Jay Milano Needs Money!

Anyone considering hiring Attorney Jay Milano should read the attached report about his conduct in my case. Mr. Milano collected $15,000 for an investigation but never paid his investigator -- he showed up at a criminal trial without any documents or witness interview summaries. During trial, Milano claimed his law firm was going out of business and needed "an immediate infusion" of $25,000 in the form of a "short-term loan." Mr. Milano then tried to force me to sign a new fee agreement -- a contingency fee agreement -- during the trial. He also demanded I sign over an insurance policy to him as well. Mr. Milano has a long history of ripping people off -- if you don't agree, contact Dr. Terrence Sasaki and he'll share his story with you!

Thank you for taking the time to review the attached report!

KOBLENTZ & PENVOSE, LLC
ATTORNEYS AND COUNSELORS AT LAW
THE ILLUMINATING BUILDING
55 PUBLIC SQUARE - SUITE 1170
CLEVELAND, OHIO 44113
TELEPHONE (216) 621-3012
FAX (216) 621-6567
WWW.KOBLENTZ-LAW.COM

RICHARD S. KOBLENTZ
BRYAN L. PENVOSE

OF COUNSEL
PETER A. RUSSELL

MARVIN A. KOBLENTZ
(1922 - 1995)

December 2, 2011

Kevin M. Spellacy, Esq.
McGinty, Hilow & Spellacy Co.,LPA
614 W Superior Ave, Suite 1300
Cleveland, OH 44113

Re: ***United State v. Anthony Viola, et al.***
United States District Court, Northern District of Ohio
Hon. Donald Nugent
Case No. 1:08:CR506

Dear Mr. Spellacy:

Please allow this correspondence to serve as the professional opinion which our office was requested to render relative to the issue of whether an actual conflict of interest existed between Anthony Viola and his counsel, Jay Milano, Esq., before and during the trial held in the above referenced matter.

By way of background and in support of my qualifications to serve as an expert witness relative to the foregoing issue, please find a copy of my Circula Vitae attached hereto as Exhibit "A" and fully incorporated herein by reference. Upon your review of the attached, please note that I have been an attorney-at-law registered to practice law by the Supreme Court of Ohio since November 7, 1975 and that I am registered to practice law before all courts in Ohio, the U.S. District Court for the Northern District, the Sixth Circuit U.S. Court of Appeals, the D.C. Circuit Court of Appeals, and the United States Supreme Court.

In addition to my primary practice in the areas of the law of legal ethics and professional responsibility, I also practice in the areas of civil litigation, legal malpractice, real estate, small business, criminal defense, white collar criminal defense, domestic relations, and probate. I have represented numerous attorneys and judges as their legal ethics counsel and as their defense counsel when facing professional charges before bar associations and the Supreme Court of Ohio.

I was led to my aforementioned practice in the areas of law of legal ethics and professional responsibility by my past volunteer service with the local bar associations. I served as a member and secretary of the Cuyahoga County Bar Association Ethics Committee from 1977 to 1980, as a member of the Grievance Committee of the Cuyahoga County Bar Association Grievance Committee from 1980 to 1995, as chair of said committee from 1988 to 1990. In addition to my service with the Cuyahoga County Bar Association, I also served as trial counsel to the Cleveland Bar Association Grievance Committee.

Throughout the time I have practiced in the area of legal ethics, I have spoken at many seminars on the topic of the former Ohio Code of Professional Responsibility and now the Ohio Rules of Professional Conduct, as well as other topics, and have also been a guest lecturer at the Cleveland-Marshall College of Law and the University of Akron School of Law on the topics of the Ohio Rules of Professional Conduct and the former Code of Professional Responsibility. In light of my above described qualifications, I reasonably believe that I am qualified to provide the professional opinion which you have requested.

As a brief aside, the below opinion addresses the issue of whether any conflict of interest existed between Mr. Milano and Mr. Viola during the federal criminal trial which prohibited any further representation by Mr. Milano. The incorporated Factual Statement and Predicate discusses in great detail the confusing set of events surrounding the legal fees charged by Mr. Milano. However, this opinion does not deliver any opinion as to any attorney fee issue including, but not limited to, whether Mr. Milano entered into any valid, ethical or reasonable fee agreements with Mr. Viola or whether those fees were earned and appropriately collected. Rather the discussion of fees is relative to examining the attorney-client relationship between Mr. Milano and Mr. Viola and whether any conflict of interest existed between them. In arriving at my professional opinion below, I have reviewed the information and materials provided to our office by Mr. Viola taken together with communications had with you and Mr. Viola in order to establish the incorporated Factual Statement. In addition to my general knowledge and understanding of the Ohio Rules of Professional Conduct (and the former Ohio Code of Professional Responsibility), I have reviewed the specific legal authority identified within the below opinion.

