

**HUNTSVILLE/MADISON COUNTY
BAR ASSOCIATION ROADSHOW**

**May 8, 2013
Huntsville-Madison County Law Library
Huntsville, Alabama**

**Current Issues In Ethics
"If This Is Ethical I Must Be Dreaming"**

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I. "HONESTY IS THE BEST POLICY BUT INSANITY IS THE BEST DEFENSE"

A. Conflict of Interest

1. "Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or
- (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."

2. "Former Client" - Yes or No?

- a. Did attorney-client relationship exist?
- b. Who do you represent now?

3. "Substantially Related"

- a. RO-89-65 - "We are of the opinion that it would be ethically impermissible for you to undertake representation of the University of XXX in any cause of action substantially related to your prior representation of the male administrative employee of the university. We are of the opinion that the prospective representation discussed in your request is substantially related to the divorce action handled and the information you obtained during the course of that representation, and solely by virtue thereof. The basis of the entire action is an alleged illicit sexual relationship between your former client and another University of XXX employee. You gained confidential or secret information about that relationship while representing your former client."

B. Present Client

**"Rule 1.7 Conflict of Interest:
General Rule**

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) Each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) The lawyer reasonably believes the representation will not be adversely affected; and
 - (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

C. Imputed Disqualification

**"Rule 1.10 Imputed Disqualification:
General Rule**

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
- (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

- (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless:
 - (1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."

II. "EVERYTHING IS OKAY IN THE END. IF IT'S NOT OKAY, THEN IT'S NOT THE END."

A. RO-2010-02 (Appendix "A")

B. RO-86-02 - "Subject to the attorney's lien provided for in Code of Alabama (1975), §34-3-61, the attorney must provide copies of a client's complete file to the client upon request if it is material delivered to the lawyer by the client or if it consists of an original document prepared by the lawyer for the client. A lawyer is not required to provide copies of legal analyses to the client unless he has specifically agreed to do so previously, and he is not required to furnish notes, research, and inter-office memoranda which went toward the compilation of the final product unless he has previously agreed to do so. This is so whether the attorney (1) voluntarily withdraws from representation under DR 2-111, (2) is discharged by his client, (3) continues to handle the active matter, or (4) concludes the matter and closes the file. Should the attorney choose to maintain a copy of these materials for his records, he must pay for the photocopying expense. Where the attorney has received full compensation for his services rendered in connection with a given file, he must surrender these materials to the client upon the client's request."

C. Lawyer Leaves Firm—Who Gets File?

RO-91-06 - "Mr. Lawyer may contact the clients so affected and inform them that they have the right to designate where their files

should go including: (1) staying with Doe, Jones and Smith; (2) going with Mr. Lawyer in his 'New' law practice; or (3) taking the file(s) to any other lawyer."

III. "NOTHING IS FOOLPROOF TO A SUFFICIENTLY TRAINED FOOL"

- A. Advertising/Marketing**
- B. Targeted Mail Solicitation**
- C. Metadata, E-mails, Faxes**
- D. "Ghostwriting" and "Unbundling" - RO-2010-01**
- E. New Rules**

1. Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer and client may agree, pursuant to Rule 1.2(c), to limit the scope of the representation with respect to a matter. In such circumstances, competence means the knowledge, skill, thoroughness, and preparation reasonably necessary for such limited representation.

2. Rule 1.2. Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(1) The client's informed consent must be confirmed in writing unless:

(i) the representation of the client consists solely of telephone consultation;

(ii) the representation is provided by a lawyer employed by a nonprofit legal-services program or participating in a pro bono program approved by the Alabama State Bar pursuant to Rule 6.6 and the lawyer's representation consists solely of providing information and advice or the preparation of legal documents; or

(iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

(i) the representation is limited to the attorney and the services described in the writing; and

(ii) the attorney does not represent the client generally or in matters other than those identified in the writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

IV. "IF YOU THINK NOBODY CARES FOR YOU, TRY MISSING A COUPLE OF PAYMENTS"

A. Problem Areas

1. Rule 1.3. Diligence

A lawyer shall not willfully neglect a legal matter entrusted to him.

