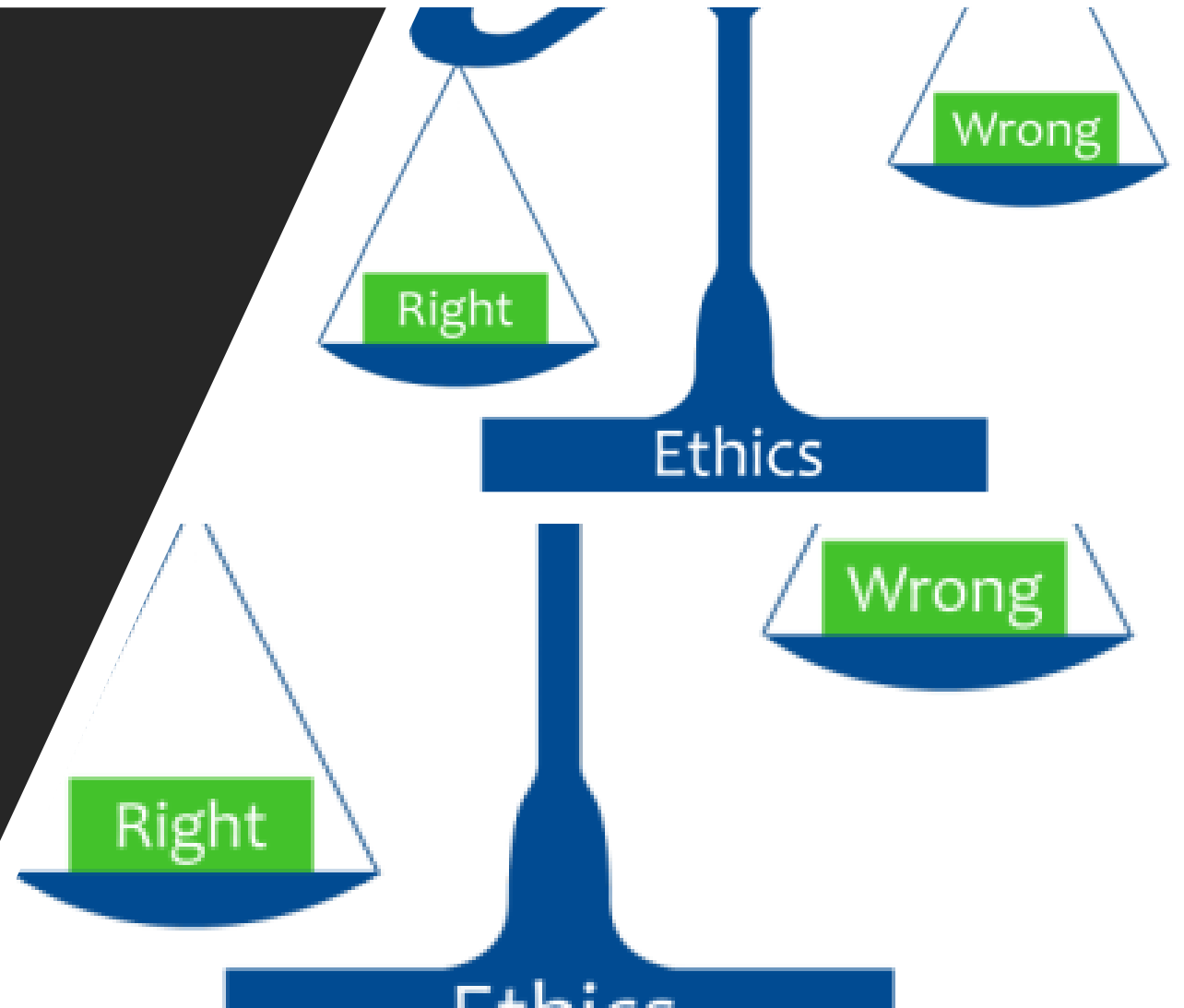


# Professional Responsibility

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# Three Professional Responsibility Topics

- ✓ Disciplinary system – what you need to know
- ✓ Legal Fees – what you should know
- ✓ Trust Accounts – what you should do