I. Factual Statement and Predicate

Prior to being indicted, but subject to investigation along with other multiple persons relative to an alleged mortgage fraud scheme, Anthony Viola sought legal representation and was referred to Jay Milano and the law firm of Milano Weiser in 2006. By and through a correspondence under the date of **August 7, 2006**, Mr. Viola retained and engaged Mr. Milano and his firm for an initial retainer of **$5,000.00**. Mr. Viola had directed Mr. Milano to offer Mr. Viola's full cooperation with the government in its investigation (although Mr. Viola has

seen no evidence in his files of any such efforts by Mr. Milano). The fee letter provides that the aforementioned retainer would not be the entire fee for the representation, but that with payment of the retainer, Mr. Milano would begin to review Mr. Viola's case and determine what the total fee would be. The fee letter ambiguously continues by saying that:

> "In any event, and even if there are no additional fees other than the retainer, please be aware that your case ends with the final [court] appearance and at that time our fee agreement ends. We will be happy to answer any questions you may have that arise after such a time but if additional work is necessary there will be additional charges."

The August 6, 2006 letter does not disclose whether Mr. Milano's fees will be charged on an hourly basis or on a flat fee basis, but does indicate that the firm's fee policy is more fully discussed in the materials provided. [1]. However, Milano Weiser's website, www.milanolaw.com, during the pendency of Mr. Viola's Motion for New Trial, contained the following general representation:

> **"6. OUR FLAT FEES ARE THE RESULT OF A BARGAIN MADE BETWEEN US.**
>
> Our primary fees and our investigative fees are set. That means you are paying us a specific amount to complete a service. If your case is dismissed after one phone call, or if our work lasts three years, we have agreed on the fee. It remains the same. You have come to us to solve a problem. We will do everything we can to accomplish that. It is in your interest to have the problem solved sooner rather than later. On the other hand, we will complete the work upon which we agree – no matter how long it takes.
>
> We are expensive, more expensive than most. Some clients look for the cheapest lawyer they can find. It is your decision, your money and your life. We have earned our reputation. We will earn our fee."

Following Milano Weiser's initial **August 7, 2006** fee letter, many more fee letters and demands for fees were made in the several years to follow:

- By and through a letter carrying the date of **February 26, 2009**,

1 No such fee policy was produced to the undersigned or this office with the copy of the August 7, 2006 letter or the copies of the other subsequently sent fee letters which were in Mr. Viola's possession and no such fee policy was provided to his office from Mr. Viola's entire client file produced to him by Milano Weiser. Following his termination of Milano Weiser, Mr. Viola made repeated requests for his client file to be produced along with "copies of any and all fee agreements, billing statements, invoices and itemization of [Mr. Milano's] time ..." April 12, 2011 correspondence of Mr. Viola to Mr. Milano.

Mr. Milano wrote to Mr. Viola stating that due to the "complexity and gravity" of his situation he was required to pay an additional **$15,000.00** in fees and that would be the fee should his case end without Mr. Viola being charged. If Mr. Viola was charged, the letter said that some amount of fees (an undisclosed amount) would be owed.

- Following Mr. Viola's indictment in federal court, Mr. Milano sent Mr. Viola another fee letter dated **June 4, 2009** stating that the "flat fee" for his case was **$55,000.00**, payable over the following three months, in addition to the $22,500.00 which Mr. Viola had already paid (not including the original $5,000.00 retainer). Mr. Milano further wrote that he "believe(s) this to be [Mr. Viola's] entire fee" unless compelled to go to trial and then there would be an additional $2,500.00 trial fee owed. [Thus, Mr. Viola's fees in total were to be $82,500.00 unless required to go to trial and then the fees would be $85,000.00.] The letter states that:

  > The "fees represent an agreement between [Mr. Viola] and [Mr. Milano] based on a mutual desire to determine a *concrete cost* for [Mr. Viola's] case. That is true if your case becomes more or less complex. In any case, we have to agree on a total fee." (emphasis added).

- On **September 23, 2009**, Mr. Milano sent a letter demanding payment of the $27,500.00 for the installments that were to be paid in July and August per the June 4, 2009 letter. Mr. Milano wrote, "I know that you will have to impose on other sources, but the amount and date are firm ... I will address the issue of *additional fees* as soon as we have a better idea of where this case is going. Keep fighting." (emphasis added). Mr. Viola paid the demanded fees.

- After also being indicted by the State of Ohio by the Cuyahoga County Grand Jury, Mr. Milano sent yet another fee letter to Mr. Viola under the date of **December 23, 2009** stating that the "flat fee" for the cases was **$100,000.00** with a $5,000.00 balance remaining due. The letter further states that once again, Mr. Milano "believes" this to be Mr. Viola's *entire fee* – although, the letter further provides that there will be an additional $3,000.00 trial fee per case, per day (estimated at $45,000.00) to be deposited into escrow prior to trial. As with the previous fee letter, the December 29, 2009 letter states that:

  > The "fees represent an agreement between [Mr. Viola] and [Mr. Milano] based on a mutual desire to determine a

concrete cost for [Mr. Viola's] case. *That is true if your case becomes more or less complex.* In any case, we have to agree on a *total fee.*" (emphasis added). Mr. Viola paid the demanded fees.