2. Rule 1.4. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. . .”

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

3. New Rule 1.15

Rule 1.15 [Safekeeping Property]—Adds to section (a), the following: “Any funds while in the lawyer’s trust account that the lawyer is entitled to receive as a fee, reimbursement, or costs shall not be used by the lawyer for any personal or business expenses until such funds are removed from the trust account.”

Under new section (e) of Rule 1.15, a lawyer who practices in Alabama shall maintain all required current financial records for a period of six (6) years after termination of the representation, including, but not limited to:

1. Detailed receipt and disbursement journals;
2. Detailed ledger records for all client trust accounts;
3. Copies of client retainer and compensation agreements as required by Rule 1.5;
4. Copies of accountings to clients or third persons for trust account disbursements to them or on their behalf;
5. Copies of bills for legal fees and expenses rendered;
6. Copies of records showing disbursements on behalf of clients;
7. Physical or electrical equivalent of all trust-account checkbook registers, bank statements, records of deposit, prenumbered canceled checks, and substitute checks;
8. Detailed records of all electronic transfers from client trust accounts;
9. Copies of monthly trial balances and quarterly reconciliations of client trust accounts maintained by the lawyers; and
10. Copies of those portions of client files that are reasonably related to client trust-account transactions.

Renumbered “new” Section (f) now requires, with respect to client trust accounts governed by Rule 1.15, that **“Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or shall authorize transfers from a client trust account.”** This section also requires that receipts be deposited intact, and that withdrawals be made only by check payable to a named payee, and not to cash, or by authorized electronic transfer.

New section (h) requires that upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust-account records specified in the Rules.

4. Certification – IOLTA

V. “A MAN IS INNOCENT UNTIL PROVEN BROKE”

A. "Non-Refundable" Retainers

1. No Such Thing - RO-93-21

RO-93-21 - * * * "... Rule 1.16 of the Alabama Rules of Professional Conduct provides that upon termination of representation a lawyer shall refund any advance payment of a fee that has not been earned. Consequently, the Disciplinary Commission expressed the view in formal opinion RO-92-17 that 'no retainer should be non-refundable to the extent that it exceeds a reasonable fee.' The Commission used the word 'retainer' in the generic sense to include not only traditional retainer arrangements but all arrangements where fees are paid in advance of service being rendered.

* * *

An indication by the lawyer that the fee is non-refundable is a misrepresentation and, thus, a violation of Rule 8.4(c).

* * *

Similar logic would apply here in that the client faced with what the client believes to be a non-refundable fee, may be reluctant to discharge the lawyer and be forced to continue with a lawyer in whom the client has no confidence."

* * *

2. Unclaimed Funds

B. Contingency Fees

1. "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.

C. Costs, Expenses, \$\$\$\$ - RO-2005-02

RO-2005-02 - * * * "The basic costs or expenses incurred by the lawyer in representing the client can be broken down into two basis categories: (1) Those costs which are incurred by the lawyer within the firm itself, e.g., photocopying, postage, audio and videotape creations, producing of exhibits and the like; and, (2) Costs incurred external of the law firm or outsourced by the law firm in further representation of the client, e.g., depositions, production of records from a third party, travel and lodging and the like.

In ABA Formal Opinion 93-379, charges other than professional fees are broken down into three groups, for discussion: (A-1) General overhead; (B-2) disbursements; and (C-3) in-house provision of services. With regard to overhead, said opinion states:

'In the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services.'

Therefore, that opinion does not consider overhead as an expense which is to be passed along to the client independent of the basic fee for professional legal services.

With regard to disbursements (B-2) above, the opinion points out that it would be improper '... if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item.' This would include, but not be limited to, litigation expenses such as jury consultants, mock trials, focus groups and the like. The opinion also points out that if a lawyer receives any type of discounted rate or benefit points, then those discounted rates or benefit points should be passed along to the client.