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Oh \*!?!#@

*I Got a Grievance*

*Attorney  
Discipline  
in Ohio*



*Basic things to be aware of.....*

*Allegations of violations of the Rules + the Canons*

*Heard by the Board of Professional Conduct  
AND the Supreme Court of Ohio*

*May be brought by ODC or CGC*



***Gov. Bar Rule V***



# Disciplinary *Process*

Complaint  
Driven

**2600**  
per year

**40%**  
investigated



# Disciplinary *Process*

**Anonymous  
or  
Matter that  
Comes to  
Their  
attention**

**Not limited to  
Issues in  
The grievance**

**Subpoena  
Power  
And they use  
it**

**MOST IMPORTANTLY**

**You have to cooperate  
And they know it!**



# Primary topics for grievances include:

- Neglect
- Communication
- Fees
- Results



# 80% of grievances can be attributed to one failing:

*Failure to properly* **Communicate**

**About Fees**

**About Case**

**About Process**







Oh \*!?!#@, I got a grievance

**1**

**Contact a Professional  
Responsibility  
practitioner!**

**Who has a  
Fool for a  
client?**



**Any lawyer  
who  
represents  
himself**

2



**Review your file  
Is it complete?  
Do you have all the  
documents you should  
have?**

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3



**DO NOT**

**CONTACT the grievant or a witness**

**ADD anything to your file**

**CHANGE anything in your file**



# *Your file should include*

**Written fee agreement**

**All documents you would expect**

**All communications with client,  
All communications with other  
Necessary parties**

**Settlement paperwork**

DID I MENTION.....

Contact a professional  
responsibility practitioner.





# *Legal Fees*



## Rule 1.5: Fees and Expenses

Rule 1.5 replaces DR 2-106 (Fees for Legal Services) and DR 2-107 (Division of Fees Among Lawyers), makes the aspirational provisions of EC 2-18 and EC 2-19 mandatory, and makes the provisions of R.C. 4705.15 (contingent fee agreements and closing statements) mandatory.

## Rule 1.5: Fees and Expenses

01

Rule 1.5(a) retains the standard of DR 2-106: “A lawyer shall not make an agreement for, charge, or collect an illegal or **clearly excessive fee.**”

02

It also sets forth the same standards as DR 2-106 for determining the reasonableness of fees.

## Rule 1.5: Fees and Expenses

- Time and Labor involved, novelty and difficulty of the issues, requisite skills required;
- Whether other employment will be precluded
- Fee customarily charged
- Amount involved and results obtained
- Time limitations imposed by the client/matter
- Nature and length of professional relationship
- Experience, reputation, and ability of the lawyer
- Whether the fee is fixed or contingent

# Specific Fee Issues

- Now required to identify the NATURE and SCOPE of the representation.
- Now required to identify the basis or rate of the fee and expenses.
- PROMPTLY!
- Preferably in writing.  
READ -- MUST BE IN  
WRITING!





## Rule 1.5: Fees and Expenses

- The lawyer's obligation to communicate is mandatory.
- In a dispute with the client, the burden will be on the lawyer to establish that the lawyer has done so.
- Writing is not only the best practice it is the best CYA.

# Contingency Fee Matters

- Per Prof. Cond. R. 1.5 (c) ALL contingency fee matters must include a fee agreement in writing
- The fee agreement must be signed by the client.
- The fee agreement must state the percentage or percentages that accrue to the lawyer in the event of settlement, trial, or appeal.
- The writing shall detail litigation and other expenses to be deducted from the recovery, and whether they are deducted before or after the contingency fee is calculated.



2

## Define Scope



FILE MESSAGE INSERT OPTIONS FORMAT TEXT REVIEW ADOBE PDF

Paste Cut Copy Format Painter Clipboard

Font Size: 12, Bold, Italic, Underline, Text Color, Background Color, Paragraph Styles

Basic Text

Address Book, Check Names, Attach File, Attach Item, Signature, Assign Policy

Names, Include, Tags

Follow Up, High Importance, Low Importance

Zoom, Apps for Office, Attach File

Zoom Add-ins NetDocs

Send

To...  
Cc...  
Bcc...

