



# MALPRACTICE ALERT!

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As we turn the calendar to the final months of 2016, it's a good time to look at trending developments for lawyers. This issue will give a discussion of recent opinions from the Board of Professional Conduct and case law updates.

This time of year is also time to look ahead and consider succession plans for your practice. This issue will provide resources and information on that important topic.

Your positive comments on the “**OBLICAlerts**” and the **Malpractice Alert** are most appreciated. We're happy to hear that our policyholders like these publications to keep up to date on emerging legal issues. If you have comments or questions, please do not hesitate to contact me. OBLIC is here for you!

Gretchen Mote, JD, Editor  
Malpractice Alert

## ADVISORY OPINIONS PROVIDE GUIDANCE

The Board of Professional Conduct of the Supreme Court of Ohio issued Advisory Opinions in 2016 that provide advice for attorneys on the application of the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar. Click on the opinion number to read the opinion.

[Opinion 2016-3](#) addressed *Lawyer Participation in Referral Services*. Online lawyer referral services are proliferating and may seem like an attractive way to get new clients.

This Opinion examined whether an online lawyer referral service that matches a prospective client with a lawyer for a particular legal service and requires the lawyer to pay a “marketing fee” for each completed client matter is permissible.



The Opinion acknowledged that this presented multiple, potential ethical issues:

- fee-splitting with non-lawyers
- advertising and marketing
- lawyer's responsibility for nonlawyer assistants interference with lawyer's professional judgment
- facilitating unauthorized practice of law

These issues involve Professional Conduct Rules 1.1, 1.6, 1.18, 5.3, 5.4, 5.5, 7.2, 7.3, 7.4 and Rule XVI of the Rules for the Government of the Bar, which provides the requirements for Lawyer Referral and Information Services.

The Opinion concluded that a lawyer should carefully evaluate a lawyer referral service to ensure the lawyer's participation is consistent with the ethical requirements. It also stated that a fee structure that is tied specifically to individual client representations that a lawyer completes or to the percentage of a fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio, pursuant to Gov Bar Rule XVI.

While using online marketing to attract clients can be beneficial, this Opinion cautions that lawyers must be careful about how they engage with such services.



[Opinion 2016-4](#) discussed the *Imputation of Conflict Involving Current and Former Legal Interns*. Law school clinics provide legal services to prepare law students to be practice ready and to meet legal needs of persons qualifying for clinic services.

This opinion answered an inquiry from a law school legal clinic asking:

- whether conflicts arising from a legal intern are imputed to the lawyers in a law firm when a legal intern is employed at the firm as a law clerk and
- whether imputed conflicts disqualify both the law firms and clinics from representing certain clients.

The opinion looked at practice by a law student with a valid legal intern certificate issued pursuant to Gov. Bar R. II. The opinion found that a law student holding such a legal intern certificate is engaged in the limited practice of law and bound by the Rules of Professional Conduct.

The opinion stated that conflicts of interest arising out of a legal intern's current or former representation of clients are imputed to all lawyers in a private law firm when the intern is employed simultaneously as a law firm clerk. However, the conflicts of a former legal intern newly employed as a lawyer are not imputed to the lawyers in a law firm, but may necessitate the screening of the lawyer from any matter in which he or she had substantial responsibility.

This information is useful as more law students become involved in law school clinics. It also emphasizes the importance of good conflict of interest checking systems for all client engagements.

[Opinion 2016-5](#) examines *Communication With Current and Former Corporate Employees*. This situation is addressed by Rule 4.2 of the Rules of Professional Conduct, which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The opinion discussed Comment [7] of Rule 4.2 which lists three categories of current employees an adverse lawyer may not contact without permission of corporate counsel. These categories include a current employee:

- who supervises, directs, or regularly consults with the corporation's lawyer concerning the matter
- who has authority to obligate the corporation with respect to the matter
- whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability.

The opinion advised extreme caution by adverse lawyers when interviewing current employees, even those who do not satisfy the categories in Comment [7].



The opinion next considered communication with a former employee. It concluded that communication with a former employee, even one whose prior acts or omissions may be imputed to the corporation, is permissible under

Rule 4.2, but before interviewing a former employee, the lawyer should disclose his/her identity.

The opinion stated a lawyer may communicate on the subject of the representation with former employees, without notification or consent of the corporation's lawyer, as long as the former employee is not represented by counsel.

Further, the opinion stated that a lawyer representing an interest adverse to a corporation may communicate with certain employees of the corporation without consent of a corporation's lawyer, even when a corporate lawyer asserts a blanket representation of the corporation and all of its current and former employees. This opinion provides further guidance on situations that involve interviewing corporate employees.



[Opinion 2016-6](#) considered *Ethical Implications for Lawyers under Ohio's Medical Marijuana Law*. Subsequently, the Ohio Supreme Court adopted an [amendment to Rule 1.2\(d\)\(2\)](#) of the Rules of Professional Conduct by which:

A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub.H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.



[Opinion 2016-7](#) focused on the *Lawyer's Duty to Promptly Deliver Funds to a Client or Third Party*. In this opinion, a lawyer asked for guidance on how long he could hold client funds in the firm trust account to ensure that the check clears before distributing funds to a client, in light of Professional Conduct Rule 1.15 that requires lawyers to "promptly" deliver funds to a client or third party.

The opinion discussed Rule 1.15 requirements, but also noted that disbursing client funds from the IOLTA before the check clears carries the risk of using funds belonging to another client to pay the check if the check is not honored.