With regard to (C-3) above, the opinion states that '... the lawyer is obliged to charge the client no more than the direct cost associated with the service ... plus a reasonable allocation of overhead expenses directly associated with the provision of the service ...'. The obvious reasoning behind this approach is that the lawyer should not utilize the lawyer-client relationship, beyond the fees for professional services, to 'manufacture' a secondary source of income by inflating costs and expenses billed to a client. This approach philosophically agrees with Rule 1.5's prohibition against clearly excessive fees. Since the basic lawyer's fee is governed by a 'reasonableness' approach, likewise, all fees and expenses which are charged back to a client during the course of the representation should be reasonable, and not considered as a secondary opportunity for a lawyer to generate additional income from the lawyer-client relationship."

* * *

VI. "IF ALL IS NOT LOST, WHERE IS IT?"

A. Threatening Criminal Prosecution

1. 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."

B. Impaired Client

Rule 1.14. Client Under a Disability

- (a) When a client's ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest.

VII. "A CLOSED MOUTH GATHERS NO FEET"

A. Confidentiality

1. Rule 1.6

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for

disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation to the client.

B. Contact With Represented Party

1. Rule 4.2. Communication With Person Represented By Counsel

- (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- (b) A person to whom limited-scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited-scope representation. If such notice is provided, the opposing lawyer shall not communicate with the person regarding matters designated in the notice of limited-scope representation without consent or authorization as provided by Rule 4.2(a).

C. The Court

1. Rule 3.3

CANDOR TOWARD THE TRIBUNAL

- (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.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

VIII. “EAGLES MAY SOAR BUT WEASELS AREN’T SUCKED INTO JET ENGINES”

- A. Automatic Overdraft Notification**
- B. Professionalism**
- C. Mandatory IOLTA**

IX. “NEVER ATTRIBUTE TO MALICE THAT WHICH CAN ADEQUATELY BE EXPLAINED BY STUPIDITY”

A. Rule 4.3. Dealing With Unrepresented Person

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (b) A person to whom limited-scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited-scope representation. If

such notice is provided, the person is considered to be unrepresented regarding matters not designated in the notice of limited-scope representation.

B. 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.
- (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
 - (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
 - (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
 - (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
 - (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
 - (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
 - (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
- (c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
 - (1) the general nature of the claim or defense;
 - (2) the information contained in a public record;

- (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case:
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

C. Rule 3.7. Lawyer As 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.

D. Rule 1.8. Conflict Of Interest: Prohibited Transactions (a) & (c)

- (a) A lawyer shall not enter into a business transaction with a client or knowingly

acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client consents in writing thereto.
- (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

E. Rule 1.8. Conflict Of Interest: Prohibited Transactions (f) & (g)

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to the representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, 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 claims or pleas involved and of the participation of each person in the settlement.

X. "ACCORDING TO MY BEST RECOLLECTION, I DON'T REMEMBER"

A. Lying Client - RO-2009-01

B. Call 1-800-354-6154

1. Tony McLain
2. Robby Lusk
3. Jeremy McIntire
4. Mark Moody

C. Write – P. O. Box 671, Montgomery, AL 36101

D. E-Mail

E. Do-It-Yourself – www.alabar.org

F. Rule 1.8

(l) A lawyer shall not engage in sexual conduct with a client or representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship, including, but not limited to:

- (4) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of legal representation;
- (5) continuing to represent a client if the lawyer's sexual relations with the client or the representative of the client cause the lawyer to render incompetent representation.

(m) Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.

(n) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (h) and in paragraphs (j) and (k) that applies to one of them shall apply to all of them.

Comment To Rule 1.8

Sexual Relations Between Lawyer and Client

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between the lawyer and the client can involve unfair exploitation of the lawyer's fiduciary role in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without the exercise of independent professional judgment being impaired. Moreover, a blurred line between the professional and personal

relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, because client confidences are protected by privilege only when they are imparted in the context of the lawyer-client relationship. Because of the significant danger of harm to the client's interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Spousal relationships and sexual relationships that predate the lawyer-client relationship, however, are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed before the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.

Imputation of Prohibitions

Under paragraph (n), a prohibition on conduct by an individual lawyer in paragraphs (a) through (h) and in paragraphs (j) and (k) also applies to all lawyers associated in a firm with the lawyer who is personally prohibited from representing the client. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraphs (l) and (m) are personal and are not imputed to associated lawyers.

