyer abuses his/her position of trust or authority while interacting with another in a professional capacity.

APPLICABLE RULES

Rules of Professional Conduct:

- Rule 8.4(g)
- Rule 8.4(h)
- Rule 1.8(j)

Code of Judicial Conduct:

- Rule 2.3(B)
- Rule 1.2 and Comment [5]

APPLICABLE RULES

Prof. Cond. R. 8.4(g)

It is professional misconduct for a lawyer to engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability.

APPLICABLE RULES

Prof. Cond. R. 8.4(h)

It is professional conduct for a lawyer to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Prof. Cond. R. 1.8(j)

A lawyer shall not *solicit* or engage in sexual *activity* with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

APPLICABLE RULES—JUDGES

Jud. Cond. R. 2.3(B)

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

APPLICABLE RULES—JUDGES

Jud. Cond. R. 1.2 A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

APPLICABLE RULES—JUDGES

Comment [5] to Jud. Cond. R. 1.2

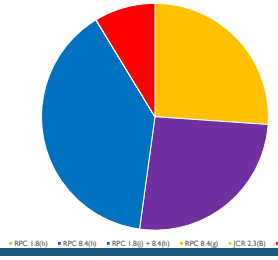
Actual improprieties include violations of law, court rules, or provisions of this code. The test for an appearance of impropriety is an objective standard that focuses on whether the conduct would create, in reasonable minds, a perception that the judge violated this code, engaged in conduct that is prejudicial to public confidence in the judiciary, or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

SEXUAL HARASSMENT CASES

TROUBLING FREQUENCY

- In 2016, the Board stated that "sexual conduct with a client seriously undermines the public's trust in the integrity of the legal profession" and suggested "that in the absence of significant mitigating factors an actual suspension should be the expected sanction for a lawyer who makes repeated unwanted solicitations of a sexual nature to a client." *Cleveland Metro. Bar Assn. v. Paris*, Board Report at ¶43.

TYPE OF RULE VIOLATIONS



ACTIONABLE HARASSMENT CASES

Conduct that violates Prof. Cond. R. 8.4(h) and/or Jud. Cond. R. 1.2:

- *Disciplinary Counsel v. Campbell* (1993), 68 Ohio St.3d 7
- *Disciplinary Counsel v. Baker*, 1995-Ohio-77
- *Lake Cty. Bar Assn. v. Mismas*, 2014-Ohio-2483
- *Disciplinary Counsel v. Skolnick*, 2018-Ohio-2990
- *Disciplinary Counsel v. Horton*, BPC Case No. 2018-010 (pending)

ODC V. CAMPBELL

- Respondent engaged in a 15-year pattern of sexual harassment that began in private practice and continued after becoming a judge. Court referenced the fact that Respondent's "actions were almost exclusively directed at those most likely to be intimidated by his position."
- "Such conduct would be unacceptable by any member of society. We, however, find it particularly intolerable by an attorney and abhorrent for a member of the judiciary." One-year suspension.

ODC V. SKOLNICK

- Respondent engaged in a two and one-half year pattern of verbal and sexual harassment directed at a paralegal in his firm. The employee eventually resigned, sought counseling, and obtained a six-figure settlement from respondent's insurance carrier.
- Citing the "longstanding and pervasive nature of [respondent's] degrading and verbal attacks," the Supreme Court suspended Skolnick for one year with six months stayed.

ABUSE OF POSITION OR AUTHORITY

Harassment directed at persons other than employees (litigants, other lawyers):

- *Disciplinary Counsel v. Weithman*, 2015-Ohio-482
- *Cleveland Metro. Bar Assn. v. Moody*, Case No. 2017-1738 (pending)

ODC V. WEITHMAN

- Magistrate engaged in multiple acts of intemperate conduct directed at lawyers appearing before him.
- Particularly egregious conduct involving a woman who was a party to a post-custody matter—ogled her and put a "bounty" on her testimony.
- Board—one-year suspension, six months stayed; Court—two-year suspension, all stayed.

ABUSE OF CLIENTS' TRUST

- Prof. Cond. R. 1.8(j) violations
- Increasing in number/frequency
- Sanctions vary greatly based on several factors:
  - Consensual (?) vs. nonconsensual;
  - Sexual relations vs. solicitation/sexting;
  - Vulnerability of client, harm to client interests;
  - Other rule violations.

ODC V. BENBOW

Disciplinary Counsel v. Benbow, 2018-Ohio-2705

- Respondent and client exchanged sexually explicit text messages and photographs; engaged in sexual activity in a courthouse conference room; activity was observed by Sheriff's deputies who monitored a live feed from a camera in the conference room.
- Respondent also was dishonest and uncooperative during the disciplinary investigation.
- Two-year suspension, one year stayed.

CONSENT TO DISCIPLINE

- Consider whether or not to use a Consent to Discipline agreement in 1.8(j) cases
- The last two Consent to Discipline agreements submitted to the Court were rejected
- Remanded back to the Board for consideration of a more severe sanction
- Both cases involved criminal convictions

ODC V. SARVER

Disciplinary Counsel v. Sarver, 2017-1081

- Respondent and client engaged in a sexual relationship and trespassed at a neighbor's house to use the hot tub; Respondent assisted the client in evading a police investigation and mislead the judge in front of whom his client's case was pending by denying the relationship with his client.
- Respondent entered guilty pleas to four misdemeanors.
- The Consent to Discipline Agreement recommended a two-year suspension, all stayed.

ODC V. MASON

Disciplinary Counsel v. Mason, 2018-0538

- Respondent and his client engaged in a sexual relationship during the pendency of her divorce.
- Respondent entered an Alford plea to an unrelated 3rd degree misdemeanor offense of soliciting.
- The Consent to Discipline Agreement initially recommended a six-month stayed suspension.
- After hearing, the Board recommended a one-year suspension, six months stayed on conditions and recommended additional conditions for reinstatement.

Ohio Board of Professional Conduct

www.bpc.ohio.gov
614-387-9370

THE MILLER BECKER
2018 SEMINAR

LEGAL MALPRACTICE
v.
LAWYER DISCIPLINE

Richard C. Alkire
Jack J. Mueller
Monica A. Sansalone

Scott J. Drexel, *Moderator*

LEGAL MALPRACTICE VS. LAWYER DISCIPLINE

Miller-Becker Seminar
Ohio State Bar Association
1700 Lake Shore Drive
Columbus, Ohio 43215

Panel of Presenters

Richard C. Alkire
Alkire Nieding LLC
Independence, Ohio

Monica A. Sansalone
Gallagher Sharp LLP
Cleveland, Ohio

John J. Mueller
John J. Mueller, LLC
Cincinnati, Ohio

Panel Moderator
Scott J. Drexel
Disciplinary Counsel
Columbus, Ohio

Friday, October 19, 2018

Introduction and Summary of Fundamental Principles

A.
Lawyer Discipline

- Rules of professional conduct serve to protect both the interests of the legal profession and the public

  Fred Siegel Co., L.P.A. v. Arter & Hadden (1999), 85 Ohio St.3d 171, 178, 707 N.E.2d 853, 859, 1999–Ohio–260 ("The purpose of disciplinary actions is to protect the public interest and to ensure that members of the bar are competent to practice a profession imbued with the public trust.")