- Still arbitrarily seeking additional fees, Mr. Milano sent another fee letter under the date of **January 21, 2010**, wherein he writes"

  "Tony,

  You got the message about fees. To be clear – to accommodate you and *to end our fee discussions* – we require a payment of **$55,000.00** ($5,000.00 from prior payments not made before March1, 2010). *This will be your fee in total.* There will be additional fees, at least the trial fee, *but you need not pay additional fees until after the first trial.* If there is a second trial, you will need to deposit additional fees before it begins.

  This represents an accommodation to you. As you are aware, there are additional fees due now. However, given your situation and if you meet this obligation, *I will wait for any balance.* If you cannot meet this obligation, I will have no choice to withdraw." (emphasis added). Mr. Viola paid these additional fees.

- Yet, on or about **December 2, 2010** ... twelve months later, after a related second State of Ohio indictment, and approximately three (3) months before the trial in the above-referenced federal case was to commence, Mr. Milano wrote to Mr. Viola:

  "To be clear about fees, you[r] case has expanded beyond a point of understand (sic) including additional indictment. "As a result *we will require additional fees* in the amount of Fifty-Thousand Dollars (**$50,000.00**). I understand you[r] financial situation is difficult. Your three (3) cases and the level of complexity have far exceeded the fees that have been charged so far."

Despite assurances from Mr. Milano that the discussion relative to fees would cease, fee discussions continued thereafter resulting in the well documented conflict and dispute erupting between Mr. Milano and Mr. Viola on the weekend after the trial had commenced and while the trial was on-going. In an effort to satisfy the demand for additional fees in the weeks leading up to the federal trial, Mr. Viola sought to settle two insurance claims on his behalf and that of his company, Realty Corporation of America, and to assign a portion of those settlement proceeds to Mr. Milano and Milano Weiser to satisfy their demands for additional fees. Initially, Mr. Milano was satisfied with the proposed $50,000.00 assignment and communicated directly with the insurance carrier. However,

later and contrary to past written promises to wait to be paid, Mr. Milano was obviously unwilling to wait to be paid his additional fees.

Just prior to trial commencing, in an e-mail sent February 19, 2011, Mr. Milano demanded that Mr. Viola *borrow $50,000.00 from his family for payment of additional fees*, emphasizing that Mr. Viola's family can wait to be paid, but that Milano Weiser would not wait. No such arrangement was made and the federal criminal trial commenced the final week of February, 2011.

During the weekend following the first week of the federal trial but while the trial was still in its early stages, Mr. Milano again changed his demand for fees. In a chain of e-mails between Mr. Viola and Mr. Milano on March 5 and 6, 2011, Mr. Milano requested that Milano Weiser be paid additional fees through a $25,000.00 loan solicited by Mr. Milano from Mr. Viola's family and through an assignment of $50,000.00 from the insurance settlement proceeds (which settlement proceeds were anticipated at the time to total $75,000.00). Mr. Milano proposed that from the anticipated $75,000.00 settlement amount, Milano Weiser would retain $50,000.00 for payment of additional fees and reimburse Mr. Viola's family for the loan they extended to Mr. Viola for payment of additional fees with the remaining $25,000.00. According to what was told to Mr. Viola, Milano Weiser was in immediate need of the $25,000.00 to meet payroll and/or other overhead business expenses. On March 5, 2011, Mr. Milano drafted a proposed e-mail to be sent to a family member of Mr. Viola soliciting the loan and aggressively insisted that Mr. Viola follow the e-mail with one of his own verifying Mr. Milano's self-serving solicitation. Mr. Viola was willing and agreed to approach his family for a loan, but was unwilling to make such a request through the e-mail solicitation made by Mr. Milano.

Mr. Milano became increasingly insistent of an immediate loan from Mr. Viola's family to pay the additional fees to the extent Mr. Viola believed that Mr. Milano was threatening to curtail his efforts at trial if the fees were not paid. In an e-mail sent from Mr. Milano to Mr. Viola at 9:37 a.m. on Sunday, March 6, 2011, Mr. Milano wrote in pertinent part, "*If you have raised the fees by Tuesday* [March 8, 2011 and during trial] *that is all that matters.* ***If not****- then we will do the best we can under the changing circumstances*." (emphasis added).

Later that day, on March 6, 2011, the Sunday after the trial had already commenced and the night before they were scheduled to return to trial, Mr. Milano sent Mr. Viola multiple e-mails about that night which are very revealing and telling as to whether any dispute and conflict of interest had emerged between them. Those e-mails include, but are not limited to, the following:

- At 2:53 p.m. sent from Mr. Milano to Mr. Viola: "Regarding fees, you have not complied with my requests, nor have we heard back from Mr. Fazio or any other member of your family. *We still anticipate $25,000.00 in fees to be received by 5PM Tuesday*

March 8, 2011. This amount would be anticipated to come as a short term loan from your family. As I have assured you and Mr. Fazio, we will repay your $25,000.00 loan from your family from the $75,000.00 insurance proceeds when they arrive. Please review the attached documents before arriving today. I expect you to sign both the fee agreement and the assignment today. If there are any problems we will discuss them first thing." (emphasis added).