APPENDIX "A"

RETENTION, DESTRUCTION

OF CLIENT FILES

ETHICS OPINION RO-2010-02

ETHICS OPINION 2010-02

Retention, Storage, Ownership, Production and Destruction of Client Files

Introduction

Formal Opinions 1986-02, 1993-10, 1994-01 are the most recent pronouncements of a lawyer's ethical obligations regarding client files. Since those opinions were issued, advances in technology, electronic filing, and internet-based electronic file storage and retrieval services have created issues that were not contemplated by those opinions. Realizing the need to provide guidance to lawyers that is relevant to the practice of law in today's technological world, the Disciplinary Commission offers the following opinion concerning a lawyer's ethical responsibilities relating to the retention, storage, ownership, production and destruction of client files.

Applicable Rules

The following rules must be considered when determining a lawyer's professional responsibilities relating to client file retention policies. Although most often considered a rule relating solely to lawyer trust accounting, Rule 1.15, Alabama Rules of Professional Conduct, sets out a lawyer's responsibilities relating to types of property of clients or third persons, other than money, and provides, in pertinent part:

“(a) A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. [...] Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation....

“(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this rule or

otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

“(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.”

* * *

“COMMENT

“A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts....”

* * *

“Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.”

The issue relating to whom the file belongs was decided in Formal Opinion 1986-02, wherein we held that the materials in the file furnished by or for the client are the property of the client.

Therefore, Rule 1.15, Ala. R. Prof. C., imposes an ethical and fiduciary duty on the lawyer to properly identify a client's file as such, segregate the file from the lawyer's business and personal property, as well as from the property of other clients and third persons, safeguard and account for its contents, and promptly produce it upon request by the client.

Although specifically addressing the issues relating to declining or terminating representation, Rule 1.16(d), Ala. R. Prof. C., also refers to client property and provides, in pertinent part:

“(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.”

As we explained in Formal Opinion 1986-02, the file belongs to the client. However, the client's possessory rights to the file are subject to an attorney's lien created by Ala. Code §34-3-61 (1975, as amended), for unpaid fees and expenses. We take this opportunity to reiterate that where a lawyer is asserting a valid attorney's lien pursuant to the Attorney's Lien Statute to secure payment for reasonable fees and expenses that the client has not paid, the lawyer has a statutory right to withhold a client's papers and property in his possession until such time as the client satisfies the lien by tendering payment or makes reasonable and satisfactory arrangements to protect or otherwise secure the lawyer's interest in the unpaid fees and expenses.

Rule 1.6, Ala. R. Prof. C., embodies one of the most fundamental principles of our profession and requires that, with few exceptions, a “lawyer shall not reveal information relating to representation of a client.” The duty to maintain confidentiality includes the duty to segregate, protect and safeguard a client's file and the information it contains. The obligation to maintain a client's file contemporaneously organized and orderly filing and indexing system is inherent in the duty of confidentiality and explicit in Rule 1.15. The failure to do so is a breach of Rule 1.15 and may also rise to the level of a breach of Rule 1.6. The principles of confidentiality, loyalty and fidelity are so fundamental to the practice of law that these rules must be enforced to eliminate even the risk of a breach of these principles.

However, a lawyer's obligation to identify and segregate a client's file, safeguard its contents, maintain its confidentiality, and promptly account for and produce it upon request from the client, does not create an obligation to preserve permanently all files of the lawyer's clients or former clients. See, D.C. Bar Opinion 206; ABA Informal Op. 1384 (1989). Lawyers do not have unlimited space to store files and what limited space is available is often expensive. Lawyers do have an ethical obligation to prevent the premature or inappropriate destruction of client files. See, D.C. Bar Opinion 205 (1989). Clients may reasonably expect lawyers to maintain valuable and useful information, not otherwise readily available to the client, in their files for a reasonable period of time. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 13384 (March 14, 1977).