Subject RE: Legal Representation

*Define exactly what asked to do, avoid using “Re: Legal Representation”*

# ***Benefits to***

CLARITY

*Avoid blame for  
unrelated matters*

*Defines when  
representation ends*

*Easier to be adverse  
to a former client*

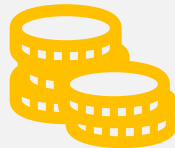
# Fee Agreement – basis or rate of fee



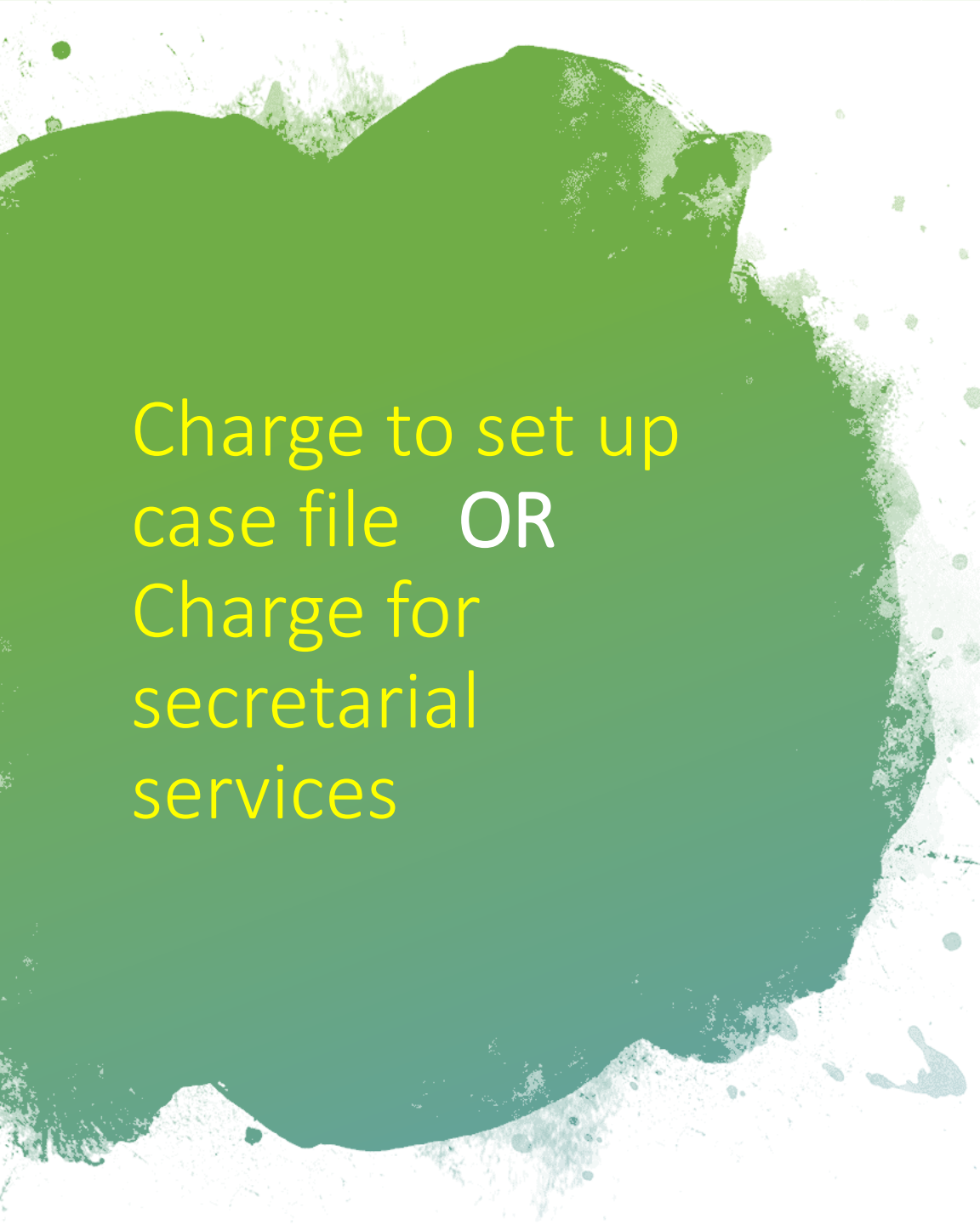
Clearly spell out terms of fee.



Including what work will be performed for that fee



How the fee will be calculated



Charge to set up  
case file OR  
Charge for  
secretarial  
services

- Supreme Court has stated that secretarial costs are normally part of overhead and should be reflected in the hourly rate or the contingency fee.
- “Litigation costs” do not include secretarial charges or paralegal costs.
- Specifically designated paralegal services can be approved by the client in an hourly matter.
- *Columbus Bar Ass’n v. Brooks*, 87 Ohio St.3d 344 (1999)

# Charge to set up file

Has to be evaluated under the standards of 1.5 and what service was rendered to the client.

