

Professionalism

Ethical Issues Faced by Young Lawyers

CLEAlabama
2010 Professionalism

J. Anthony McLain
General Counsel
tony.mclain@alabar.org

Robert E. Lusk, Jr.
Assistant General Counsel
robert.lusk@alabar.org

Alabama State Bar
415 Dexter Avenue
Montgomery, Alabama
334-269-1515

OFFICE ORGANIZATION AND ADMINISTRATION

Maintaining your good professional reputation, increasing your profitability and your chances of success begin with understanding some basic, common-sense principles of business management and personal organization. For those of you in solo or small firms, you have already faced the critical temptation of leveraging your success by renting the nicest office, buying top-of-the line furnishings, leasing the latest and most technologically up-to-date office equipment, and hiring support staff. For those of you in medium to large firms or in government practice, you have not been faced with the trappings of the “latest and best,” but the odds are that within the first 10 years of your practice, you too will face these same temptations. Words to the wise: *Unless you are already independently wealthy, keep your overhead low.* The practice of law is stressful enough without the added stress of having to pay others for the “latest and best,” especially after the realization hits you that it was not a basic necessity for a successful and reputable law practice.

ORGANIZATION

If you don't already have excellent organizational skills, then hire a secretary who does. Creating and maintaining a systemic and organized approach to your practice will: improve efficiency; reduce the risks of missed deadlines; improve communication; enable cooperation and team-work; improve client relations; and enhance your professional and personal reputation. It will also reduce the risks of malpractice claims and reduce the risks of ethics violations and resulting discipline.

Most ethics complaints against lawyers involve the failure to communicate and the failure to exercise reasonable diligence or willful neglect of client matters, violations of Rules 1.4 and 1.3, Alabama Rules of Professional Conduct. Here are some practical steps you can take to enhance your organizational skills and, thereby, reduce the negative consequences of disorganization. Create or familiarize yourself with your firm's:

- Client intake system
 - Intake – file origination
 - Conflicts check prior to engagement
 - Limit client conversations; avoid confidential information material to the matter
 - Names of all parties or potential parties
 - Names of all entities or potential entities
 - Officers
 - Directors
 - Affiliates
 - Type of representation – subject matter
 - Positions on legal issues

- Communication about engagement or declination, fees, costs, scope of representation, duration of representation, grounds for withdrawal, retention and destruction of file policy, confidentiality, and results are not guaranteed
- Filing system
 - Client documents
 - Correspondence
 - Notes/Memoranda
 - Research
 - Drafts
 - Pleadings
 - Lawyer documents
 - Forms
 - Research – Issues
 - Reading file for correspondence organized chronologically
- Docketing/Case Management system
 - Manual dual-entry with individual calendars and master calendar
 - Computerized calendaring system
 - Tickler system
- Billing system

Implement or improve on your personal organizational skills, such as:

- Maintain and constantly update a personal “to-do’ list
- Create files for all matters immediately
- Clear your desk daily
- Complete time sheets contemporaneously or, at least, daily
- Review mail promptly
 - Respond or take action on the same day, if possible
 - Discard junk
 - Calendar follow up
 - Include a response requested by date in all correspondence
- Return all calls the same day
 - Have the file in front of you when you return the call
 - If you can’t return the call, have your assistant respond and calendar a reminder for you to call the next day
 - Document all phone calls
- Set aside time each day for certain tasks, such as meeting clients, reviewing mail, office administration, returning phone calls
- Maintain and up-to-date master client list with contact and alternate contact information, as well as in the client file
- Regularly file and delete e-data and e-files
- Follow the OHIO rule: **Only Handle It Once**

PROFESSIONAL SUPPORT STAFF

Most secretaries and paralegals know a lot more about the practice of law than you do and you should treat them accordingly. They have the power to make you or break you. Therefore:

- Treat them with respect and common courtesy
- Show personal concern when appropriate
- Acknowledge them; say “good morning,” “please,” and “thank you”
- Communicate with them on a professional level
- Don’t raise your voice or use sarcasm
- Inquire about their workload
- Be willing to do “non-lawyer” administrative tasks
- Give credit for a job well done