Adopt File Retention Policies

The best practice is for a lawyer to adopt and follow a file retention policy that best fits the needs of the lawyer's practice and the lawyer's clients. File retention policies may vary from lawyer to lawyer and even from client to client, but they must be consistent with the guidelines expressed in this opinion. Additionally, the policy must be communicated to the client in writing at the outset of the representation. Upon conclusion of the representation, the lawyer should reiterate the policy and engage in appropriate follow up with the client regarding retention and destruction of the client's file. The lawyer's file retention policy may be included in the retainer or engagement agreement. In certain situations, it may be necessary and appropriate for a lawyer to create a separate file retention and destruction policy, tailored to meet the specific needs of a client or a client matter, or the lawyer's practice. In developing a file retention and destruction policy, the lawyer must abide by the guidelines expressed in this opinion and should also

consider the individual client's level of education, sophistication, resources and other relevant circumstances.

Although as a general rule the file belongs to the client and must be produced promptly upon request, circumstances may exist that would make production of a copy of the entire client's file inappropriate. Absent a court order, a lawyer should not tender the entire file to a client, who has diminished capacity or serious mental health disorders, or to juvenile clients or to clients who have a propensity for violence. A lawyer may also refuse to tender the entire client file to clients who are violent criminal defendants, sex-offenders, or other clients where the information contained in the file would endanger the safety and welfare of the client or others. In these circumstances, it is reasonable and appropriate for the lawyer to redact or remove documents containing sensitive mental health or medical records, descriptions of crimes, photographs of crime scenes or victims, sensitive or salacious information, and personal or other identifying information relating to jurors, victims, witnesses or others. A lawyer's retention and destruction policy should allow for these exceptional situations.

How long must a file be retained?

Generally, a lawyer should maintain a copy of the client's file for a minimum of six (6) years from termination of the representation or conclusion of the matter. A lawyer's failure to maintain a file for this minimum period of time is presumptively unreasonable based upon consideration of the statute of limitations under the Alabama Legal Services Liability Act (Ala. Code §6-6-574) and the six-year period of limitations for the filing of formal charges in lawyer disciplinary matters (Rule 31, Alabama Rules of Disciplinary Procedure). Six (6) years is the absolute minimum period, but special circumstances may exist that require a longer, even indefinite, period of retention. Files relating to minors, probate matters, estate planning, tax,

criminal law, business entities and transactional matters should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer, or the administration of justice.

What is considered part of the client's file?

In general, there are two approaches to determine what constitutes the client's file. The "entire file" approach provides that the client owns and is, therefore, entitled to all of the documents within the client's file, unless the lawyer establishes that withholding items would not result in foreseeable prejudice to the client or would, as previously discussed, endanger the health, safety or welfare of the client or others. *In the Matter of Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP*, 91 N.Y. 2d 30, 666 N.Y.S. 2d 985, 689 N.E. 2d 879, 883 (1997); *Clark v. Milam*, 847 F. Supp. 424, 426 (D. W.Va. 1994); *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992); *Martin v. Valley Nat. Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991); *Resolution Trust Corp. v. H--, P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989). The "end product" approach divides ownership of documents in the file between the client and the lawyer and permits a lawyer to retain certain documents, such as notes by the lawyer to himself made in preparation for deposition, trials, or interviews or blemished drafts of other documents, which may contain the lawyer's mental impressions, opinions, and legal theories, some of which may not be flattering or palatable to the client or the lawyer. *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, et al.*, 824 S.W.2d 92 (Mo. App. E.D. 1992); Minnesota Lawyers Professional Responsibility Board Opinion 13 (June 15, 1989); ABA Informal Ethics Op. 1376 (Feb. 18, 1977). Either approach requires weighing the protections of both a lawyer's right to think and practice freely during the representation and the client's right to demand an accounting of the actions of his lawyer. The rationale supporting the "end product" approach is that unless

the lawyer's recorded thoughts are protected, he will not provide effective representation. The "entire file" approach, which is the majority view, fosters open and forthright lawyer-client relations. The rationale supporting this approach is that a lawyer's fiduciary relationship with a client requires full, candid disclosure. The relationship would be impaired if lawyers withheld any and all documents from their clients without good cause. *Henry v. Swift, Currie, McGhee & Hiers, LLP, et al.*, 581 S.E.2d 37 (Ga. 2003) (Adopting the majority view.) The Disciplinary Commission agrees with the majority of jurisdictions that the "entire file" approach is the best approach. The lawyer is in possession of the file, knows its contents, and is best able to determine the appropriateness of redaction or removal of some of its contents. In those situations where the lawyer determines that production of the entire file is unreasonable or inappropriate, the lawyer must provide reasonable notice to the client that portions of the file have been redacted or items removed for good cause.