Was it just another way to obtain \$ for secretarial services? Was it reasonable?

\$800 – likely unreasonable; \$75 possibly reasonable.

Not likely to be a stand-alone discipline matter.

# Travel time billing questions



Lawyer has hourly rate client and charges for travel time. Lawyer performs work for other client(s) while traveling. Can she bill both clients for work performed.



DEPENDS

# Travel time billing

- If both are hourly rate clients – NO. Not possible to bill two different clients for the same time. Lawyer working on an hourly basis can not bill the same hour to two different client matters.
- *Disciplinary Counsel v. Holland*, 106 Ohio St.3d 372 (2005)
- **STILL may be** possible to bill one client a “travel fee or travel rate” which is different than normal hourly rate and indicate to client that the cost is solely to compensate you for traveling.
- Supreme Court of Ohio has not specifically approved of a travel fee or travel hourly rate.

# Rule 1.5: Fees and Expenses

- Rule 1.5 (c)(1) requires that all contingent fee agreements be reduced to a writing signed by the client and the lawyer. The similar requirement in R.C. 4705.15(B) is limited to “tort actions.”
- Rule 1.5 (c)(2) requires the preparation of a closing statement, to be signed by the lawyer and the client, in matters involving contingent fees.






# contingency fees



- Acceptable to increase percentage as work increases – from settlement to trial to appeal.
- Anything above 40% (where work through appeal is possible), will be viewed with suspicion.

## Contingency Fees – two features

Allowed to provide access to justice system  
to those who are otherwise unable to  
afford to pay counsel



SINGLE MOST IMPORTANT AND DEFINING  
FEATURE – the lawyer and client are sharing  
the risk of non-recovery. Absent a shared  
risk of non-recovery, it is not an allowable  
contingency fee.

Absent a shared risk  
of non-recovery =  
clearly excessive fee  
in violation of 1.5



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## “Non-Fee producing” hearings

- Required hearings – to have certain treatment allowed or to have additional conditions allowed in claim or to have bills paid for treatment already rendered.
- Some firms charge a contingency fee for the representation and then add a fixed fee for attendance at one or more of these “non-fee producing” hearings.

“Administrative fee” for work after weekly benefits award is made



What is extent of this work?



Is it anticipated in the fee agreement?



How much time is involved?



No shared risk of non-recovery, so not a candidate for a contingency fee

Client is  
awarded Perm.  
Total Disability

- In these circumstances, lawyer permitted to receive 1/3 of accrued benefits as the fee AND is awarded a \$15,000 statutory amount as set by the Commission.
- My understanding these matters typically involve less than 50 hours of work to reach the PTD. (the \$15,000 alone is the equivalent of \$300/hour).



Assume the client comes back and wants to convert the ongoing PTD payments to a lump sum

- What is the appropriate fee then?
- This is a choice by the client. He/she will get the award either way – either ongoing payments or a lump sum.
- And very little work is involved – file the application with the client's signature and then wait.
- **No risk of non-recovery.**
- Hourly fee or a fixed fee is appropriate, contingency fee is not.

Another  
question that I  
was asked to  
address

- I understand claimant's counsel will set up an exam for the client with an independent doctor.
- These are arranged by the attorney with the doctor -- typically a letter saying
  - Please examine, provide your opinion and send me your invoice for services
- BUT then the lawyer doesn't pay the doctor out of the settlement.



## Rule 1.5 (c)(2) – Settlement statement in contingency fee matters

- LAWYER SHALL – prepare a closing statement and provide same to the client.
- The closing statement shall specify compensation, costs and expenses to be deducted from the settlement
- And the division of fees between lawyers not in the same firm who are sharing in the fee
- LAWYER & CLIENT must sign the statement.

Settlement Statement is providing client with accurate information about what the lawyer is doing with the settlement funds.

- INCLUDING what the lawyer is doing with the payment for the medical provider who performed the independent examination



## Rule 1.15 – Safekeeping Funds and Property

- 1.15(d) – Upon receiving funds in which a third person has a lawful interest, a lawyer SHALL –
  - Promptly notify the third person
  - Promptly deliver those funds to the third person.



What if the lawyer simply transfers the funds from the lawyer's IOLTA to her operating account?

- WITHOUT paying the medical provider from the settlement proceeds, the lawyer is in violation of Rule 1.15.
- This constitutes conversion of the funds by the lawyer.
- And making a false statement to the client in the settlement statement.