The opinion found that a lawyer may hold a client's funds in trust for a reasonable period of time to ensure that the check has cleared and the funds are available to distribute to the client or third party. Further, subject to the exceptions in the opinion, the opinion stated that a reasonable period of time consists of one week to ten days, given federal banking regulations and modern banking practices. OBLIC recommends that prior to disbursing funds the lawyer contact the bank to be sure the funds are actually in the IOLTA account and available for distribution, not just that the check has "cleared."

This opinion may be useful in explaining to clients why the lawyer cannot immediately write a distribution check to them when the clients have negotiated a settlement check to resolve their claim. It may also help to avoid a scam situation where a lawyer is asked to deposit a check in the IOLTA account and then provide funds from that deposit to a third party, before the check is later determined to be fraudulent.



## Our Testimonials

[Opinion 2016-8](#) withdraws Opinions 89-24 and 2000-6 and gives guidance on *Client Testimonials in Lawyer Advertising and Online Services*. The opinion addressed truthfulness in advertising and communication of a lawyer's services in Rules 7.1 and 7.2 and the restrictions on revealing information relating to representation in Rules 1.6 and 1.9 when evaluating a client testimonial.

The opinion stated:

- A lawyer may include a client testimonial in advertising so long as it does not constitute a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services or create unjustified expectations for prospective clients. Testimonials generally referring to favorable outcomes for clients must contain an appropriate disclaimer to avoid unjustified expectations.
- Client testimonials in an advertisement that state the amount of a settlement or verdict are inherently misleading even if a disclaimer is used.
- A lawyer is responsible for monitoring testimonials and reviews made by clients on websites if the lawyer controls the content of the website. Online testimonials or reviews from clients about the lawyer or the lawyer's services that contain false, misleading, or nonverifiable communications must be removed by the lawyer when the lawyer has control over the online content.

If a lawyer has or is considering ads that include testimonials, this opinion should be reviewed.

## SUPREME COURT DECIDES CASES ON CAT TAX FOR ONLINE RETAILERS

Online activity is in focus on many fronts. In an opinion decided November 17, 2016, [Crutchfield Corp. v. Testa](#), Slip Opinion No. 2016-Ohio-7760, the Ohio Supreme Court affirmed the decision of the Board of Tax Appeals upholding the imposition of the commercial activity tax (CAT) by the Tax Commissioner of Ohio on the Virginia-based Crutchfield Corporation. The Tax Commissioner determined that orders of goods initiated by Ohio consumers via computer and transported into Ohio by an out-of-state company make the company's sales "taxable gross receipts."

The Commercial Activity Tax (CAT) in [Chapter 5751](#) of the Ohio Revised Code was adopted by the Ohio General Assembly in 2005 as part of the overhaul of Ohio's state tax system. Pursuant to 5751.02 of the Ohio Revised Code, a commercial activity tax is levied on each person with taxable gross receipts for the privilege of doing business in this state.

The Court found that the \$500,000 in annual sales-receipts threshold to apply the CAT meets the commerce clause requirement for a "substantial nexus" with the state and that a physical presence is not required. This is an important decision for lawyers advising any out-of-state companies that meet the threshold requirement selling goods online from out-of-state.



## NEGLIGENT MISIDENTIFICATION DOES NOT EXIST IN OHIO

In a case submitted to the Ohio Supreme Court by the U.S. District Court for the Southern District of Ohio, [Foley v. Univ of Dayton](#), Slip Opinion No. 216-Ohio-7591, decided November 3, 2016, the Ohio Supreme Court found that no cause of action exists in Ohio for the tort of negligent misidentification.

The case arose from the arrest of two persons named Foley and a friend, who were arrested for burglary after knocking on the door of a townhouse on the University of Dayton campus. The charges against them were dismissed or resolved and they filed suit in federal court against the persons who called the police.

In its opinion, the Ohio Supreme Court noted several appellate court decisions that discussed the tort of negligent misidentification. However, the Supreme Court has never recognized it and declined to do so in this opinion.

## SUCCESSION PLANS FOR YOUR PRACTICE

What happens to your practice if you experience an unforeseen emergency? What if you are in an accident or have a heart attack? What if you die suddenly and unexpectedly?

These are all real scenarios that practicing attorneys can experience. It is especially critical for solo practitioners, but equally as important for attorneys in firms to have plans in place to deal with the unexpected.



What should you do?

- Think about another attorney to be contacted by the person who would be notified in the event you experience an emergency situation. The person to be notified is likely your spouse, significant other, another family member or a close friend.
- The other attorney would not “take over” your client files, but only determine upcoming court dates, statutes and appointments, and notify clients, courts and opposing attorneys, as needed.
- The agreement should be in writing. You may wish to execute a Power of Attorney for the designated attorney. See [Succession Planning for Ohio Attorneys](#).
- You should introduce the other attorney to the person who will be contacted in the event of the emergency and go over the procedures to be followed.



- Upon the occurrence of the emergency event, the contact person would then notify the other attorney for whom you have arranged access to your office.
- At the office, the attorney would retrieve from the secure location – likely a locked, fireproof cabinet – the passwords to access your computer records for your docket and calendar, your client database and trust account and financial records and notify clients, courts and others, as needed.

It is critical for lawyers to have these plans in place. [ABA Lawyer Demographics for 2016](#) indicate that 34% of US lawyers are age 55 or older. Of the lawyers in private practice, 49% are solo practitioners, while another 20% practice in firms of 10 or less. Putting emergency succession plans in place can save considerable stress if an emergency situation occurs and protect your clients as well as your assets.

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