What contents of a client's file may be destroyed?

We have consistently opined that six (6) years is the minimum period of time a lawyer must retain a client's file after the file is closed or after final disposition of the matter. See, Formal Opinions 1994-91 and 1993-10. Although we have opined that six (6) years was generally a reasonable minimum period of time, we are aware that most have assumed that the six (6) year minimum period of time applied to all client files. Today, we emphasize that six (6) years is the minimum period of time that a client's file must be retained, but circumstances may extend that minimum period of time indefinitely. Even when the passage of time and other circumstances render destruction of a client's file appropriate, there are some contents that should never be destroyed.

In Formal Opinion 1993-10, we described the nature of documents that might be contained in a client's file and opined that it was the nature of those documents that determined whether they could be destroyed. We stated that those documents fall into four (4) basic categories. Today, we modify that categorization to simplify the analysis; the results are unchanged.

Category 1 property is "intrinsically valuable property." Its "value" is inherent in its nature. Value is not dependent upon certainty of ownership or its source. The fact that the property may be a copy or duplicate, rather than an original, may minimize its value, but this factor, without more, does not change its character as a Category 1 documents. Copies of Category 1 documents must be retained indefinitely, unless the lawyer determines that the copy can be lawfully destroyed because it has been rendered useless and of no value by the client's possession of the original, or by the proper recording of the original, or at the specific written instruction of the client, under circumstances where destruction of the property would not otherwise be illegal or improper. However, the best practice is that the lawyer should never destroy originals of Category 1 property. Where destruction is necessary and appropriate, the lawyer should deliver the original to the client or deposit it with the court. Examples of such property include, but are not limited to: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, stock certificates, bonds, cash, negotiable instruments, certificates of title, abstracts of title, deeds, official corporate or other business and financial records, and settlement agreements.

Category 2 property is "valuable property." Its value is dependent upon the present circumstances or upon the reasonably foreseeable probability of a change in future circumstances. Factors that the lawyer may consider are certainty and identity of ownership,

source of the property, its intended purpose, its planned or possible use, its character as an original or copy, its form and size, the practicality of preserving or storing it, and the reasonable expectations of the client or owner regarding its ultimate disposition. Category 2 property may be destroyed with the actual consent of the client or upon the client's implied consent, which may be obtained by the client's failure to take possession of the property on or within 60 days of a date established by the lawyer's written file retention policy or as provided in a separate written notice, sent to the client's last known address, advising of the date of the lawyer's planned destruction or disposal of the property. Notice provided as part of the lawyer's written file retention policy, which is affirmatively acknowledged in writing at the outset of the representation or upon termination of the representation, is presumed sufficient and no further notice or attempted notice is required prior to destruction or final disposition of the property. Examples of Category 2 property include, but are not limited to: tangible personal property, photographs, audio and video recordings, pleadings, correspondence, discovery, demonstrative aids, written statements, notes, memoranda, voluminous financial, accounting, or business records, and any other property, the premature or unauthorized destruction of which would be detrimental to the client's present or reasonably foreseeable future interests.

Category 3 property is property that has no value or reasonably foreseeable future value. It does not fall into either Category 1 or Category 2. It may be destroyed after the minimum required period of time without notice to or authorization by the client. However, the best practice is for the lawyer to use the same notice procedure for Category 3 property as prescribed for Category 2 property.

Documents which fall into category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories 2

and 3 should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him. After the minimum retention period of six (6) years, those documents may be appropriately destroyed. There is no longer a category 4 for purposes of the analysis.

Before destroying or disposing of any client file, it is the lawyer's responsibility to review and screen the file to ensure that Category 1 property is not being destroyed. The lawyer must maintain an index of all destroyed files, which index must contain information sufficient to identify the client, the nature or subject matter of the representation, the date the file was opened and closed, the court case number associated with the file, a general description of the type of property destroyed, e.g., "Pleadings, Correspondence, Notes, Legal Research, Videotapes, Photographs," a notation that the file was reviewed for Category 1 property, by whom, whether or not such property was contained in the file, and if so, its location or disposition, and the date and method of destruction of the file.