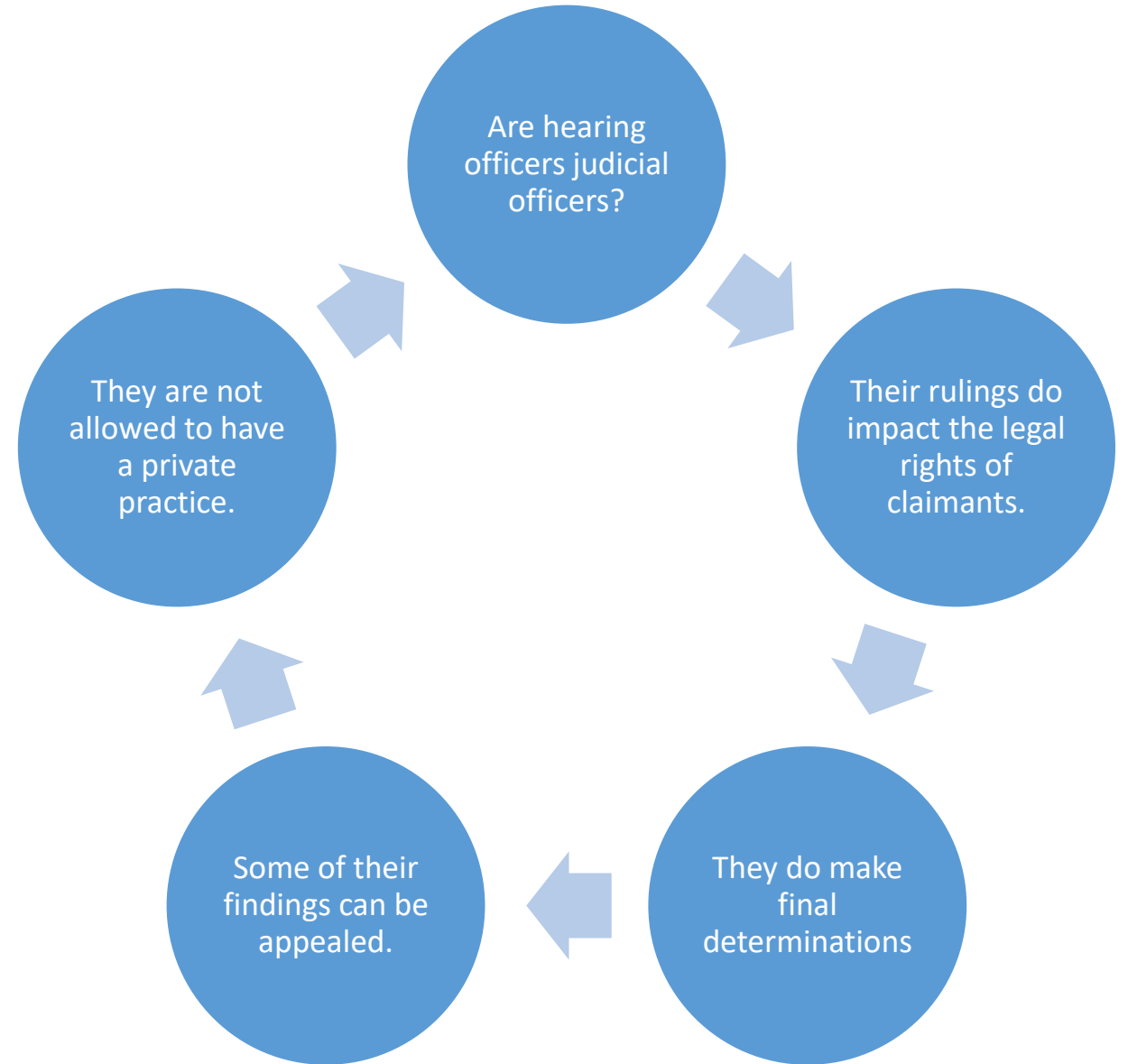


DIFFERENT  
TOPIC –  
Sharing fees  
with a lawyer  
not in your  
firm

- Rule 1.5(e) covers this. Specific requirements –
- The division of fees is in proportion to the services performed OR
- Each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client.
- CLIENT must give written consent after disclosure of id of each lawyer that fees will be divided, and that division is in proportion to services or each lawyer assumes joint responsibility.
- SETTLEMENT STATEMENT must be signed by client and each lawyer if a contingent fee is used and there is no court approval of fee.