Upon arriving at Milano Weiser, Mr. Viola was presented with a draft "Assignment/Power of Attorney" and a draft "Contingency Fee Agreement." [2]. prepared for his signature where together, the draft documents deliver payment of the entire $75,000.00 insurance proceeds to Milano Weiser ($50,000.00 for fees allegedly owed in the federal criminal case and $25,000.00 for a "flat retainer" for Rachel Weiser, Mr. Milano's partner, and Milano Weiser to represent Mr. Viola in the State of Ohio civil case). Nowhere in those documents presented for Mr. Viola's signature was there any assurance to repay any $25,000.00 loan to Mr. Viola's family – as Mr. Milano had solicited and made assurances of repayment to Mr. Viola's family from the insurance settlement proceeds just hours before Mr. Viola's arrival. Upon Mr. Viola questioning Mr. Milano about the change in fee proposal without any terms relative to repayment of any monies loaned form his family, Mr. Milano became irate with Mr. Viola and an insurmountable conflict and dispute occurred.

Tensions boiled over. Mr. Viola was convinced that he had been lied to by Mr. Milano about his family being repaid if they agreed to make the loan and Mr. Milano was attempting to take advantage and coerce payment of another $100,000.00 in fees from him – when the only focus between them should be preparing to continue for the remainder of the trial which reconvened the next day. After years of satisfying arbitrary, periodic demands by Mr. Milano for additional fees (as outlined above) without any adequate explanation as to the need for more fees, how prior fees had been earned and without the originally agreed legal work for set amounts of fees having yet to be completed, Mr. Milano's insistence of a loan from Mr. Viola's family to pay yet more fees during the pendency of the federal trial (... or else ...) was the proverbial straw that broke the camel's back.

As a result, Mr. Viola became angry and left the meeting at the offices of Milano Weiser where he had agreed to meet to continue preparing for his federal criminal trial. Mr. Milano's e-mails ensued:

- Sent at 5:15 p.m. from Mr. Milano to Mr. Viola; " ... We do we have the second issue of fees. That issue was off the table when you said it was. You said that you needed to discuss that issue

2 Though referenced as a "Contingency Fee Agreement" in the heading of the letter, the terms set forth therein do not appear to establish any contingency fee terms.

with your family and that was that.

Fee issues are totally separate from (sic) from preparation.

I will do everything I can for the remainder of trial. You need to assist. ..."

- Sent at 6:45 p.m. from Mr. Milano to Mr. Viola; After Mr. Viola informed Mr. Milano that he was seeking outside counsel to review his fees and Mr. Milano's recent conduct, Mr. Milano pled with him via e-mail for Mr. Viola to return to the office to assist Mr. Milano's co-counsel, a newly admitted attorney named Joe Medici [3], with trial preparation ..., "You told Joe that you would never come back to our office. I cannot believe the location of work is at question.

  If you cannot assist me personally, as your lawyer, then you must make that plain, in writing, before the trial begins tomorrow at 8:30.

  You must trust me as your lawyer completely. You must make that clear. If you do not, then you need to make that clear too. These are very serious matters.

  Tonight, If (sic) you do not return it will hurt your defense. To continue to refuse to assist will make your defense impossible. We will need to address that with the Judge.

  Again, as I said before and earlier tonight and in the last e-mail, our preparation and fees are two different issues. They do not overlap.

  Of course, it would have been helpful if your family had lent you a portion of what is due. I do not know why you made me ask them but you would not do so yourself. None of that is an issue now. I accept that you are seeking counsel on fees. Do as you please. The fee issue is over for the rest of the trial. It was over within minutes of when it arose today.

  The insurance issue has always been handled by Rachel. You

3 Mr. Medici's attorney-client relationship with Mr. Viola has not been called into question. However, it should be noted that upon Mr. Milano informing Mr. Viola that his partner, Rachel Weiser, would not be available to assist Mr. Milano with the federal criminal trial as Mr. Viola had been previously assured, Mr. Milano advised Mr. Viola to pay Mr. Medici another $5,000.00 in attorney fees in addition to the thousands of dollars in fees already paid to Mr. Milano. Mr. Viola paid Mr. Medici's fees.

need to let her know if you wish her to continue to pursue it. When you saw her Friday, your position was that you would do anything she needed to complete that part. If that has changed let her know.
So you need to –
1: go back to the office and assist Joe right now.
2: Affirm that you will assist me in preparing your case, in my office and at court and anywhere else that I see necessary.
3: Confirm that you trust my judgment and that we will cooperate in completing the case, or say that you no longer, for whatever reason, trust me as your lawyer.
4: Let Rachel know if you wish her to continue to work with the insurance company."