  Kutnick v. Fischer, Cuyahoga Cty. App. No. 81851, 2004–Ohio–5378, ¶ 17, 2004 WL 2251799, *3 ("The purpose of the attorney disciplinary rules is to protect the public interest and ensure that members of the bar are competent to practice their profession …")

- Given the function of rules of professional conduct, "[t]he purpose of disciplinary actions is to protect the public interest and to ensure that members of the bar are competent to practice a profession imbued with the public trust." *Fred Siegel Co.*, 85 Ohio St.3d at 178, 707 N.E.2d at 859

  - Accordingly, a violation of the Ohio Rules of Profession Conduct may occur even when the client suffers no harm or damage or loss

    See Disciplinary Counsel v. Zingarelli, 89 Ohio St.3d 210, 219, 729 N.E.2d 1167, 1175 (2000) ("[H]arm [or damage or loss] to a client is not a necessary element for there to be a violation of DR 9–102(A).")

- Rather than a possibility of liability in monetary damages, a lawyer faces in the lawyer-disciplinary process the possibility of non-monetary sanction for " '[m]isconduct' [that occurs by] any violation … of any provision of the oath of office taken upon admission to the practice of law in this state or any violation of the Ohio Rules of Professional Conduct …, disobedience of these rules or of the terms of an order imposing probation or a suspension from the practice of law, or the commission of an illegal act or conviction of a crime that reflects adversely on the lawyers' honesty or trustworthiness." *Gov.Bar R.V, § 35, 5(J)*

B.
Legal Malpractice

- In contrast to rules of professional conduct or "ethics rules," civil rules of conduct serve to provide "a means to redress a person harmed by tortious

conduct." *Fred Siegel Co.*, 85 Ohio St.3d at 178, 707 N.E.2d at 859

- "An attorney's professional obligations under the disciplinary rules do not necessarily translate into tort duties the attorney owes to his or her client which, if breached, may be the subject of a malpractice claim." *Kutnick v. Fischer*, 8th Dist. Cuyahoga No. 81851, 2004–Ohio–5378, ¶ 17.

- Thus, "not every violation of the ethical rules contained in the Rules of Professional Conduct constitutes legal malpractice, and not every act of legal malpractice constitutes a violation of ethical rules requiring discipline." *Powell v. Rion*, 2nd Dist. No. 24756, 2012– Ohio–2665, 972 N.E.2d 159, ¶ 26.

    - Likewise, a "violation of the [Ohio Rules of Professional Conduct] does not, in itself, create a private cause of action." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 178, 707 N.E.2d 853, 859 (1999)

    - For example, if conduct is negligent but causes the client no harm, loss, or damage, the lawyer bears no liability for malpractice

      Muehrcke v. Housel, 8th Dist. No. 89470, 181 Ohio App.3d 361, 2008–Ohio–4445, 909 N.E.2d 135, ¶ 17 ("]A]n action for legal malpractice requires proof of actual damages."), and *United States Fire Ins. Co. v. Ohio High School Athletic Assn.*, 71 Ohio App.3d 760, 764, 595 N.E.2d 418, 420 (1st Dist.1991) ("[N]egligent conduct without injury is not actionable …")

    - This is so because "tort law … provides a means of redress to individuals for damages suffered as a result of tortious conduct." *Fred Siegel Co.*, 85 Ohio St.3d 178, 707 N.E.2d at 859.

1.
Legal Malpractice

- Generally speaking, "legal malpractice" is nothing more than a breach of a professional duty—a civil legal duty, such as the duty of care, or a civil fiduciary duty, such as the duty of loyalty—that a lawyer owes the client in and as a result of a professional relationship

  E.g., *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20, 24, 749 N.E.2d 161, 162, 725 N.Y.S.2d 592, 593, 121 A.L.R.5th 713 (2001) ("[M]alpractice is professional misfeasance toward one's client …") [defining "malpractice" for purposes of applying New York statute of limitations (Civil

Practice Law and Rules § 214(6)]; *Martinson Mfg. Co. v. Seery*, 351 N.W.2d 772, 775 (Iowa 1984) ("Legal malpractice consists of the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake."); and *Sommers v. McKinney*, 287 N.J.Super. 1, 9, 670 A.2d 99, 103 (App. Div.1996) ("Legal malpractice is negligence relating to an attorney's representation of a client.")

- "[L]egal malpractice … is, by definition, any professional misconduct or unreasonable lack of skill or fidelity in professional and fiduciary duties by an attorney. *BLACK'S LAW DICTIONARY* 864 (5th ed. 1979)." *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo.App.1988)

    - "Actionable legal malpractice" differs from "legal malpractice" because "actionable legal malpractice" requires damages. *See Muehrcke v. Housel*, 8th Dist. No. 89470, 181 Ohio App.3d 361, 2008–Ohio–4445, 909 N.E.2d 135, ¶ 17 ("[A]n action for legal malpractice requires proof of actual damages.")

      Accord Pickard v. Turner, 592 So.2d 1016, 1020 (Ala.1992) ("Generally, actionable [legal] malpractice cannot be established in the absence of a showing that the attorney's wrongful conduct has deprived the client of something to which he would otherwise have been entitled." (*citing and quoting* 7A *C.J.S.* 462 (*Attorney and Client § 255*);and *Keister v. Talbott*, 182 W.Va. 745, 749, 391 S.E.2d 895, 899 (1990) ("Proof of the attorney's negligence alone is insufficient to warrant recovery; it must also appear that the client's damages are the direct and proximate result of such negligence. *Stewart v. Hall*, 770 F.2d 1267 (4th Cir.1985); *Byrd v. Martin, Hopkins, Lemon & Carter, P.C.*, [564 F.Supp. 1425 (W.D.Va.1983), *aff'd*, 740 F.2d 961 (4th Cir.1984)]; *Blackhawk Bldg. Sys. Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288 (Iowa 1988); *Allied Prods., Inc. v. Duesterdick*, [217 Va. 763, 232 S.E.2d 774 (1977)]; *Bowman v. Two*, 104 Wash.2d 181, 704 P.2d 140 (1985).")

2.
Lawyer Discipline

- The rules of professional conduct (sometimes called "ethics rules") provide an overall framework for regulating the conduct of lawyers in the practice of law

- "The Ohio Rules of Professional Conduct…define proper conduct for purposes of professional discipline … The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law."

  Scope ([14] and [16]), OHIO RULES OF PROFESSIONAL CONDUCT

  - *Accord*, *Burke v. Lewis*, 2005 UT 44, ¶ 29, 122 P.3d 533, 540 (Utah 2005) ("Initially, we note that the Utah Rules of Professional Conduct are 'rules of reason .... [that] should be interpreted with reference to the purpose of the legal representation and of the law itself.' *Utah R. Prof'l Conduct Scope* … As the rules correctly point out, 'no worthwhile human activity can be completely defined by legal rules.' *Id.* As a result, '[t]he Rules simply provide a framework for the ethical practice of law.' *Id."*)

  - When Ohio followed the Code of Professional Responsibility, the rule was essentially the same

    - The Code of Professional Responsibility's Ethical Considerations set aspirations intended to guide a lawyer in conducting himself or herself, while the Code's Disciplinary Rules set the minimum standard for a lawyer to follow when conducting himself or herself.

      Toledo Bar Ass'n v. Bell (1997), 78 Ohio St.3d 88, 89, 676 N.E.2d 527, 528 ("Our Ethical Considerations state standards of professional conduct towards which every lawyer should strive; our Disciplinary Rules specify a minimum level of conduct below which no lawyer should fall.")