COURT PERSONNEL

Although this applies in all professional relationships, nowhere is it as important in dealing with professional support staff and court personnel – The Golden Rule: “Do unto others as you would have them do unto you.” Court personnel, like professional support staff, know more about the practice of law than you and can often make things easier or more difficult depending on how you treat them. You should consider court personnel can function as a:

- Resource
 - Procedure/Local custom
 - Forms
 - Research
- Access - Judge’s doorkeeper
- Barometer – Let you know if you want to open the door or not
- Lifesaver – Their help will cover a multitude of your mistakes
- 13th Juror – Never underestimate their wisdom or disregard their opinion

CONFLICTS OF INTEREST

Conflicts of interest are another source of ethics complaints and malpractice claims against lawyers. They also often result in lawyer disqualification, which may result in forfeiture of fees, loss of other client business, increased legal costs for the client, delay, and an adverse impact on the administration of justice. Conflicts issues can be complicated and confusing and many conflicts that arise during representation cannot be foreseen, but a lawyer must screen for conflicts at the outset of the representation and be sensitive to conflicts or possible conflicts issues throughout the representation. It is helpful to remember that conflicts issues always involve consideration of principles of confidentiality, client loyalty, client trust, client choice, independent professional judgment, and legitimacy of judicial proceedings.

Rule 1.7 - The General Rule

- A conflict of interest is involved if the representation of a client will be directly adverse to another client
- 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
- In multi-party litigation the lawyer must assess the risk that the lawyer’s representation of one client will be significantly and plausibly 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 interest 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 normally present adversity that constitutes a conflict of interest. When simultaneously representing co-parties, their claims, theories or defenses must be mutually consistent
- A significant conflict of interest that often presents in representing multiple plaintiffs involves litigation where there is a limited pool of funds
- Not all differing interests in complex and multi-party litigation create a conflict of interest requiring disqualification. To determine whether or not a conflict of interest exists, the lawyer should assess:
 - Context of the representation
 - Clients' common interests in relation to adverse interests
 - Practicality of individual representation
 - Client choice
 - Extent of judicial oversight
- 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
- A lawyer may take adverse legal positions in different courts at different times

Rule 1.8 – Prohibited Transactions

- 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
- 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

- 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.
- No negotiation for media or literary rights during the representation.
- 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)
- 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
- 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
- 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
- Lawyers related as parent, child, sibling, or spouse may not represent adverse parties without informed consent
- 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
- Can't represent both parties in family law matters
- No sex with clients

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

“(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

“(2) continuing to represent a client if the lawyer's sexual relations with the client or representative of the client cause the lawyer to render incompetent representation.

“(m) Except for 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 (k) that applies to one of them shall apply to all of them.”

Rule 1.9 – Former Client Conflicts

- Prior lawyer-client relationship
- Represent another person with materially adverse interests to the prior client in the same or substantially related matter
 - Commonality of parties or persons
 - Commonality of facts
 - Commonality of issues
 - Commonality of subject matter
- **Or** use confidential information to the disadvantage of the former client

Rule 1.10 – Imputed Disqualification

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

Waiver

- Actual waiver
 - Reasonable belief representation will not be adversely affected
 - Informed consent
 - Documented
- Implied waiver
 - Failure to assert conflict at earliest opportunity
- Non-waivable conflicts
 - Direct adversity
 - 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

- Confidentiality prevents disclosure necessary to obtain informed consent
- Prospective waiver
 - Ineffective unless highly sophisticated client and conflict is
 - Confidentiality prevents disclosure necessary to obtain informed consent

COMMUNICATION

As previously mentioned, the overwhelming majority of complaints against lawyers involve the lawyer's willful neglect of legal matters and the failure to reasonably communicate with clients.