- Sent at 7:03 p.m. from Mr. Milano to Mr. Viola; Mr. Milano wrote:

  "Fees are not an issue in this trial. You need to go to the office and assist Joe tonight.

  You need to be specific as we are going to be in Court tomorrow at 8:30 AM. What do you intend to do. You need to answer my questions about how we continue with specificity. Further, do you intend to have another lawyer with you tomorrow. We will not simply walk in and begin the trial without resolution of the assistance and trust issues."

- Sent at 8:56 p.m. from Mr. Milano to Mr. Viola:

  "Last communication of the day.
  The issues have distilled.

  Fees are not an issue related to the rest of trial.

  You need to determine and inform me if you trust me or not.

  You need to inform me if today was an aberration and from now on you will cooperate fully with me (face to face in my office) or not.

  You need to give me answers to these questions before Court tomorrow. Your answer could be: 1) yes I do trust you and will cooperate from now on. Or 2) no, I do not.

  If the answer to both questions is a clear and unambiguous yes, then we will proceed tomorrow. If it is no, or if you do not respond, then I will need to approach the Judge.

If you have retained counsel on the issue, just have him respond. I will await your reply."

Mr. Viola did not return to the offices of Milano Weiser. No resolution of these issues was ever reached. No written conflict waiver was ever obtained by Mr. Milano from Mr. Viola with his informed consent to proceed with the representation at the already commenced trial.

Rather, acting out of fear and anxiety of the potential consequences of either not having the benefit of his counsel of the approximate past five years assist him with the remainder of trial or of otherwise approaching the court with the disputes which he had with his counsel after trial had commenced and was still on-going, Mr. Viola continued with Mr. Milano as his counsel at the federal trial.

Nonetheless, the issue of fees (and the resulting feelings of distrust and lack of confidence in Mr. Milano) were not set aside or put on hold during the course of the remaining federal criminal trial. Mr. Viola has stated that he was verbally berated by Mr. Milano about the issue at trial. In addition, the tension is memorialized through an e-mail from Mr. Milano's law partner. While stating that "[n]ow the pressure point of [Mr. Viola] obtaining immediate funds to pay your fees from your family has passed" and that [Mr. Viola] and [Mr. Milano] are in trial and you should not deal with this ... But you and I have to ... ," Mr. Milano's partner, Rachel Weiser, sent an e-mail to Mr. Viola on March 16, 2011 seeking resolution of payment of fees in both re-establishing the terms of the additional legal fees allegedly owed in the federal case and the requisite fees for the commencement of her work in the State of Ohio civil matter as presented on March 6, 2011in the "Contingency Fee Agreement" and Assignment of insurance settlement proceeds.

Again, as the trial proceeded, the issue of fees (and the resulting, lack of trust and confidence in Mr. Milano) were not resolved and issues of presentation of evidence at trial materialized. Mr. Viola, although being tried together with Co-Defendant Mr. Gofman and even though their counsel had entered into a cooperative joint defense letter agreement, always believed that additional evidence or testimony specific to him and relative to his lack of wrong-doing or lack of knowledge of wrong-doing by others would be presented by Mr. Milano on his behalf.

In fact, several other fact witnesses who had been interviewed who could offer testimony exculpatory in nature towards Mr. Viola's defense and who had been told that they would be called and expected to testify at trial, were never contacted during trial or called to testify at trial by Mr. Milano.

In addition to the multiple fact witness who Mr. Viola anticipated to testify, Mr. Viola, at Mr. Milano's direction, retained a private investigator, Colley

Intelligence, to interview witnesses and provide a report. Mr. Viola was puzzled as to the reason as to why the investigator retained did not testify at trial or the witnesses that were interviewed by the investigator. After timely filing his pending motion for new trial, Mr. Viola learned that Colley Intelligence had, in fact, conducted an in-depth investigation and completed a report, but did not produce it to Mr. Milano as their services had not been compensated. Mr. Viola had paid to Mr. Milano the funds which were anticipated to be needed to satisfy the investigator's fees, but other than a couple of itemized billing statements from Colley Intelligence provided early during its investigation, Mr. Viola has not seen any other billing statements from Colley Intelligence as all statements were sent to Mr. Milano's office directly.

The partial, but incomplete investigative report of Colley Intelligence and the affidavits of the various fact witnesses who were not called to testify at trial are attached as exhibits to the motion to show cause which Mr. Viola filed in the federal matter, *pro* se, on April 25, 2011.

Mr. Viola was frustrated and perplexed as to why after extensive preparation, in which he directly assisted, as to why the witnesses he expected to be called were never called to the stand at trial. Rather, after Mr. Gofman's attorneys completed the presentation of their case, Mr. Viola believed that Mr. Milano put on a quick and incomplete defense on his behalf without calling the many witnesses who Mr. Viola believed would be called to testify. Despite the assurances to the contrary which Mr. Milano provided in his March 6th e-mails, it became clear to Mr. Viola as the trial unfolded that his defense was being compromised or limited on account of his not paying the demanded additional fees.