- Ethics rules "reflect a professional consensus of the standards of care below which an attorney's conduct should not fall, it would be illogical to exclude evidence of the [rules of professional conduct] in establishing the standard of care." *Mainor v. Nault*, 120 Nev. 750, 769, 101 P.3d 308, 321 (2004), *overruled on unrelated substantive matter by Delgado v. American Family Ins. Group*, 125 Nev. 564, 217 P.3d 563 (2009)

- Some ethics rules merely regulate aspects of the practice of law

- Rule 1.5, Fees and Expenses; Rule 1.15, Safekeeping Funds and Property; Rule 1.17, Sale of Law Practice; Rule 5.1, Responsibilities of Partners, Managers, and Supervisory Lawyers; Rule 5.2, Responsibilities of Subordinate Lawyer; Rule 5.3, Responsibilities Regarding Nonlawyer Assistants; Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law; Rule 5.6, Restrictions on Right to Practice; Rule 5.7, Responsibilities Regarding Law-Related Services; Rule 7.1, Communications Concerning a Lawyer's Services; Rule 7.2, Advertising and Recommendation of Professional Employment; Rule 7.3, Direct Contact with Prospective Clients; Rule 7.4, Communication of Fields of Practice and Specialization; and Rule 7.5, Firm Names and Letterheads

- Other ethics rules govern certain aspects of the lawyer-client relationship

  - Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer; Rule 1.4, Communication; Rule 1.5, Fees and Expenses; Rule 1.6, Confidentiality of Information; Rule 1.7, Conflict of Interest: Current Clients; Rule 1.8, Conflict of Interest: Current Clients: Specific Rules; Rule 1.9, Duties to Former Clients; Rule 1.10, Imputation of Conflicts of Interest: General Rule; Rule 1.13, Organization as Client; Rule 1.14, Client with Diminished Capacity; Rule 1.15, Safekeeping Funds and Property; Rule 1.16, Declining or Terminating Representation; and Rule 1.18, Duties to Prospective Client

- Yet other ethics rules set the standards that, at a minimum, a lawyer must follow to continue enjoying the privilege to practice law

  - Rule 1.1, Competence; Rule 1.3, Diligence; Rule 1.4, Communication; Rule 1.6, Confidentiality of Information; Rule 1.16, Declining or Terminating Representation; Rule 1.18, Duties to Prospective Client; Rule 2.1, Advisor; Rule 2.3, Evaluation for Use of Third Persons; Rule 3.1, Meritorious Claims and Contentions; Rule 3.3, Candor Toward Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.5, Impartiality and Decorum of Tribunal; Rule 3.6, Trial Publicity; Rule 3.7, Lawyer as Witness; Rule 4.1, Truthfulness in Statements to Others; Rule 4.2, Communication with Persons Represented by Counsel; Rule 4.3, Dealing with Unrepresented Person; and Rule 4.4, Respect for Rights of Third Persons

    - When a lawyer's conduct violates a rule of professional conduct, the lawyer may face disciplinary proceedings and a disciplinary

sanction

Scope [19], OHIO RULES OF PROFESSIONAL CONDUCT ("Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process."). Thus, when a lawyer's conduct violates a rule of professional conduct, the lawyer risks a profession-related consequence

- The profession-related consequence would take the form of a sanction involving the lawyer's license. This sanction could affect the lawyer's ability to practice law
    - Under Gov. Bar R. V, § 6(B), the Supreme Court of Ohio could: (1) disbar the lawyer from the practice of law; (2) suspend the lawyer from the practice of law for an indefinite period, subject to reinstatement; (3) suspend the lawyer from the practice of law for a period of six months to two years, subject to a stay in whole or in part; (4) probate a sanction for a period of six months to two years, upon conditions; (5) reprimand the lawyer publicly

3.
Rules of Conduct—Civil Legal and Professional Discipline

- Civil rules of conduct determine a lawyer's liability to a client for what layman (and some lawyers) commonly call "malpractice"
    - These civil rules-of-conduct govern the civil or legal standard that applies to a lawyer in a particular circumstance.
    - Lawyers and courts generally refer to this civil or legal standard as the civil or legal "standard-of-care" or "standard-of-conduct"
    - The civil or legal standard-of-conduct determines whether the lawyer acted with reasonable care in fulfilling his legal duties to a client
- A lawyer who violates a civil or legal standard-of-care or standard-of-conduct, may face a claim for "malpractice," and may face civil liability
    - So, a lawyer who violates a civil or legal standard-of-care or standard-of-conduct, risks a civil and financial consequence (in the form of a

judgment ordering the lawyer to pay a sum of money as damages)

- Rules of professional conduct serve a purpose different than the purpose civil rules-of-conduct serve

    - Rules of professional conduct protect both the interests of the legal profession and the public

      Fred Siegel Co., L.P.A. v. Arter & Hadden (1999), 85 Ohio St.3d 171, 178, 707 N.E.2d 853, 859, 1999–Ohio–260 ("The purpose of disciplinary actions is to protect the public interest and to ensure that members of the bar are competent to practice a profession imbued with the public trust.")

      Kutnick v. Fischer, Cuyahoga Cty. App. No. 81851, 2004–Ohio–5378, ¶ 17, 2004 WL 2251799, *3 ("The purpose of the attorney disciplinary rules is to protect the public interest and ensure that members of the bar are competent to practice their profession …")

    - Breach of a rule of professional conduct, involves the potential discipline of the lawyer who breached the rule—a public remedy

      E.g., *Just Dirt, Inc. v. Knight Excavating, Inc.*, 157 P.3d 431, 436 (Wash.App. 2007) ("The [Rules of Professional Conduct] cannot be proper grounds for the trial court to base a fee award because a 'breach of an ethics rule provides only a public, *e.g.,* disciplinary, remedy and not a private remedy.' *Hizey v. Carpenter,* 119 Wash.2d 251, 259, 830 P.2d 646 (1992).")

    - Civil rules of conduct serve to set the standards governing liability for purposes of tort law

        - Civil rules-of-conduct serve to provide "a means to redress a person harmed by tortious conduct." *Fred Siegel Co.*, 85 Ohio St.3d at 178, 707 N.E.2d at 859

          Accord, *Kutnick*, 2004–Ohio–5378, ¶ 17

            - The remedy for harm that tortious conduct causes, represents a purely private remedy

    - A violation of one of the Ohio Rules of Professional Conduct is not malpractice *per se*, though the violation may establish negligence *per*

se

- In Ohio, the doctrine of "negligence *per se,*" applies only to violations of statutes or ordinances

  Flynn v. Sharon Steel Corp. (1943), 142 Ohio St. 145, 163, 50 N.E.2d 319, 327 ("The doctrine of negligence *per se* has application only to the violation of statutes or ordinances."), *disapproved on unrelated point*, *McBennett v. Piskur* (1965), 3 Ohio St.2d 8, 209 N.E.2d 138

- "Where a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence *per se*." *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198, 201 (*citing to Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440, paragraph one of the syllabus)

  Accord, Flynn v. Sharon Steel Corp. (1943), 142 Ohio St. 145, 163, 50 N.E.2d 319, 327 ("29 Ohio Jurisprudence, 427, Section 38, reads in part: 'In Ohio, there is considerable authority in support of the prevailing view that the violation of the terms of a statute constitutes negligence per se. The most popular expression of this rule in Ohio is that the violation of a statute passed for the protection of the public is negligence per se, or negligence as a matter of law.'")

- When a court applies the doctrine of negligence *per se*, the court is merely conclusively determining that the defendant owed the plaintiff a particular duty and that the defendant breached the duty he or she owed the plaintiff

  Chambers, 82 Ohio St.3d at 565, 697 N.E.2d at 201 ("Application of negligence *per se* in a tort action means that the plaintiff has conclusively established that the defendant breached the duty that he or she owed to the plaintiff.")

- Thus, a finding of negligence *per se*, falls short of a finding of liability

  Chambers, 82 Ohio St.3d at 565, 697 N.E.2d at 201 ("It is not a finding of liability *per se* because the plaintiff will also have to

prove proximate cause and damages. *Pond v. Leslein* (1995), 72 Ohio St.3d 50, 53, 647 N.E.2d 477, 479.")

