

Tuscaloosa County Bar Association CLE

December 6, 2019

Ethics Primer and Outline

Roman Ashley Shaul
General Counsel
Alabama State Bar
Montgomery, Alabama
334-269-1515

I. ETHICS OPINIONS - Start Here

A. Formal

B. Informal

Rule 18 Alabama Rules of Disciplinary Procedure. Conduct not subject to disciplinary action.

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, to the Office of General Counsel, said inquiry shall be considered confidential. Additionally, if said lawyer receives a formal or informal opinion from the Office of General Counsel that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action.

II. CLIENT – or not? It’s not always clear.

A. Is there a lawyer-client relationship?

1. Fee?
2. Contract - Express or Implied?
3. Privileged/Confidential Information

B. Third Party Payor

C. Rule 1.8. Multiple Clients

* * *

- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after

consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement;

* * *

D. Rule 1.13. Organizational Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
 - (1) Asking reconsideration of the matter;

 - (2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
and

 - (3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

E. Client With Diminished Capacity - Rule 1.14

III. FEES - If you do the work, make sure you can get paid.

A. Rule 1.5. Fees

- (a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
 - (2) the likelihood, if apparent to the client that the acceptance of the particular employment will preclude other employment by the lawyer;

- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent; and
- (9) whether there is a written fee agreement signed by the client.

* * *

B. Written Fee Contract

C. Rule 1.5. Referral Fees/Division of Fees

* * *

- (e) A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:
 - (1) either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;
 - (2) the client is advised of and does not object to the participation of all the lawyers involved;
 - (3) the client is advised that a division of fee will occur; and

(4) the total fee is not clearly excessive.

* * *

D. What are expenses? - RO-2005-02

E. Witness Fees/Expenses - Buying Testimony?

IV. CONFLICTS OF INTEREST – Always make sure you check

A. Factors

1. Confidential information
2. Loyalty
3. Client trust
4. Judicial interests
5. Client choice

B. Rule 1.7. The General Rule

1. A conflict of interest is involved if the representation of a client will be directly adverse to another client.
 2. A conflict of interest is involved, even when there is no direct adversity, if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's duties to another client, or by the lawyer's own interests, a former client, or a third person.
 3. In multi-party litigation the lawyer must assess the risk that the lawyer's representation of one client will be materially adversely affected by the lawyer's representation of another client.
- When multiple parties are only nominally aligned on the same side of litigation the risk that a conflict of interests exists or will develop is substantial.

- When multiple parties have only nominal differences simultaneous representation may occur with appropriate disclosures and informed consent.
 - Multiple parties with potential cross-claims or inconsistent theories or claims normally present adversity that constitutes a conflict of interest. When simultaneously representing co-parties; their claims, theories or defenses must be mutually consistent.
 - A conflict of interest that often presents when representing multiple plaintiffs involves matters where there is a limited pool of funds.
4. A lawyer may not simultaneously take adverse legal positions on behalf of different clients unless the adverse legal positions are taken in different courts and the adverse legal position taken in one court would not have a material adverse affect on the other client.
 5. A lawyer may take adverse legal positions in different courts at different times.

C. Rule 1.8. Prohibited Transactions

1. Business transactions must be fair and reasonable to the client, fully disclosed in writing to the client in a manner that the client can reasonably understand, the client should have a reasonable opportunity to seek advice of independent counsel, and client must consent in writing to the transaction.
 - “Adverse”
 - Ordinary fee contract is not prohibited
 - Transactions to secure fee or exchanges in lieu of fee are prohibited, unless compliance with rule.
2. Use of confidential information to the disadvantage of the client is prohibited. However, the rule does not prohibit a lawyer’s use of information that does not disadvantage the client.
3. Lawyer may not prepare instrument that gives a substantial gift to the lawyer or person related to the lawyer as parent, child, sibling, or spouse, unless the client is related.