Following the trial and the guilty verdict rendered against him which he believes to have directly resulted from the limited defense presented on his behalf, Mr. Viola terminated Mr. Milano and his firm. In addition, Mr. Viola made numerous requests following the termination of his representation by Mr. Milano for copies of any and all fee agreements, billing statements, invoices and itemization of [Mr. Milano's] time along with a copy of Colley Intelligence's full report and an accounting of the funds provided for payment of the investigator's fees. Aside from the fee letters referenced above, no such requested fee information has been produced to Mr. Viola in his client file or otherwise.

Aside from their representation in federal matter, Mr. Milano and Milano Weiser no longer represent Mr. Viola in the two State of Ohio criminal matters and the State of Ohio civil matter which have yet to go to trial. To date, no unearned fees have been returned to Mr. Viola by Milano Weiser.

II. Legal Analysis

Attorneys admitted to practice before the United States District Court for

the Northern District of Ohio are bound by the ethical standards of the Ohio Rules of Professional Conduct adopted by the Supreme Court of Ohio. LCrR 57.7(a). Specific as to the requirements of attorneys in analyzing conflict of interest issues, Rule 1.7 of the Ohio Rules of Professional Conduct ("RPC") provides when lawyers are permitted and not permitted to accept or continue a representation of a current client when a conflict of interest exists. RPC 1.7 states:

> **Rule 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS**
>
> (a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:
>
> (1) the representation of that client will be directly adverse to another current client;
>
> (2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.
>
> (b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:
>
> (1) the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) each affected client gives *informed consent, confirmed in writing*;
>
> (3) the representation is not precluded by division (c) of this rule.
>
> (c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:
>
> (1) the representation is prohibited by law;
>
> (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding. Ohio Rev Code Ann RPC 1.7 (Baldwin 2011).

While attempted collection and payment of legal fees does not always necessarily involve the existence of a conflict of interest, one can certainly emerge from an attorney's agreement for payment of legal fees and the attorney's efforts to collect legal fees. Official Comment 5 of RPC 1.5 ("FEES AND EXPENSES") provides the following insight:

> "An agreement may not be made whose terms might induce the *lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest*. For example, a lawyer *should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required*, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction." Ohio Rev Code Ann RPC 1.5 Ofc Cmt 5 (Baldwin 2011).

Mr. Milano's numerous and vague "flat fee" agreement letters, as identified above, create an agreement where his services were to be performed up to an arbitrarily chosen amount, while the letters also recognize within their contents that additional amounts of fees would most likely be charged without adequately explaining why additional work would need to be performed and why additional fees would be required. The ultimate result was the conflict and dispute that occurred on March 6, 2011 while the trial was proceeding and the appearance to Mr. Viola that Mr. Milano curtailed his services and put on Mr. Viola's defense in a manner which was contrary to Mr. Viola's interests. Mr. Milano's March 6, 2011 e-mail at 9:37 a.m. reveals Mr. Milano's intention to curtail services in the middle of trial by stating that, "If you have raised the fees by Tuesday [March 8, 2011 and during trial] that is all that matters. If not- then we will do the best we can under the changing circumstances." Rather than concretely settling the terms of legal fees to be paid well in advance of trial, Mr. Milano's fee agreement letters and demands for payment of additional fees up through the midst of trial created a situation that could induce Mr. Milano to limit his services at trial.

Clearly, as expressly acknowledged by Mr. Milano's e-mails on March 6, 2011, a dispute arose and a conflict existed between Mr. Viola and Mr. Milano during the course of trial. Given the timing of Mr. Milano's insistent demands for a large payment of additional fees (even if it meant Mr. Viola borrowing money from his family and being deceptive as to whether that loan would be repaid), Mr. Milano's priorities were his own personal and business interests in being paid immediately rather than focusing on preparing for trial, proving Mr. Viola's innocence and maintaining Mr. Viola's liberty.

Moreover, while the dispute between lawyer and client arose out of demands for payments of additional legal fees, Mr. Milano's e-mails shed

important light on the trust and confidence that a client must have in a lawyer which was at the very least compromised, if not destroyed, between Mr. Viola and Mr. Milano while the trial was underway. Mr. Milano recognized the dispute and conflict of interest which existed, but failed to take the required remedial measures – if it was possible to remediate those issues at this point in time.

Mr. Milano's response to the dispute was to place the burden and responsibility on his client, Mr. Viola. To begin, Mr. Milano saying that the issues of fees, preparation for trial and whether or not Mr. Viola trusted him are all separate issues, does not make it so. Likewise, Mr. Milano self-servingly saying that the dispute relative to payment of fees was over hours before trial was to commence when Mr. Viola did not or could not accede to his demands, also does not make it so. These issues of being pushed to a breaking point over demands for additional fees and simultaneously protecting the important traits of the attorney-client relationship are intertwined and cannot be segregated. Mr. Milano's e-mails appear to be a futile after-the-fact attempt to rectify his own misconduct.