- "It is well-established common law of Ohio that malpractice is limited to the negligence of physicians and attorneys." *Thompson v. Community Mental Health Centers of Warren County, Inc.* (1994), 71 Ohio St.3d 194, 195, 642 N.E.2d 1102, 1103, 1994 – Ohio – 223

- Though the rules of professional conduct are not statutes because the Supreme Court of Ohio adopted the rules pursuant to its constitutional mandate to regulate the practice of law (and lawyers) in Ohio, at least one court, the Supreme Court of Texas, has treated the rules of professional conduct as if they were statutes

  See O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 399 (Tex. 1988) ("According to the State Bar, disciplinary rules are not statutes because they are promulgated by this court pursuant to its inherent power to regulate the legal profession…We have considered this argument but nonetheless conclude that our disciplinary rules should be treated like statutes.") (action involved a request by a lawyer for temporary and permanent injunctions prohibiting the State Bar of Texas from prosecuting a disciplinary action against the lawyer)

  - Likely, the Supreme Court of Ohio will decline to treat the rules of professional conduct as if they were statutes for purposes of applying the doctrine of negligence *per se*

    See Hizey v. Carpenter, 119 Wash.2d 251, 261, 830 P.2d 646, 652 (Wash. 1992) (*en banc*) ("Plaintiffs would have the fact finder in a legal malpractice action rely, at least in part, on an alleged ethical violation to find a breach of the legal standard of care. In furtherance of their argument, plaintiffs analogize the CPR and RPC to statutes or administrative regulations, the violation of which produces evidence of negligence or, in some jurisdictions, negligence per se. This analogy is flawed. The CPR and RPC are not statutes or administrative regulations.")

    Cf. Bickel v. Mackie, 447 F.Supp. 1376, 1383 (N.D.Iowa

1978) (rejecting theory analogizing Code of Professional Responsibility to the "rules of road," for purposes of a request for a finding of negligence *per se*)

- The Tenth District Court of Appeals of Ohio has rejected the theory that a showing of any violation of the Code of Professional Responsibility provided the basis for a finding of negligence or malpractice *per se*

  Northwestern Life Ins. Co. v. Rogers (1989), 61 Ohio App.3d 506, 511, 573 N.E.2d 159, 163 ("Assignments of Error Nos. 1 and 2, simply stated, would have this court adopt a malpractice *per se* standard of liability upon a showing of any alleged noncompliance with the Code of Professional Responsibility, and without the necessity of plaintiff providing expert evidence in support of the malpractice allegation. It is clear that there can be instances where noncompliance with the Code of Professional Responsibility does not result in malpractice. Before legal malpractice can occur, the client must have incurred damages which were directly and proximately caused by the attorney's malpractice.")

  But, see, the opinion of the Eighth District Court of Appeals in *E.B.P., Inc. v. Cozza & Steuer* (1997), 119 Ohio App.3d 177, 694 N.E.2d 1376. In that case, the court implicitly recognized the possibility of malpractice *per se.* The court said, in the context of a lawyer-malpractice claim relating to a settled matter, "[a] settlement entered into as a result of an attorney's exercise of reasonable judgment in handling a case bars a malpractice claim against the attorney…However, a legal malpractice claim is not barred when the attorney has acted unreasonably or has committed malpractice *per se*." *Id.*, 119 Ohio App.3d at 182, 694 N.E.2d at 1379

- Because civil rules of conduct relate to the basis for a tort remedy and rules of ethics merely provide an overall framework for the bar to regulate the conduct of lawyers in the practice of law, no violation of a rule of ethics, constitutes "malpractice" *per se*

E.g., American Express Travel Related Services Co., Inc. v. Mandilakis (1996), 111 Ohio App.3d 160, 165-166, 675 N.E.2d 1279, 1282-1283 ("AMEX and First Data argue that they need not show a relationship to show a duty … DR 7-102(B)(1) places a duty on an attorney to disclose a client's fraud. The question is whether a failure in the exercise of that duty results in actionable civil liability. We think not … [T]he Code of Professional Responsibility lists only disciplinary action as a possible sanction for violation of the Disciplinary Rules…There is no mention of civil liability."); *Palmer v. Westmeyer* (1988), 48 Ohio App.3d 296, 298, 549 N.E.2d 1202, 1205 (trial court committed no error in law when it held that violations of the Disciplinary Rules in the former Ohio Code of Professional Responsibility, fail to constitute malpractice *per se*); and *Kutnick*, 2004–Ohio–5378, ¶ 17 ("An attorney's professional obligations under the disciplinary rules do not necessarily translate into tort duties the attorney owes to his or her client which, if breached, may be the subject of a malpractice claim.")

- To establish a claim for "malpractice" by a lawyer, a plaintiff needs to establish (1) a lawyer-client relationship (which implicitly gives rise to duties the lawyer owes the client), (2) a breach of a duty owed in that relationship, and (3) damages proximately caused by the breach

  Ratonel v. Roetzel & Andress, L.P.A., 147 Ohio St.3d 485, 2016–Ohio–8013, 67 N.E.3d 775, ¶ 6 (2016) ("To establish a cause of action for legal malpractice, a plaintiff must show 'the existence of an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by that breach.' *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011–Ohio–2266, 950 N.E.2d 157, ¶ 25.")

  - A breach by a lawyer of a duty the lawyer owes the client, standing alone, fails to establish a claim of lawyer malpractice because establishing the breach fails necessarily to establish damages proximately caused by the breach

    - To constitute actionable negligence, the breach must cause damages. *Palmer v. Westmeyer* (1988), 48 Ohio App.3d 296, 298, 549 N.E.2d 1202, 1205 ("Appellants claim that appellees violated their

> duty not to represent conflicting interests without full disclosure to, and permission of, the clients. A breach of this duty would not, in and of itself, constitute malpractice. There must also be damages proximately resulting from any breach.")

- The conduct on which a party bases a claim of lawyer malpractice—conduct that breaches a duty—may also constitute conduct that independently violates a rule of professional conduct

  In *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 257, 602 A.2d 1277, 1285 (1992), the Supreme Court of Pennyslvania expressed this rule in these words:

  > The Superior Court seems to have the idea that because conduct is not a tort simply because it is a disciplinary violation, then conduct ceases to be a tort when it is at the same time a disciplinary violation. This is an inversion of logic and legal policy and misunderstands the history of the disciplinary rules. The Superior Court's decision contradicts the logic of this Court's decision in *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), and in *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58 (1989). Adler in particular has direct application here. That case involved lawyer misconduct that violated the ethical rule against solicitation and the legal rule against misuse of confidential employer information. Since misuse of a law firm's confidences is actionable while also being an ethical violation, surely misuse of a client's confidences can be actionable while also being an ethical violation. As regards misuse of a former client's confidences, the disciplinary rules derive from the lawyer's common law duties, not the other way around.")

  The Supreme Court of Oregon had previously reached a similar result in *Oregon ex rel. Bryant v. Ellis*, 301 Or. 633, 636–37, 724 P.2d 811, 812 (1986).

  > Disciplinary rules approved by this court have the

> status of law in Oregon. ORS 9.490. The enforcement of those rules by means of imposing disciplinary sanctions is in the jurisdiction of the professional boards created by the Oregon State Bar Rules of Procedure and ultimately of this court. It does not involve the state's other courts. *Brown v. Oregon State Bar*, 293 Or. 446, 451–52, 648 P.2d 1289 (1982). This, of course, does not mean that conduct proscribed by a rule of professional conduct, such as one of the Disciplinary Rules, may not also violate a civil obligation of a member of the profession to another person. On the contrary, such rules ordinarily are designed to protect clients, patients, or other persons against the consequences of a misplaced trust in the professional's sense of responsibility and probity. Thus circuit courts have jurisdiction to try damage claims for professional negligence notwithstanding that enforcement of the professional rule against neglecting or acting incompetently in a legal matter, DR 6–101, is in the exclusive jurisdiction of the disciplinary tribunals and this court.