4. No negotiation for media or literary rights during the representation.
5. No financial assistance to a client, except:
 - Court costs or litigation expenses (contingent on outcome for non-indigent clients)
 - Court costs or litigation expenses (not contingent on outcome for indigent clients)
 - Emergency financial assistance (Re-payment may not be contingent on outcome and provided that the financial assistance was not promised prior to the lawyer-client relationship)
6. Payment for services by third parties is permissible if client consents and if there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.
7. Aggregate settlements require each client's consent and disclosure of the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.
8. May not prospectively limit liability to client or settle a claim for such liability with an unrepresented client or former client without first advising the client that independent representation is appropriate.
9. No proprietary interest in cause of action or subject matter of litigation, except: lien for fees and expenses and contract with client for reasonable fees.
10. No Sex with Clients –Rule 1.8(l)

D. Rule 1.9. Former Client Conflicts

1. Prior lawyer-client relationship
2. Represent another person with materially adverse interests in the same or substantially related matter
 - Commonality of parties or persons
 - Commonality of facts
 - Commonality of issues

- Commonality of subject matter
3. *Or*, use confidential information to the disadvantage of the former client.

E. Rule 1.10. Imputed Disqualification – Lawyers Moving Firms

1. Lawyers associated in a firm are treated as the same lawyer for conflict purposes.
2. Lawyer joining firms only brings with him actual conflicts and confidential information known to him.
3. Lawyer leaving a firm takes with him his actual conflicts and confidential information, *(unless the firm retains the file and confidential information)*.
4. Rule 1.10

“(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them, practicing alone, would be prohibited from doing so by Rules 1.7, 1.8(a) - 1.8(k), 1.9, or 2.2.”

F. Waiver of Conflicts

- Actual waiver
 - Lawyer reasonably believes representation will not be adversely affected
 - Informed consent
 - Documented
- Implied Waiver
 - Failure to promptly assert conflict at earliest opportunity
- Non-waivable Conflict
 - If disinterested lawyer would conclude that client should not agree to the representation under any circumstances, then it is improper even to ask for the waiver
 - Impossible to make disclosure necessary to obtain informed consent

- Prospective waiver

V. CANDOR & FAIRNESS – Don't lie

A. Rule 3.1. Meritorious Claims and Contentions

“(a) In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the lawyer’s client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

“(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”

- The lawyer has a duty not to abuse legal procedure
- Not necessarily concerned with frivolousness
- Focus is on the lawyer’s state of mind or motivation
- Requires a reasonable inquiry into facts
 - Ask client
 - Lawyer may rely on accounts given by client unless they are from a demented mind, contradicted by other evidence or internally inconsistent.
- Legal contentions
 - Complete ignorance of or indifference to the legal principles vs. acknowledgment of legal principle with argument for modification, extension, or reversal or principle

B. Rule 3.3. Candor

“(a) A lawyer shall not knowingly:

“(1) make a false statement of material fact or law to a tribunal;

“(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or

“(3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”

- Lawyer does not vouch for the evidence submitted in the cause
- Lawyers representations to the court must be truthful or made with a reasonable belief as to truthfulness after reasonably diligent inquiry
- Omissions of material facts equivalent of affirmative misrepresentation
- No requirement to disclose contrary legal authority, but lawyer may not make misleading legal argument
- Lawyer must refuse to offer known false evidence
- If false evidence has been offered and thereafter lawyer learns of its falsity, lawyer should remonstrate with the client, and if the client refuses, then the lawyer should take reasonable remedial measures, which may include withdrawal and revelation of the falsity to the court
- If a lawyer “believes” evidence to be false, then the lawyer may refuse to offer it

C. Rule 3.4. Fairness to opposing party and counsel

“A lawyer shall not:

“(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value ...

“(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

“(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

“(d) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless; (1) the person is a relative, employee or agent of client and person's interests will not be adversely affected by refusing to give information; (2) the person is prohibited by law from making the disclosure; or (3) the information pertains to a covert law enforcement investigation.”

- An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding.
- An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income
- Lawyer may advise relatives and employees of a client to refrain from voluntarily giving information to another party, if the refusal will not adversely affect the relative or employee

D. Rule 3.6. Trial Publicity

“(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”

E. Rule 3.7. Lawyer As a Witness

“(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

- “(1) the testimony relates to an uncontested issue;
- “(2) the testimony relates to the nature and value of legal services rendered in the case; or
- “(3) disqualification of the lawyer would work substantial hardship on the client.”