Further, despite Mr. Milano's repeated insistence in his March 6th e-mails, it is not the obligation of the client, Mr. Viola, to provide a written statement of his affirmed trust and confidence in his attorney before continuing with the representation and proceeding with the trial. Mr. Milano, by his own written words, realized that there was a dispute between himself and his client, and that a resulting conflict of interest existed between them the night before trial – to the extent Mr. Viola told him he was seeking independent counsel to review Mr. Milano's fees and relative conduct. At that point, Mr. Milano was required by RPC 1.7 to not continue with his representation of Mr. Viola and to not proceed as his counsel at trial until he obtained Mr. Viola's "informed consent, confirmed in writing" as to the conflict between them.

These steps obviously were not taken. Rather, Mr. Milano attempted to conceal the conflict and proceed at trial without either obtaining Mr. Viola's informed consent, confirmed in writing, or otherwise approaching the court with his ethical dilemma – as he said he would do in his e-mails.

Also relative to the above dispute, Mr. Milano was obligated to obtain Mr. Viola's informed consent before soliciting and attempting to collect payment of legal fees from a third party – regarding both the loan from Mr. Viola's family and the assignment of insurance settlement proceeds.

As RPC 1.8(f) states:

> RPC 1.8 (f) A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) and, if applicable, division (f)(4) apply:

(1) the client gives *informed consent*;

(2) there is *no interference* with the lawyer's independence of professional judgment or *with the client-lawyer relationship*;

(3) information relating to representation of a client is protected as required by Rule 1.6; Ohio Rev Code Ann RPC 1.8(f) (Baldwin 2011) (emphasis added).

Mr. Viola did not provide his informed consent for Mr. Milano to solicit payment of legal fees from Mr. Viola's family in the form a loan in the manner in which he did and under false assurances of repayment. In fact, Mr. Viola expressly objected to the solicitation in his reply e-mails to Mr. Milano. Still, Mr. Milano pushed him to seek the loan. Likewise, Mr. Viola never agreed to an assignment of the entire $75,000.00 insurance settlement proceeds – only a portion thereof. Further, as is manifested in the numerous e-mails relative to the sought loan and payment of fees during the course of the trial, Mr. Milano's duty to exercise independent professional judgment in his attorney-client relationship with Mr. Viola was interfered with as the lawyer and client needed to be working cooperatively towards preparing for trial rather than arguing over payment of fees.

Under these facts and applicable law, Mr. Milano was ethically prohibited from continuing his representation of Mr. Viola as a conflict of interest existed to which Mr. Viola did not provide his informed consent, confirmed in writing.

"'There is nothing more critical to the professional relationship between attorney and client than the trust and confidence of the person being represented.'" *Cincinnati Bar Assoc'n v. Hackett*, 129 Ohio St.3d 186, 188 (Ohio 2011) quoting *Fox & Assoc. Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69, 71, 541 N.E.2d 448. A lawyer's duties of trust and confidence and the ethical rules incumbent upon Ohio lawyers require that the personal desires of the lawyer must be subordinated to those of the client. *Id.*

The Sixth Amendment entitles a defendant in a criminal case to the effective assistance of competent counsel which includes the right to representation that is *free from conflicts of interest. United States v. Frances M. Flood*, 2:07-CR-485 DB (UTCDC) (April 7, 2010) *citing United States v. Gallegos*, 39 F.3d 276, 277-78 (10th Cir. 1994) *see also Wood v. Georgia*, 450 U.S. 261, 271 (1981) (emphasis added). Where there was no objection to a claim at trial of a conflict of interest claim, the client must demonstrate an actual conflict of interest which adversely affected his lawyer's performance." *Id., citing United States v. Alvarez*, 137 F.3d 1249, 1251 (10th Cir. 1998) (quoting *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990)). "[D]efense counsel's performance [is] adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy was available to defense counsel, but it was

inherently in conflict with his duties to others or to his own personal interests." *Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990). If a defendant is able to show an actual, as opposed to a potential, conflict and that the conflict affected the adequacy of her representation, the law does not require her to show prejudice in order to obtain relief. *Culyer v. Sullivan*, 446 U.S. 335, 350 (1980). *See also United States v. Robbins*, Civil 08-CV-390-TCK-TLW (OKNDC) (August 24, 2011).

"While the point of the Sixth Amendment is not to allow Monday-morning quarterbacking of defense counsel's strategic decisions, a lawyer cannot make a protected strategic decision without investigating the potential bases for it. *See Id.* at 690-91, 104 S.Ct. 2052; *see also Bigelow v. Haviland,* 576 F.3d 284, 288 (6th Cir.2009). It is particularly unreasonable to fail to track down readily available and likely useful evidence that a client himself asks his counsel to obtain without ascertaining what the evidence is. *See Bigelow,* 576 F.3d at 287-88." *Couch v. Booker,* 632 F.3d 241, 246 (6th Cir. 2011).