# Hearing Officers- bound by the judicial code?

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# Judicial Canons

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Rule 1.1 -- judicial officers shall comply with the law.

Rule 1.2 – shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary.

Rule 2.2 Shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.



A photograph of two people falling through a clear blue sky. The person on the left is a woman in a blue tank top and black leggings, falling with her arms outstretched. The person on the right is a man in a light blue tank top and black leggings, also falling with his arms outstretched. The word "Trust" is written in white serif font between them.

Trust

# Trust Account Guidelines



# Trust Account Requirements

- Lawyer shall hold client or third-person property:
  - In connection with a representation
  - Separate from lawyer's property
- Duty to Safeguard



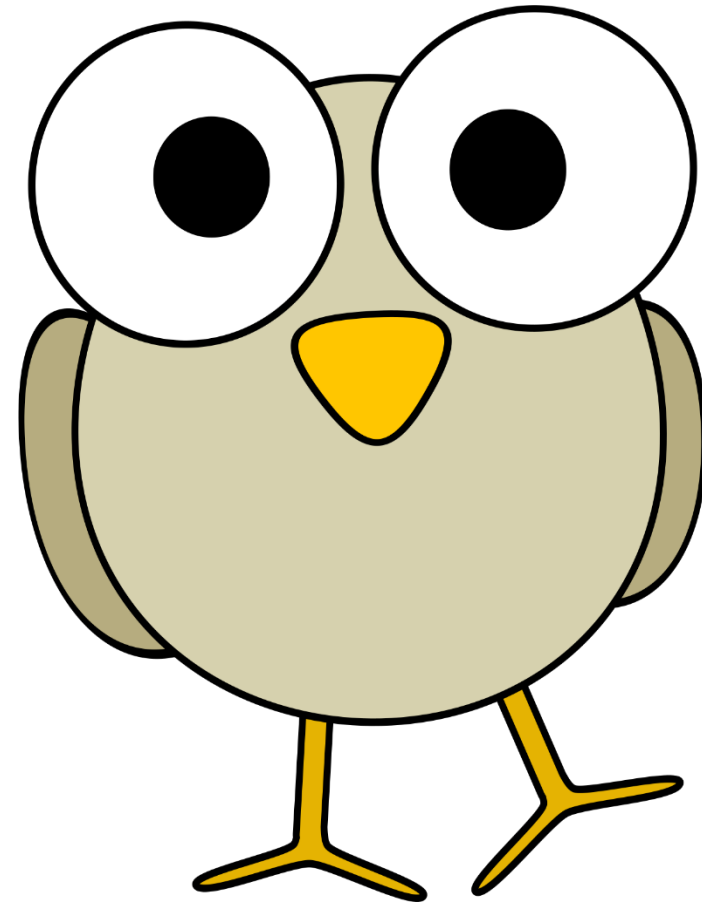
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# AND.....

- Prompt notification
- Prompt delivery
- Full accounting upon request
- Identify and label
- Maintain complete records

# What Funds Belong in Trust Account?

- Funds belonging to client
- Funds belonging partly to client and partly or potentially to lawyer (i.e. settlement proceeds)
- Funds belonging to third party related to handling of case (medical bills payment)



# What Does NOT Belong in Trust Account?

- Funds belonging totally to the lawyer
- Funds not related to the representation of a client



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# Rule 1.15: Safekeeping Property

- A lawyer may deposit his/her own funds in a client trust account for the sole purpose of:
  - Paying bank service charges
  - Obtaining a waiver of bank service charges
    - Only in the amount necessary for that purpose



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**EMBRACING OUR  
DIFFERENCES**

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## Types of Trust Accounts

- IOLTA
- Client Trust Account
- See Comment 3A to Rule 1.15

# Retainers: Avoid Creating a Fish with Feathers

- Where should it be deposited?
- Is it an advance against fees?
- Is it for costs?
- Is it an amount paid solely for your availability whether you work or not?





# Hint!



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- Is there a retainer agreement or engagement letter that specifies to whom the retainer belongs and how it will be used?