The Fourth District Court of Appeal of Florida essentially agreed with this principle in *Elkind v. Bennett*, 958 So.2d 1088, 1092 (Fla.App. 2007)

> Because Florida also recognizes the fiduciary obligation of an attorney, we agree with *Bevans* [*v. Fix*, 42 P.3d 1013, 2002 WY 43 (Wyo. 2002)], that the mere inclusion of the duty of confidentiality in the Rules of Professional Responsibility does not prevent the breach of this duty from being enforced as a tort. Further, we also agree with *Bevans* that it may be enforced as an aspect of legal malpractice, as an essential element of the claim is the breach of a reasonable duty … Therefore, we hold that a breach by an attorney of a duty of confidentiality to his or her client which causes damage to the client may be enforced by way of an action for legal malpractice

- Some courts find that proof of a violation of an ethics rule,

creates a rebuttable presumption of a breach of the applicable civil or legal standard-of-care

E.g., Rizzo v. Haines, 520 Pa. 484, 503, 555 A.2d 58, 67 (Pa. 1989) ("We further believe that expert testimony was not needed to detail the fiduciary obligations of an attorney who engages in financial transactions with his client, since these obligations are established by law, the Code of Professional Responsibility, and the Model Rules of Professional Conduct."); and *Beattie v. Firnschild*, 152 Mich.App. 785, 791, 394 N.W.2d 107, 109 (Mich.App. 1986) ("An attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client, assuming the position of highest trust and confidence … The Code of Professional Responsibility is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession … There is a rebuttable presumption that violations of the Code of Professional Responsibility constitute actionable malpractice.")

- At least one court in Ohio has apparently accepted this view

  See *David v. Schwarzwald, Robiner, Wolf & Rock Co.* (1992), 79 Ohio App.3d 786, 802, 607 N.E.2d 1173, 1183 (trial court should have allowed plaintiff's expert witness "to testify regarding defendant's conduct, in relation to the Disciplinary Rules of the Code of Professional Responsibility.")

4.
Some Examples of Conduct Constituting an Ethics Violation (Disciplinable Misconduct) That Also Constitutes A Basis for a Claim of Lawyer Malpractice

- Undertaking a matter as to which lawyer lacks "competence"

  - A lawyer who treated ownership interests in a corporation as a tenancy-in-common among the shareholders, then used a probate proceeding to transfer shares as joint-tenancy assets, demonstrated a complete "lack of understanding of fundamental principles essential to practice of law." *Colorado ex rel. Goldberg v. Gordon*, 199 Colo. 296, 607 P.2d 995 (1980)

- The Supreme Court of Kansas indefinitely suspended from the practice of law a lawyer engaging in a bankruptcy practice who

  > repeatedly failed to follow the bankruptcy court rules and local rules concerning noticing of motions … [did] not understand or apply the essentials of bankruptcy law … did not understand the difference between secured and unsecured creditors, the fact that unsecured debts are discharged in a Chapter 7 bankruptcy, the fact that Chapter 13 plans cannot be filed with payments that extend beyond 60 months (the jurisdictional limit of the Bankruptcy Code), and the difference between motion practice and adversary practice in the bankruptcy courts … filed incomplete pleadings or pleadings that lacked the required client signature, appeared at Chapter 7 creditors meetings unprepared to represent his clients, and repeatedly failed to protect his clients tax refunds by means of the necessary pre-petition actions.
  >
  > The lawyer "admitted incompetence to practice his specialty, bankruptcy." *In re Farmer*, 263 Kan. 531, 950 P.2d 713 (1990)

  - These lawyers committed conduct that would violate Rule 1.1, Ohio Rules of Professional Conduct (2007)—the rule provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation." Rule 1.1, Ohio Rules of Professional Conduct (2007)

  - A comparable civil duty exists

    In the non-disciplinary, civil context, this means that a lawyer must know, or must gain familiarity with, well-settled legal principles that govern, or that relate to, the legal matter on which the client seeks advice, or as to which the client seeks services. *Hillegass v. Bender*, 78 Ind. 225, 1881 WL 7287 (1881); *Citizens' Loan Fund & Savings Association of Bloomington v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890); and *Watkiss & Saperstein v. Williams*, 931 P.2d 840 (1997)

    The Supreme Court of Indiana explained in *Hillegass* that in general:

> A lawyer is not liable for every mistake. He is not liable for a mistake committed in matters where the law is doubtful and uncertain. "God forbid," said ABBOTT, C. J., "that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." Nor is the lawyer bound to bring to the practice of his profession the highest skill and learning. He is bound to possess and exercise competent skill, and if he undertakes the management of a law affair, and neither possesses nor exercises reasonable knowledge and skill, he is liable for all loss which his lack of capacity or negligence may bring upon his client. "What an attorney does profess and undertake, and all that he professes and undertakes, is, first, that he possesses the knowledge and skill common to members of his profession, and, second, that he will exercise, in his client's business, an ordinary and reasonable degree of attention, prudence, and skill." *Shearman & Redf. Neg.*, section 211. *Reilly v. Cavanaugh*, 29 Ind. 435; *Caverly v. McOwen*, 123 Mass. 574.

Hillegass, 78 Ind. at 226–227, 1881 WL 7287, *1. That court proceeded to explain for exactly what a lawyer bears civil-law tort-responsibility to a client. The court did so by expressing what a lawyer impliedly generally professes to a client merely by undertaking to represent, or to advise, a client by declaring what a lawyer undertaking for a client a matter in litigation before a court or other tribunal:

> The man who professes to act as a lawyer must be acquainted with the settled rules of law and the practice of the courts prevailing in the locality wherein he practices. "For this purpose," to borrow the language of a late writer, "there must be a familiarity with the adjudicated local law as well as the statute law bearing on the particular point; and there must be a knowledge of the legal machinery necessary for the application of this law. To undertake the management of a case without such knowledge is negligence which makes the lawyer liable for any loss which his client may thereby incur." *Whart. Negligence*, section 749 … It is the duty of a lawyer to know whether public matters, such as the duties of the officers connected with the court in which he practices, are regulated by statute … A lawyer who does

> not know whether the duties of the clerk of the court in which his professional duties are performed are, or are not, defined by statute, can not be deemed to possess competent skill. It is a lawyer's duty to know the elementary rules of law upon familiar matters of practice, as well as the settled rules governing matters which spring out of the ordinary transactions of every-day life, and which are of frequent application.