What are the ethical considerations relating to electronic files?

The practice of law today often requires legal documents and many other components of a client's file to be converted to, created, transmitted, stored, and reproduced electronically. Moving from "the paper chase" to "the paperless office" presents practical concerns. Converting existing paper files to electronic format is usually accomplished by "scanning" the paper file, which converts it to a format that can be stored, transmitted, and reproduced electronically.

When paper files are converted to electronic format, destruction of the paper file is not without limits or conditions. Even after Category 1 documents are scanned and converted to electronic format, the lawyer cannot destroy the paper Category 1 document. After scanning and

conversion, Category 2 and 3 documents may be destroyed, but the best practice is to follow the procedure used for ordinary paper documents.

Like documents that are converted, documents that are originally created and maintained electronically must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document. The lawyer must ensure that the process is at least as secure as that required for traditional paper files. The lawyer must have reasonable measures in place to protect the integrity and security of the electronic file. This requires the lawyer to ensure that only authorized individuals have access to the electronic files. The lawyer should also take reasonable steps to ensure that the files are secure from outside intrusion. Such steps may include the installation of firewalls and intrusion detection software. Although not required for traditional paper files, a lawyer must “back up” all electronically stored files onto another computer or media that can be accessed to restore data in case the lawyer’s computer crashes, the file is corrupted, or his office is damaged or destroyed.

A lawyer may also choose to store or “back-up” client files via a third-party provider or internet-based server, provided that the lawyer exercises reasonable care in doing so. These third-party or internet-based servers may include what is commonly referred to as “cloud computing.” According to a recent ABA Journal article on the subject, “cloud computing” is a “sophisticated form of remote electronic data storage on the internet. Unlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored ‘in the cloud’ is kept on large servers located elsewhere and maintained by a vendor.” Richard Acello, *Get Your Head in the Cloud*, ABA Journal, April 2010, at 28-29.

The obvious advantage to “cloud computing” is the lawyer’s increased access to client data. As long as there is an internet connection available, the lawyer would have the capability

of accessing client data whether he was out of the office, out of the state, or even out of the country. In addition, "cloud computing" may also allow clients greater access to their own files over the internet. However, there are also confidentiality issues that arise with the use of "cloud computing." Client confidences and secrets are no longer under the direct control of the lawyer or his law firm; rather, client data is now in the hands of a third-party that is free to access the data and move it from location to location. Additionally, there is always the possibility that a third party could illegally gain access to the server and confidential client data through the internet.

However, such confidentiality concerns have not deterred other states from approving the use of third-party vendors for the storage of client information. In Formal Opinion No. 33, the Nevada State Bar stated that:

"[A]n attorney may use an outside agency to store confidential client information in electronic forms, and on hardware located outside the attorney's direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent."

In approving on-line file storage, the Arizona State Bar noted in Formal Opinion 09-04 that:

"[T]echnology advances may make certain protective measures obsolete over time. Therefore, the Committee does not suggest that the protective measures at issue in Ethics Op. 05-04 or in this opinion necessarily satisfy ER 1.6's requirements indefinitely. Instead, whether a particular system provides reasonable protective measures must be "informed by the technology reasonably available at the time to secure data against unintentional disclosure." N.J. Ethics Op. 701. As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients' documents and information."

In their opinions, the Bars of Arizona and Nevada recognize that just as with traditional storage and retention of client files, a lawyer cannot guarantee that client confidentiality will never be breached, whether by an employee or some other third-party. Rather, both Arizona and Nevada adopt the approach that a lawyer only has a duty of reasonable care in selecting and entrusting the storage of confidential client data to a third-party vendor. The Disciplinary Commission agrees and has determined that a lawyer may use "cloud computing" or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.

The duty of reasonable care requires the lawyer to become knowledgeable about how the provider will handle the storage and security of the data being stored and to reasonably ensure that the provider will abide by a confidentiality agreement in handling the data. Additionally, because technology is constantly evolving, the lawyer will have a continuing duty to stay abreast of appropriate security safeguards that should be employed by the lawyer and the third-party provider. If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third party provider.