# Classic Retainer

- True “earned upon receipt” retainer
  - Classic or General Retainer
- If truly earned upon receipt:
  - No agreement to represent on a specific matter
  - Agreement to be available for client in the future
  - Forego clients with conflicts



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# Special Retainers



- Specified fee in exchange for specified services
- True advance on fees
- If time exceeds advance, additional \$ due from client
- No right to keep \$ not earned
  - Client entitled to a refund

# Hybrid – General/Special Retainer

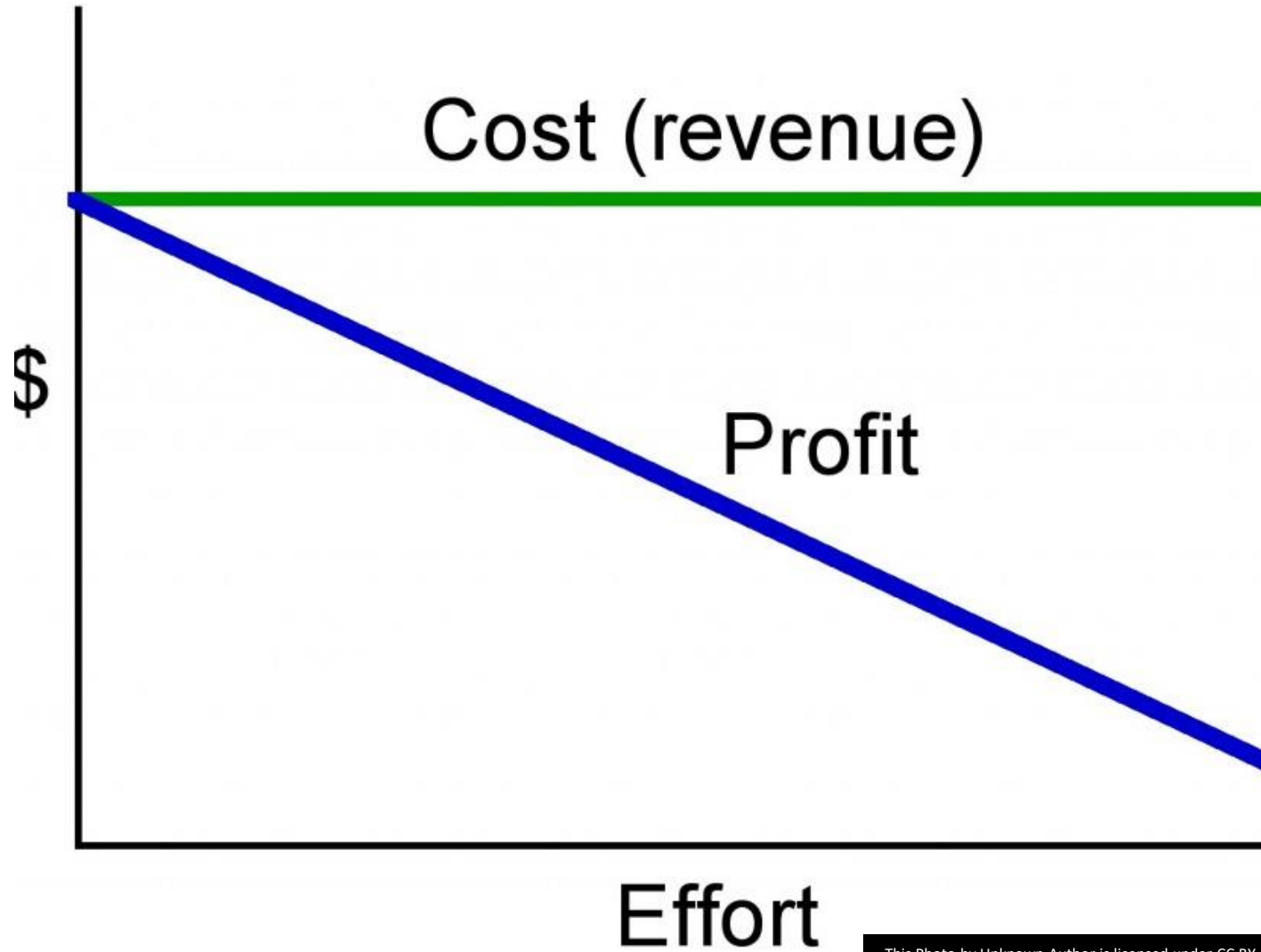
- Set retainer to be billed against that is also for attorney's availability and is nonrefundable
- Burden is on the attorney to establish retainer is classic/general and not special



A large, abstract blue watercolor splash shape on the left side of the slide, with various shades of blue and some white speckles. The text is white and positioned within this shape.