Hillegass, 78 Ind. at 227, 1881 WL 7287, *1–*2

About a decade later, in *Friedley*, 123 Ind. 143, 23 N.E. 1075, the Supreme Court of Indiana again discussed the lawyer's implied general duties on an undertaking. The court explained:

> An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence, ordinarily possessed and employed by well-informed members of his profession in the conduct of business such as he has undertaken. He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported, and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession … It is his own fault, however, if he undertakes without knowing what he needs only to use diligence to find out, or applies less than the occasion requires. A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions in his own state …

123 Ind. at —, 23 N.E. at 1075–1076

The Supreme Court of California, sitting *en banc*, discussed those duties in *Smith v. Lewis*, 13 Cal.3d 349, 530 P.2d 589, 118 Cal.Rptr. 621, 78 A.L.R.3d 231 (1975). The California court explained that "an attorney … is expected … to possess knowledge of those plain and elementary principles of law which

> are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." *Smith*, 13 Cal.3d at 358, 530 P.2d at 595, 118 Cal.Rptr. at 627
>
> The Supreme Court of Utah discussed this rule in the context of a lawyer handling a matter in litigation in the court's 1997 opinion in *Watkiss & Saperstein v. Williams*, 931 P.2d 840 (1997). The Utah court stated that "an attorney engaged in litigation must be conversant with the procedural and substantive rules that govern the litigation of the action." *Watkiss & Saperstein*, 931 P.2d at 846

- Failing to abide by client's decision concerning settlement of claim or action

  - The Supreme Court of Rhode Island disciplined a lawyer for accepting a settlement offer that client had expressly instructed lawyer to decline. *In re Indeglia*, 765 A.2d 444 (R.I. 2001)

  - The court explained why it disciplined the lawyer, saying:

    > It is axiomatic that the decision of whether to accept a settlement offer in a civil proceeding rests in the hands of the client. An attorney may counsel a client on whether to accept or reject an offer, and provide his or her advice on whether an offer is acceptable or advisable. If an attorney believes that a client's rejection of a settlement proposal is unreasonable, he or she must so advise the client. If the client does not accept the attorney's recommendation, the attorney can not usurp this ultimate decision and settle a claim without the client's consent. Accordingly, by accepting Callahan's offer, against the express directive of his client, the respondent clearly has violated the directive of Rule 1.2. Whether or not he believed the client's settlement position was unreasonable in these circumstances is irrelevant.

    Indeglia, 765 A.2d at 447

  - The Supreme Court of Indiana temporarily suspended a lawyer who improperly attempted to limit the authority of the client over settlement. The lawyer's fee agreement relating to a representation in

a personal-injury action stated, among other things, that "[the clients] hereby authorize our attorney to settle this matter for any amount he determines is reasonable without further oral or written authorization." *In re Lansky*, 678 N.E.2d 1114, 1115 (Ind. 1997)

The court explained:

> The practice of law is more than a mere vocation undertaken for profit. A lawyer has a duty to protect and preserve the rights and property of a client … A fiduciary relationship exists between a lawyer and client, and the confidence which the relationship begets between the parties makes it necessary for the lawyer to act in utmost good faith … The respondent breached his fiduciary obligation to a client by seeking to limit her control over basic aspects of her case.

Lansky, 678 N.E.2d at 1116.

- These lawyers committed conduct that would violate Rule 1.2(a), Ohio Rules of Professional Conduct (2007)—the rule provides, in relevant part, that

  > [s]ubject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation … A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

- A comparable civil duty exists.

- Clients have sued lawyers for settlements the clients contended the lawyer had no authority to make

  E.g., Taylor v. Wilson, 180 S.W.3d 627 (Tex.App. 2005); *Lorenzetti v. Jolles*, 120 F.Supp.2d 181 (D.Conn. 2000); *Johnson v. Culotta*, 874 So.2d 942 (La.App. 2004).

  - And clients have sued lawyers for coercing settlement of a claim

    E.g., Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo.App. 1994)

The lawyers in *Jones* included in their fee agreement a provision that purported to prohibit the client from "unreasonably" refusing settlement. Another provision purported to permitted the law firm to withdraw if the client "unreasonably" refused a settlement. That same provision stated that upon withdrawal, the lawyer could recover costs and fees equal to the law firm's "normal" hourly rates for the work it had performed. The Colorado appellate court found the provision unenforceable, as a matter of law. *Jones*, 903 P.2d at 34.

- Failure to file action before limitations period expired
    - The Supreme Court of Kentucky disciplined a lawyer for, among other conduct, allowing the limitations period to expire on a claim the lawyer had undertaken to prosecute for a client. *Kentucky Bar Association v. Lococo*, 54 S.W.3d 164 (Ky. 2001)
        - Lococo's conduct could violate Rule 1.3, Ohio Rules of Professional Conduct–-the rule provides that "[a] lawyer shall act with *reasonable* diligence and promptness in representing a client."
    - A comparable civil duty exists.
    - Some Ohio cases involving claims against lawyers for failing to prosecute a claim before the limitations period expired: *Busacca v. Maguire & Sanders, LLP* (2005), 162 Ohio App.3d 689, 834 N.E.2d 856 (claim that lawyer failed to re-file a dismissed action within the time allowed by the savings statute, R.C. § 2305.19); *DePugh v. Sladoje* (1996), 111 Ohio App.3d 675, 676 N.E.2d 1231 (claim that statute of limitations on estate's wrongful death claim against county expired due to lawyer's mistaken advice that, when wrongful death action was dismissed before statute of limitations expired, savings statute would give estate one year from dismissal to re-file case); *Landis v. Hunt*, 80 Ohio App.3d 662, 610 N.E.2d 554; and *Rinehart v. Maiorano* (1991), 76 Ohio App.3d 413, 602 N.E.2d 340

THE MILLER BECKER
2018 SEMINAR

DISCIPLINARY PROCESS OVERVIEW
(Optional)

Richard A. Dove
Scott J. Drexel

DISCIPLINARY PROCESS OVERVIEW

Richard A. Dove
Director
Board of Professional Conduct

Scott J. Drexel
Disciplinary Counsel

GOV. BAR R. V

Three-tiered process:

- **Investigation**—grievance investigated by by Office of Disciplinary Counsel (ODC) or certified grievance committees (CGCs)
- **Adjudication**—formal complaint heard before Board of Professional Conduct (BPC)
- **Review and imposition of discipline**—Supreme Court

STATISTICS

- 3,500 grievances filed in 2017; 2,300 with ODC, 1,200 with CGCs
- 40% dismissed on intake (DOI); 60% opened for investigation
- 75 formal complaints filed with the Board

GRIEVANCE PROCESS

- Letter of Inquiry (LOI)
- Investigation—response to LOI, subpoenas, witness interviews, depositions
- Letter of Dismissal or Notice of Intent

LETTER OF INQUIRY

- Includes copy of grievance
- Written response within 2 weeks (may extend)
- Failure to respond—not a good idea
- Duty to cooperate

INVESTIGATION

- Response from attorney/judge
- Response may be provided to grievant
- Investigators @ ODC
- Subpoena power
- Witness interviews

FORMAL COMPLAINT

- Notice of intent
- Response from attorney/judge
- File with Board:
  - Complaint
  - Response, if any
  - Summary of investigation
  - Exhibits
- Waiver of probable cause

PROBABLE CAUSE

- Two, three-member panels, with alternates
- One panel meets each month
- Review materials submitted by relator
- Standard—substantial, credible evidence
- Options—certify, dismiss, certify in part/dismiss in part
- Appeal from dismissal

CERTIFICATION OF COMPLAINT

- If probable cause is found:
  - Complaint is certified to Board and served on Respondent
  - Respondent has 20 days to answer
  - Default proceedings, if no answer
- Complaint is public once certified—on-line docket

BOARD PROCEEDINGS

- Answer filed—case assigned to 3-commissioner panel
- Prehearing telephone conference with parties
- Time guidelines for Board proceedings:
- 40 days—initial prehearing conference
- 150 days—hearing scheduled
- 40 days—after submission of case to panel, report prepared for submission to full Board

BOARD PROCEEDINGS

- Amended complaint—motion for leave to amend (absent Respondent's consent); no separate probable cause determination
- Stipulations—strongly encouraged, especially as to facts
- Joint exhibits—strongly encouraged
- Consent to discipline

DEFAULT PROCEEDINGS

- No answer to formal complaint:
  - Certify respondent's default to Supreme Court
  - Court issues show cause order
  - No reply, interim default suspension imposed
  - Relator or respondent can seek remand to Board
  - If no remand, second show cause order issued six months after interim default suspension is imposed
  - No reply, indefinite suspension
  - Relator or respondent can seek remand

HEARING PROCEDURES

- Formal hearing
- Rules of Evidence and Civil Rules apply
- Relator—BOP by clear and convincing evidence
- Primary issues:
  - Facts
  - Rule violations
  - Aggravating and mitigating factors
  - Sanction

PANEL AND BOARD

- Panel questions Respondent
- Panel findings/dismissals
- Panel prepares written report to full Board
- Full Board deliberates and votes
- Approve/modify findings of fact, conclusions of law, aggravating/mitigating factors, and recommended sanction

SUPREME COURT OF OHIO

- Board report and record filed with Supreme Court
- Court issues show cause order (except consent to discipline); parties have 20 days to object
- No objections—Court considers on report and record
- Objections—oral argument (except reinstatement)
- Supreme Court is NOT bound by Board recommendation, even where no objections

WHAT INFLUENCES SANCTION?