In whatever format the lawyer chooses to store client documents, the format must allow the lawyer to reproduce the documents in their original paper format. If a lawyer electronically stores a client's file and the client later requests a copy of the file, the lawyer must abide by the client's decision in whether to produce the file in its electronic format, such as on a compact disc or in its original paper format.

When a lawyer discards laptops, computers, or other electronic devices, he must take adequate reasonable measures to ensure that client files and/or confidential information have been erased from those items. Failure to do so could result in the disclosure of confidential

information to a subsequent user. If such disclosure occurs, the lawyer could be subject to disciplinary action for a violation of Rule 1.6 of the Alabama Rules of Professional Conduct.

In what format must the client's file be delivered?

There are various possible combinations of client file formats, including original paper files scanned and converted to electronic document format, original e-documents, and e-mails. Often client files are maintained in part in paper format and electronic format. Rarely is it possible to originate and maintain a client file in electronic format. Therefore, the best practice is to develop a procedure that integrates the various file formats into an organized, indexed and searchable, unified system, so that prompt access to and production of the complete file, regardless of its various formats, can be reasonably assured.

Where a client has requested a copy of his file, the file may be produced in the format in which it is maintained by the lawyer, unless otherwise agreed upon or requested by the client. If the client requests that the electronic documents be produced in paper format, then the lawyer must accommodate the client, unless the lawyer's written file retention policy agreed to by the client provides otherwise. Even in cases where the lawyer's file retention policy provides that the file will be produced in only electronic format, where the client's level of education, sophistication, or technological ability, or lack of financial resources, or the unavailability of computer hardware or software necessary to access the documents would create an burden on the client to access the file in electronic format, the lawyer must produce a copy of the file in traditional paper format. Likewise, if the client requests the lawyer to produce the file in electronic format, but the lawyer maintains portions of the file in traditional paper format, the lawyer is not required to produce the file in electronic format, but may simply produce the file in the format in which it is maintained.

Can the lawyer charge the client for the cost of copying the file?

A lawyer may not charge the client for the cost of providing an initial copy of the file to the client. We note that many lawyers furnish courtesy copies of documents to their clients during the representation. Again, unless the lawyer includes a provision providing otherwise in his written file retention policy, acknowledged by the client at the outset of the representation, providing contemporaneous courtesy copies does not change the lawyer's obligation to tender the *entire* file to the client at the termination of the representation. And, the lawyer may not charge the client for copying the *entire* file, even though courtesy copies of some documents have been previously provided to the client. Although some of the documents being provided to the client may be duplicates, tendering the entire file protects the interests of the client and the lawyer with the assurance that nothing has been overlooked. If the lawyer includes a contrary provision in the client contract or engagement letter which provides that contemporaneous courtesy copies of documents during the representation satisfies his obligation to produce the client's file, such provision must describe with specificity what documents will be contemporaneously produced, what documents will not be contemporaneously produced, and what procedure and safeguards will be in place to ensure that the contemporaneous courtesy copy policy will be consistently followed. In any case, the client has a right to inspect the lawyer's file to ensure that the client's contemporaneous courtesy copy corresponds to the lawyer's copy of the file. Lawyers may not charge the client for any costs incurred in producing and tendering the file to the client. However, the lawyer may charge reasonable copying costs if a client requests additional copies of his file.

As a general rule, the client is responsible to make arrangements to pick up a copy of his file at the lawyer's place of business. The lawyer may insist on a written acknowledgement of

receipt from the client as a condition of surrender of the file. In the event the client refuses to acknowledge receipt of the file, the lawyer may refuse to tender the file. If the client requests that the file be produced to his authorized agent, then the lawyer should insist on written authorization to do so and should expressly warn the client that production of the file to a third party may defeat confidentiality and attorney-client privilege. Finally, if the client requests that the file be produced by mail, common carrier, or at a location other than the lawyer's office, the client is responsible for the costs associated with such production and the lawyer may withhold production until the client pre-pays the estimated costs or makes arrangements agreeable to the lawyer.