## Hybrid involving contingency and hourly

- Any attempt to combine an hourly rate with a contingency fee is likely to be viewed as an excessive fee – no shared risk of non-recovery.
- Only situation where Supreme Court of Ohio has not objected to a hybrid is when an employment lawyer charged an hourly fee for the investigation of the matter and then entered into a contingency fee agreement to conduct a lawsuit on the claim.



## Flat/Fixed Fee

- Board Opinion #2016-01
- Flat/Fixed Fees are allowed
- The fee agreement must comport with the Rules (1.5)

# Where do you put the money?

- Classic/General Retainer (Earned Upon Receipt)
  - Operating account
- Special Retainer (Billed Against)
  - Into trust account until earned
- Fixed/Flat Fee
  - Trust Account, UNLESS.....
- ALL are subject to reimbursement



# Fee Review

All fees are subject to review under the Rule 1.5 standards of what is a clearly excessive fee



Judicial Review

## Rule 1.15: Safekeeping Property

- Rule requires all **records of client funds** and property be maintained for 7 years
- Rule specifies exactly what trust account records must be maintained for 7 years



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# Rule 1.15: Safekeeping Property

- All fee agreements
- Record for each client's funds
  - Date, amount and source of funds
  - Date, amount, payee and purpose of each disbursement
- Current balance



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# Rule 1.15: Safekeeping Property

- Record for each bank account
  - Name of account, date, amount, and client affected by each credit and debit
  - Balance in the account
  - All bank statements, deposit slips, and canceled checks (if provided)
  - Monthly reconciliation



# Reconciliation

- Individual client record
- Bank account record
- Bank statement



## Rule 1.15: Safekeeping Property

- Upon dissolution of a law firm, partners shall arrange for one or more of them to account for client funds and to maintain all records generated under this rule.



## Rule 1.15

- Advances on costs go into trust account
- Costs
  - Travel expenses, deposition costs, photocopies
    - Only actual cost to be billed
    - No surcharge may be added





# ABA Opinion 93-379

- “The lawyer’s stock in trade is the sale of legal services, not photocopied paper, tuna fish sandwiches, computer time or messenger services.”



# Rule 1.15: Safekeeping Property

- Comment 2
  - Account expenses that may be deducted from account proceeds and those that may not
- Comment 3A
  - When to use IOLTA and when to use an individual client trust account



# Common Errors



- Bank fees and check printing charges debited from trust account without offsetting funds
- Failure to verify collection of deposits into trust account
- Failure to deposit funds prior to issuing trust account checks
- Improper or lack of endorsements, resulting in returned checks



# Common Violations in Maintenance of Trust Account Records



- Failure to maintain individual client records or equivalent
- Failure to maintain duplicate deposit slips
- Failure to reconcile individual client records to bank statements and the general trust account record
- Failure to maintain records after completion of the lawyer's fiduciary duty

# Common Violations in the Use of Trust Accounts

- Improper transaction processed through the trust account
- Using the trust account as an operating account
- Using the trust account for family, associations and non-client-related transactions
- Depositing earned fees into the trust account

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# Common Violations in the Use of Trust Accounts

- Assuming the bank's decision to grant immediate credit on deposited item is the equivalent of the funds actually being collected
- Failing to withdraw earned fees from the trust account
- Maintaining a large balance of lawyer or law firm funds in the trust account



# When Do I Deposit Funds?

As quickly as possible because you have a duty to safeguard them



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# When Do I Transfer Earned Fees?

- Within a reasonable time after they're earned
- Once earned, fees do not belong in a trust account
- You can't spend your money UNTIL it is moved from trust account to operating account



# Staff Assistance

- Staff may assist
  - Employees must be competent and properly supervised
- Internal controls must be adequate to safeguard client funds and property
- ODC v. Ball; Rule 5.3



# The Lawyer MUST

- Train and supervise staff
- Regularly review records





# Regular Review of Records

- Lawyer most familiar with client matters:
  - Most likely to spot errors
    - i.e. wrong amount recorded to wrong client
  - Knows to safeguard amounts that need special attention (those involving unresolved disputes)



# Can Non-Lawyers Be Signers on Trust Account?

- Technically, yes.
- Management considerations:
  - Since attorney is responsible, is it worth the risk?
  - Is it necessary?



# Credit cards

- Use of credit card payments
  - See Board Opinion #2007-3
- Distribution of funds when the identity or whereabouts of the owner of the funds is unknown
  - See Board Opinion #2008-3



# Thank You!

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