- Aggravating factors:
  - Prior discipline (what is or is not?)
  - Dishonest or selfish motive
  - Pattern of misconduct
  - Noncooperation
  - Failure to make restitution
  - Failure to acknowledge wrongdoing

WHAT INFLUENCES SANCTION?

- Mitigating factors:
  - No prior discipline
  - Absence of a dishonest or selfish motive
  - Full and free disclosure
  - Acknowledge wrongdoing
  - Character and reputation
  - Restitution

WHAT INFLUENCES SANCTION?

- Disorder—defined in Section 35
- Four requirements for a disorder to be considered in mitigation:
  - *Diagnosis*—qualified health care professional
  - *Prognosis*—opinion that attorney can engage in competent and ethical professional practice of law
  - *Treatment/counseling*—sustained period of successful treatment (mental disorder) or completion of approved treatment program (substance use disorder)
  - *Causation*—disorder caused or contributed to misconduct

DISPOSITION TIMES

- ODC/CGCs—up to one year to investigate
- Board—8-9 months from filing to disposition
- Supreme Court—8-10 months

QUESTIONS

THE MILLER BECKER
2018 SEMINAR

PRESENTERS' BIOS

PRESENTERS' BIOGRAPHICAL INFORMATION

RONALD B. ADRINE was first elected to the bench of the Cleveland Municipal Court in 1981. He was reelected five times without opposition, retiring at the end of his sixth term in January of 2018. During his thirty-six years on the bench, Judge Adrine served as faculty for the Ohio Judicial College on issues concerning Access to Justice, an undertaking he continues during his retirement. In addition, the judge served as a member of the Governor's Task Force on Family Violence in Ohio, the Ohio Attorney General's Victim's Assistance Advisory Board, and the Ohio Supreme Court's Domestic Violence Task Force. He co-chaired the National Judicial Institute on Domestic Violence and chaired the National Board of Directors of Futures Without Violence, formerly known as the Family Violence Prevention Fund. He was elected to serve as the first chair of Cleveland's Domestic Violence Coordinating Council. The Judge lectures extensively on domestic violence issues to a host of organizations, associations, and governmental agencies, including, the U.S. Department of Justice, the National College of District Attorneys, The National Council of Juvenile and Family Court Judges, the National League of Cities and the National Center for Disease Control, to name but a few. He is co-author of a reference work entitled, "Ohio Domestic Violence Law," part of the West Publishing Group's Ohio Handbook Series. He is a graduate of Fisk University and the Cleveland-Marshall College of Law.

RICHARD C. ALKIRE has been an active trial lawyer from 1980 to the present concentrating his practice on the representation of plaintiffs in a variety of personal injury matters including injuries due to defective products, medical malpractice, automobile accidents, premises liability, construction accidents, hazing and other circumstances. He also represents plaintiffs and defendants in legal malpractice litigation as well as employees in wrongful termination litigation. After serving on the Board of Commissioners on Grievances and Discipline between 1997 and 2006, serving as its chair for two years and chair of one of its probable cause panels for two years, he began representing lawyers and judges in discipline matters. His current practice now includes providing consultation to lawyers, law firms and judges in regard to the application of the Ohio Rules of Professional Conduct and the Code of Judicial Conduct in addition to providing representation to law firms and their constituents upon the departure of law firm members. He is the past-President of the Cleveland Academy of Trial Lawyers, past President of the Ohio Chapter of the American Board of Trial Attorneys, the past-President of the Cleveland Marshall Alumni Association, a life member of the Eighth Judicial District Conference and board certified in Civil Trial Law. Rick is a frequent speaker at continuing legal education seminars on the subjects of ethics and professional responsibility and topics related to litigation. He is presently the managing member of Alkire & Nieding LLC, a law firm in Independence.

D. ALLAN ASBURY joined the Ohio Board of Professional Conduct in 2014 as senior counsel. Before joining the Board, Mr. Asbury served as Administrative Counsel for the Supreme Court and Secretary of the Board on the Unauthorized Practice of Law. His primary duties for the Board include researching and drafting advisory opinions, providing ethics advice to Ohio lawyers, judges and judicial candidates, and assisting in

the Board's ethics outreach and education efforts. Mr. Asbury received his undergraduate and law degrees from Capital University. He is admitted to practice in Ohio, United States District Court for the Southern District of Ohio, and the U.S. Supreme Court. He is a member of the ABA Center for Professional Responsibility and a faculty member of the Ohio Judicial College.

HON. ROCKY A. COSS graduated from The Ohio State University College of Law in 1975 and has served as Judge of the Highland County Court of Common Pleas, General and Domestic Relations Divisions since August of 2008. Judge Coss served six terms as the Highland County Prosecuting Attorney from 1977-2001. He has also been admitted to practice in the Southern District of the United States District Court, the U.S. Court of Appeals for the Sixth Circuit and the United States Supreme Court. During that time he also maintained a private law practice which included general civil litigation, personal injury, domestic relations, real estate, corporation law, and probate. He has been a presenter for the Ohio Judicial Conference including training for new judges on case management and ethics training for court staff. While serving as prosecuting attorney, he was an instructor for the Ohio Prosecuting Attorneys Association on several topics including cross-examination. Judge Coss has served on the Board of Professional Conduct since June of 2016.

DAVID L. DINGWELL is a partner in the Canton law firm of Tzangas Plakas Mannos Ltd. He presently serves on the Board of Professional Conduct, having originally been appointed in 2012. David has served as the President of the Stark County Bar Association (2012-2013), serves as a member of the Board of Directors of Arts In Stark, and has served on the boards of several area organizations. Prior to his appointment to the Board of Professional Conduct, David served for many years on the Stark County Bar Association's certified grievance committee, and chaired that committee from 2006 through 2008. David's passion is photography, and his current project involves photographing all 88 of Ohio's county courthouses.

SCOTT J. DREXEL is Disciplinary Counsel for the state of Ohio, having been appointed to a four-year term in October 2013 and reappointed for a two-year term commencing in October 2017. Prior to relocating to Ohio, Mr. Drexel spent 31 years with the state bar of California, including four years as Chief Disciplinary Counsel, 17 years as Administrative Officer and Chief Counsel to the state bar court, and 10 years as Chief Assistant General Counsel. He also served two years in the Professional Responsibility Advisory Office of the United States Department of Justice and represented attorneys in disciplinary actions. Mr. Drexel is a graduate of the University of Southern California and the Hastings College of Law and is admitted to practice in Ohio, California, before several federal courts, and before the United States Supreme Court.