Mr. Viola provided to Mr. Milano fact witnesses who could testify as to his innocence and further agreed to engage a private investigator. Mr. Viola expected and anticipated these persons and the investigator to testify at trial as his counsel had told the witnesses that they would. Yet, to Mr. Viola's surprise and frustration, those witnesses never testified and as is *Couch*, Mr. Milano made a decision to not call those witnesses or the investigator without receiving Colley Intelligence's full report and work product.

Without question, and without being required under the law to show prejudice as set forth above, the above-discussed existence of a conflict of interest prohibiting the continued representation, together with the failure of Mr. Milano to call the multiple fact witnesses and a representative of Colley Investigation (without knowing the contents of the report) in presenting Mr. Viola's defense at trial affected the adequacy of Mr. Milano's representation of Mr. Viola.

(remainder of page intentionally left blank)

EXHIBIT "A"

Richard S. Koblentz

Koblentz & Penvose, LLC
55 Public Square, Suite 1170
Cleveland, Ohio 44113
216-621-3012

Law Practice:

General Practice of Law, including Legal Ethics and Discipline Law, Civil Litigation, Real Estate, White Collar Criminal Defense, Small Business, Criminal Defense, Domestic Relations, Probate.

Education:

J.D. - Cleveland-Marshall College of Law - Cum Laude 1975
B.S. - Ohio State University - 1972

Professional Associations:

1. Ohio State Bar Association
2. Cleveland Bar Association
3. Geauga County Bar Association
4. National Association of Criminal Defense Lawyers
5. Ohio Criminal Defense Lawyers Association
6. Cuyahoga Criminal Defense Lawyers Association
7. Cleveland-Marshall Law Alumni Association

Professional Activities and Honors:

1. Named outstanding alumnus - Cleveland Marshall College of Law, 1997
2. Inside Business= Leading Lawyer List for Northeast Ohio - Attorney Discipline - 2001 - Present
3. Cincinnati Magazine - List of Ohio Super Lawyers, 2003 - Present
4. Rated AAV@ and listed by Martindale-Hubbell in the *Bar Register of Preeminent Lawyers 1990 - Present*
5. Trustee - Cuyahoga County Bar Association - 1985 -1989
6. Vice President - Cuyahoga County Bar Association - 1989 -1992
7. Trustee - Cleveland-Marshall Law Alumni Association - 1985 -1987
8. Secretary - Cleveland-Marshall Law Alumni Association - 1987 -1988
9. Vice President - Cleveland-Marshall Law Alumni Association - 1988 -1989
10. President Elect - Cleveland-Marshall Law Alumni Association - 1989 -1990
11. President - Cleveland-Marshall Law Alumni Association - 1990 -1991
12. Honorary Trustee - Cleveland-Marshall Law Alumni Association - 1991 - Present
13. Charter Life Member - Judicial Conference, Eighth Judicial District

EXHIBIT "A"

14. Member, Grievance Committee - Cuyahoga County Bar Association – 1980 - 1995
15. 1988 -1990
16. Member and Secretary - Cuyahoga County Bar Association Ethics Committee - 1977 -1980
17. Member, Legislative Committee of Ohio Association of Criminal Defense Lawyers
18. Member, Court Oversight Committee of Cuyahoga Criminal Defense Lawyers Association
19. Trial Counsel to Cleveland Bar Grievance Committee
20. Co-Chairman, Annual Cleveland-Marshall Alumni Luncheon - 1986 -1989
21. Speaker, Various Seminars on Legal Ethics and Other Topics Sponsored by -
    - Ohio Judicial College
    - Board of Commissioners on Grievances and Discipline
    - Ohio Legal Center
    - Cuyahoga County Bar Association
    - Cleveland-Marshall College of Law
    - Cleveland Bar Association
    - American Association of Attorney-Certified Public Accountants
    - Various Proprietary Organizations
    - David Myer College
    - Cleveland-Marshall Law Alumni Association
22. Guest Lecturer - Cleveland-Marshall College of Law - Topics of Professional Responsibility and Criminal Law

Community Activities:

1. Board Member - Cuyahoga County Board of Mental Retardation and Developmental Disabilities - 1986 -1996
2. Chairman - Cuyahoga County Board of Mental Retardation and Developmental Disabilities - 1988 -1990; 1991
3. President - Cleveland Baseball Federation - 1996 -Present
   Member of Executive Committee; Trustee and Counsel for Cleveland Baseball Federation - 1985 -1996
4. Board Member - Project Love - 2003 - Present
5. Chairman - Kick Off for Kindness - Project Love - 2002 - Present
6. Member of Campaign Cabinet of Jewish Community Federation
7. Co-Chairman - Friends of the Mentally Retarded (Committee for Passage of Cuyahoga County Board of Mental Retardation and Developmental Disabilities levy, November, 1990 election)
8. Vice President - American Jewish Congress, Ohio Region - 1991 -1995
9. Co-Chairman - Committee on Law and Social Action - American Jewish Congress, Ohio Region - 1991 -1995
10. Trustee - Law Advisory Board - Cleveland Works - 1990 - 2003