“(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

- Applies to trial phase of representation only
- Not imputed to remaining members of law firm
- Three exceptions - testimony related to an uncontested issue; testimony related to nature and value of legal services rendered in the case; disqualification of the lawyer would work substantial hardship on the client

F. Rule 3.10. Threatening Criminal Prosecution

“A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

VI. ADVERTISING – Also applies to social media

A. Rule 7.1. Communications Concerning a Lawyer’s Services

- This rule applies to any form of marketing
- Focus is on the content of the information, rather than the means of dissemination (RO-96-07)
- Generally, any information communicated about a lawyer’s services is subject to the following regulations or limitations:
 - False or misleading information about the lawyer or the lawyer’s services
 - Information that would create unjustified expectations
 - Endorsements or testimonials
 - Damage awards, past results and client testimonials not permitted (RO-93-08)
 - Damage awards, past results and testimonials are permitted if “extended disclaimer” is used (RO-03-01)
 - Self-laudatory statements prohibited
 - Comparative language prohibited

B. Rule 7.4. Communicating Fields of Practice

- May communicate that lawyer does or does not practice in a particular field
 - “Practice limited to”
 - “Concentrating in”
- Shall not state or imply that the lawyer is a specialist, except:
 - Patent lawyer admitted before US Patent and Trademark Office
 - Admiralty
 - Proctor in Admiralty

- Certified by certifying organization approved by the Alabama State Bar Board of Legal Certification
 - American Board of Certification
 - Business Bankruptcy
 - Consumer Bankruptcy
 - Creditor's Rights
 - National Board of Trial Advocacy
 - Civil Trial Advocacy
 - Criminal Trial Advocacy
 - Family Law Trial Advocacy
 - National Elder Law Foundation, Inc.
 - Elder Law

C. Rule 7.2. Advertising

- Applies to any communications concerning a lawyer's services
- Focus is on content, not means of dissemination
- May not violate Rule 7.1
- Copy of recording must be mailed or delivered to the Office of General Counsel within three days after the first date of dissemination
- The duration and the publisher or broadcaster of shall be identified within the advertisement or in a communication accompanying
- The responsible lawyer must keep a copy for six years
- Lawyer may not give anything of value to a person for recommending the lawyer's service
- May not establish a separate firm and pay for advertising and other expenses (RO-93-23)
- Lawyer may not pay for advertising of another attorney in exchange for referrals (RO-99-01)
- Lawyer may pay reasonable cost of advertising
- Lawyer may pay usual charges of a not-for-profit referral service
- Advertisement must include the name of a responsible lawyer
- Advertisement must contain disclaimer, "No representation is made that the quality of the legal service to be performed is greater than the quality of legal services performed by other lawyers."
- Display of the firm name, address and telephone number, along with the scales of justice displayed on the tire cover of a spare tire mounted on the back of a conversion van is advertising and requires the disclaimer. (RO-90-63)

- Advertised fees must be honored for a period of not less than 60 days following the date of the last publication or broadcast of the advertisement, if not prima facie evidence of misleading advertising and deceptive practices

VII. SOLICITATION – But, their friend told me to call them?

A. Rule 7.3. Direct Contact with Prospective Clients

- No direct contact with prospective clients where there is no familial or current or prior professional relationship
- Lawyer may not contract with “Welcome Wagon” for Welcome Wagon to include the firm’s brochure and other advertising material to the people on whom they call (RO-91-17)
- Lawyer cannot print firm information on exterior of prescription bags to be disbursed by a pharmacy to its customers (RO-03-01)
- Offer to provide legal services on a pro bono basis is not subject to the rules governing advertising and solicitation (RO-03-01)
- Communications to former clients not covered by Rule 7.3, Ala. R. Prof. C. (RO-03-01)
- Lawyer’s employees and agents prohibited
 - Law enforcement
 - Investigators
 - Freelance private investigators
 - Reporters
 - Wrecker service
 - Medical personnel
- Lawyer may not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule
- Prohibits contact:
 - In person
 - Telephone
 - Telegraph
 - Facsimile
 - Other communication directed to a specific recipient
 - *Email*
 - *Chat groups*
 - *Discussion forums*