RICHARD A. DOVE is the Director of the Board of Professional Conduct, and serves as the Board's chief legal and administrative officer. Prior to his appointment as in 2011, Mr. Dove served for more than 22 years on the staff of the Supreme Court of Ohio, the last four of which as Assistant Administrative Director. He is immediate past president of the National Council of Lawyer Disciplinary Boards. Rick is a graduate of Wittenberg University and Capital University Law School and is admitted to practice in Ohio, before

the United States District Court for the Southern District of Ohio, and before the Supreme Court of the United States.

ROBERT FITZGERALD is a three-term member of the Board of Professional Conduct and chairs the Board's Advisory Opinion Committee. Before joining the Board, he served as bar counsel for the Allen County certified grievance committee. A practitioner for 36 years, Mr. Fitzgerald is the managing member of the Lima law firm of Fitzgerald, Reese and Van Dyne where his practice focuses on insurance defense. He is a graduate of Ohio Northern University and the Pettit College of Law at Ohio Northern and is admitted to practice in Ohio, the United States District Court for the Northern District of Ohio, the Sixth Circuit Court of Appeals, and before the United States Supreme Court.

JUDGE JEFFREY E. FROELICH is a judge on the Second District Court of Appeals. Prior to his election to the Second District in 2008, Judge Froelich served 16 years as a County Court Judge and 14 years on the General Division of the Montgomery County Common Pleas bench; he has also sat by appointment on the Ohio Supreme Court. Judge Froelich was an Assistant Montgomery County Prosecutor, partner in a law firm, Director of the Law Clinic at the University of Dayton School of Law, and has since taught as an Adjunct Professor. He is a graduate of Miami University and the University of Michigan Law School and was honorably discharged from the Army Reserves. Judge Froelich has been very active in the community and currently serves on several foundation and nonprofit boards. Judge Froelich received the 2009 Friend of Legal Education Award from the Ohio State Bar Association and is a past president of the Dayton Bar Association and has served as chair of its Certified Grievance Committee. He is also currently on the Supreme Court's Commission on Professionalism.

KRISTI R. MCANAUL joined the Ohio Board of Professional Conduct in 2018 as counsel. Her primary duties for the Board include researching and drafting advisory opinions, providing ethics advice to Ohio lawyers, and assisting in the Board's ethics outreach and education efforts. Prior to joining the Board, Ms. McAnaul served as a Staff Attorney at the Ohio Department of Education in the Office of Professional Conduct. She also worked in private practice for over nine years with a primary focus on juvenile and domestic law. Ms. McAnaul graduated magna cum laude from Capital University Law School and was a member and Research Editor of the Capital University Law Review. She received her undergraduate degree from Oakland University in Rochester, Michigan.

JOHN J. MUELLER is member of the bar in Ohio, Kentucky, Indiana, and New York. Through his own firm, located in Cincinnati, he concentrates his practice in (a) litigation involving plaintiffs' lawyer malpractice claims, (b) defense of grievance investigations and lawyer-discipline matters, and (c) lawyer-mobility matters (law-firm mergers; law-firm break-ups; lawyer movement between firms). Mr. Mueller also holds a certificate as a certified public accountant from the Accountancy Board of Ohio (license currently inactive). Mr. Mueller has served on the OSBA Legal Ethics and Professional Conduct Committee and he currently serves as a member of the Certified Grievance Committee of the Cincinnati Bar Association. In addition, he is a member of the following professional organizations: Cincinnati Bar Association; Association of Professional Responsibility Lawyers; and American Association of Attorney-Certified Public Accountants (Life

Member). Mr. Mueller frequently lectures and presents, and occasionally writes, on legal-ethics matters, particularly matters relating to lawyer's trust accounts and obligations for accounting for client funds.

JANICA PIERCE TUCKER is a partner in the Columbus office of Taft Stettinius & Hollister. She also serves as co-chair of Taft's Diversity & Inclusion Committee, a team of attorneys and senior staff who collaborate to create initiatives that advance a comprehensive mindset of inclusiveness in the firm's thinking and actions. Janica focuses her practice on representing clients in all aspects of employment and labor law. She also represents primary and secondary schools and defends employers against a broad range of employment claims including sexual harassment, discrimination, retaliation and wrongful discharge matters. She earned a B.A. from the University of Tennessee and a J.D. from The Ohio State University College of Law.

KIMBERLY VANOVER RILEY is a partner with the law firm of Montgomery, Rennie & Jonson where she practices in the areas of employment, civil rights, and disciplinary defense. Ms. Riley is a certified instructor in Human Resources for the National Center for State Courts' Institute for Court Management, and she is an Ohio State Bar Certified Specialist in Labor and Employment Law. She has previously served as the Chair of the Ethics and Professionalism Committee of the Cleveland Metropolitan Bar Association and the Chair of its Labor and Employment Section. She also serves on the CMBA Bar Admissions Committee, and she is a Master of the Bench in the Cleveland Employment Inn of Court.

JOHN P. SAHL is the Inaugural Joseph G. Miller of Professor of Law and the Director of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law where he regularly teaches professional responsibility, evidence, and sports law. He is currently working with co-authors on a Professional Responsibility textbook slated for publication in 2017.). Professor Sahl clerked for Chief Judge William Holloway Jr. of the U.S. Court of Appeals for the Tenth Circuit and was senior counsel to the Subcommittee on the Constitution, Federalism and Property Rights of the U.S. Senate Judiciary Committee.

MONICA A. SANSALONE is a partner with Gallagher Sharp LLP. She also serves as the firm's Professional Liability Practice Group Manager and is a member of the firm's Management Committee. She represents lawyers in grievance proceedings and defends them against malpractice claims. She consults on ethics and risk management matters, presuit evaluation, and claim repair. She provides representation in trial courts and on appeal, including matters before the Supreme Court of Ohio. She is also a member of the firm's Appellate Practice Group, with a particular focus on professional liability matters. Monica is a graduate of Cleveland-Marshall College of Law and Loyola University of Chicago. She is Martindale-Hubbell, AV® Peer Review Rated, an Ohio Super Lawyer, and a former Law Clerk to the Honorable Terrence O'Donnell, Eighth Appellate District. Monica serves on the Supreme Court of Ohio Lawyers' Fund for Client Protection Board of Commissioners and the Advisory Committee of the Solo Practitioner Incubator at Cleveland-Marshall College of Law. She formerly served on the Commission on Professionalism of the Supreme Court of Ohio, chairing the Commission from 2007-

2008. Monica is a member of the Claims and Litigation Management Alliance (CLM), the Lawyers Professional Liability Committee of the American Bar Association, as well as the Ohio State and Cleveland Bar Associations. She frequently lectures on lawyer ethics, malpractice, and professionalism.

PATRICIA A. WISE is a partner at Spengler Nathanson Ltd. and was among the first class certified by the Ohio State Bar Association as a specialist in Labor and Employment Law. She recently testified before the Bipartisan Congressional Caucus for Women's Issues at their hearing, "Beyond the Headlines: Combating Service Sector Sexual Harassment in the Age of #MeToo" and before the California Legislature's Joint Subcommittee on Sexual Harassment Prevention and Response. Patty served as a representative of the Ohio State Bar Association to develop an Ohio Judicial College training program requested by Ohio Supreme Court Chief Justice Maureen O'Connor to address the issue of harassment. Former Supreme Court Justice Judith Lanzinger appointed Patty to the Board of Professional Conduct, where Patty is serving her second term and chairs the Budget and Personnel Committee. Patty is president of Advocates for Basic Legal Equality, Legal Aid of Western Ohio, and Northwest Ohio Homeownership Development Agency and is a board member of the Toledo Fair Housing Center.

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