- Written communication not permitted when:
 - Not applicable to solicited communications (RO-03-01)
 - Concerns personal injury or wrongful death as a result of accident or natural disaster, unless 30 day waiting period is observed
 - Know or reasonably should person is already represented
 - Person has made known to lawyer they do not want to receive
 - Communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence
 - Contains false, fraudulent, misleading, deceptive, or unfair statement or claim, or violates Rule 7.1
 - Knows or reasonably should know person is a minor, or incompetent or person's physical, emotional or mental state makes it unlikely the person would use reasonable judgment in employing a lawyer
- Written communication (*unsolicited email*) when permitted, must:
 - Copy of communication, envelope and list of names and addresses of intended recipients filed with Office of General Counsel, before or concurrently with dissemination
 - List cannot be on computer disk (RO-96-05)
 - Lawyer must preserve a copy of the above for six years
 - Only regular mail permitted
 - No reference to approved by the Alabama State Bar
 - "Advertisement" in 14-point type, red ink, in lower left-hand corner of envelope and on each page of communication
 - No extraneous terms (RO-96-05)
 - Should not include contract, but if you do, "SAMPLE" must appear on each page and "DO NOT SIGN" must appear on signature line
 - First sentence must say, "If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure, or written communication]"
 - Must state how the lawyer obtained the information prompting the communication
 - May not reveal nature of legal matter on envelope
 - Lawyer must be able to prove truthfulness of all the information contained in the communication

VIII. ADVERSE PARTY COMMUNICATION – Talk to my lawyer

A. Rule 4.2. Communication with Person Represented by Counsel

“In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.”

- This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation.
- Parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so.
- Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.
- In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with person having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.
- The rationale behind the rule is to protect the attorney-client privilege.
- Contacting the current employee should be acceptable if he or she meets the following criteria:
 - lacked managerial responsibility;
 - not the subject of the imputed liability; and
 - incapable of making admissions that would bind the party
- Contacting Former Employees - RO-92-12

A lawyer may contact a former employee of the opposing party *ex parte* unless the contact is intended to deal with privileged matters.

- Governmental Client Exception to the Anti-Contact Rule
 - Generally, permits direct lawyer contact with a governmental officer or employee represented in their official capacity. However, some states recognize an exception to the exception, in cases where the governmental client is represented with respect to negotiation or litigation of a specific claim and the contact does not involve an issue of general policy. Restatement Third, The Law Governing Lawyers §101
 - The Governmental Client Exception assumes that the officer or employee is sued in their official capacity. If a governmental officer or employee has retained separate counsel to represent them in their individual capacity, then the Governmental Client Exception is not applicable
 - Jurisdictions are split over the extent and scope of the Governmental Client Exception
 - In Alabama, the Disciplinary Commission held in RO-2003-03 that Rule 4.2 does not prohibit a lawyer from communicating directly with government officials who are represented by counsel about the subject matter of the representation
 - The government may impose a policy that requires officials and employees to refuse to speak to opposing counsel without consent or the presence of the government agency's lawyer
 - Caution: The Governmental Client Exception does not allow, however, the lawyer representing the government to communicate directly with private individuals represented by counsel without counsel's consent

IX . RULE 1.16. TERMINATING REPRESENTATION – You're Fired

- Mandatory – Lawyer shall withdraw when:
 - Representation violates Rule of Professional Conduct or other law
 - Lawyer is impaired
 - Lawyer is discharged

- Mandatory – Lawyer shall withdraw when:
 - Permissive – Lawyer may withdraw, if withdrawal can be accomplished without material adverse affect on the client, when:
 - Client persists in criminal or fraudulent action
 - Client used lawyer’s services to perpetrate a crime or fraud
 - Repugnant or imprudent objective
 - Client fails substantially to meet obligation to the lawyer after reasonable warning
 - Unreasonable financial burden on lawyer
 - Other good cause

- Court controls

- Upon withdrawal must take reasonable steps to protect the client’s interests, such as give reasonable notice, allow time to employ new counsel, surrender papers and property, refund unearned portion of fee. (Notice of impending deadlines, assist in transition of file)

X. RESPECT FOR RIGHTS OF THIRD PERSONS – Rule 4.4

Just because they don’t have a lawyer is not permission to misrepresent facts and circumstances.

XI. SUPERVISORY LIABILITY & INDEPENDENT JUDGMENT OF A LAWYER

- A. Rule 5.1** – You may be held liable for the professional misconduct of other lawyers in your office or firm.

- B. Rule 5.3** - You may be held liable for the professional misconduct of paralegals and assistants in your office or firm.

2018 – DISCIPLINARY STATS

Complaints Received	1181
Complaints Screened Out	873
Formal Investigative Files Opened	303
Private Reprimands	32
Public Reprimands	11
Suspensions	34
Disbarments	9
Consent to Disbarment	3
Transfer (under Rule 27)	10
Probation (in connection with discipline)	8
Surrender of License	1
Formal Opinions Issued	0
Informal Opinions Issued	3273

Grievance Flowchart