Failure to Communicate (Rule 1.4)

- Case Status
 - Return phone calls
 - Be honest
- Informed Decisions
 - Engagement
 - Identify client
 - Identify matter
 - Identify who will be working on the matter
 - Scope and duration of representation
 - Full disclosure, cooperation and confidentiality
 - Basis and rate of fee, costs and expenses, billing, payment terms
 - What fee covers and what it does not
 - Circumstances that will allow termination by lawyer
 - Client's right to terminate
 - Client file retention policy
 - Results not guaranteed
 - Instructions to client to sign and return copy
 - Disengagement
 - Statement of nonrepresentation and basis of decision where permissible and appropriate
 - Statement of matters in which the firm represents the client and those in which the firm does not or that the firm does not represent the person in any matter, whichever is applicable
 - Disclaimer of any duty or responsibility to monitor changes in the circumstances and law affecting the matter

- Statement encouraging the person to engage another lawyer for a second opinion
 - Notice of any known deadlines or possible expiration of any statute of limitations
 - Proof of receipt is advisable
- Other information reasonably necessary to allow the client to make informed decisions regarding the representation

Lack of Diligence (Rule 1.3)

- Procrastination
- Poor office organization and administration
- Almost always leads to Rule 1.4 violation
- A note about Incompetence (Rule 1.1)

CLIENT RELATIONS

Your reputation and success depends in large measure on what clients think of you. It has been said that a satisfied client may tell one or two people about their lawyer, but an unsatisfied client will tell everyone they meet about their lawyer.

- Create professional boundaries
- Be respectful and courteous
- Don't make promises
- Emphasis open communication
- Know your clients
- Respect their priorities
- Be honest
- Be prepared
- Be practical and solution oriented
- Be objective
- Be in control
- Bill fairly, regularly, and accurately

FEES

Rule 1.5(a) prohibits an agreement for charging or collecting a clearly excessive fee.

“...A fee is **clearly excessive** when, after review of the facts, a lawyer of ordinary prudence would be left with a

definite and firm conviction that the fee is in excess of a reasonable fee.”

Factors considered when determining whether fee is excessive:

- Time and labor involved
- Difficulty of matter
- Skill required
- Conflicts created
- Fee charged in the locality for similar services
- Amount involved
- Results obtained
- Nature and length of professional relationship
- Experience
- Reputation
- Ability
- Fixed or contingent fee
- Written fee agreement signed by client

These factors are neither exclusive nor exhaustive.

Rule 1.5(b) requires that the basis *or method* and rate of the fee be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Rule 1.5(c) requires that contingent fee agreements be written. They must state the method by which the fee will be determined, including percentages, whether expenses and costs will be deducted and, if so, whether they are to be deducted before or after the contingent fee is calculated. The lawyer must provide a written accounting stating the outcome of the matter, the amount of recovery, the remittance to the client and how it was determined.

Rule 1.5(d) prohibits contingent fees in domestic cases.

Rule 1.5 (e) prohibits a division of fees between lawyers not in the same firm, unless (a) the division is in proportion to the work done by each lawyer or (b) each lawyer, in writing, assumes joint responsibility for the representation or (c) in a contingency fee case the fee is divided between the referring and the receiving lawyer (d) and in any case the client is advised and does not object to the participation of the lawyer and the division of the fee, and (e) the total fee is not clearly excessive.

- Market

- Competitor's fees
- Client expectations
- Client service driven market expectations
- Client's perceived value
- Business Considerations
 - Do you know how much it costs to run your business, pay yourself a living wage, and meet your tax obligations?
 - Business plan
 - Budget
 - Cost analysis
- Type of case or work
 - Routine
 - High Volume
 - Specialized
 - Lawyer's reputation
 - Lawyer's experience
 - Unique/Experimental
 - Groundbreaking
 - First impression
- Other factors
 - Matter of interest
 - Court or judge
 - Opposing counsel
- Type of client
 - New client
 - Regular client
 - Difficult client
 - Demanding client
 - Nonchalant client
 - Needy client
 - Sophisticated client
 - Unsophisticated client

When evaluating or reevaluating your fee system there are many other factors that may impact your decision, but you cannot engage in a meaningful evaluation without considering the foregoing. Lawyers should move away from the idea that fees or rates fixed at a predetermined amount in every case and consider that the amount of the fee for any given matter should be a range that allows the lawyer an opportunity to consider and balance the relevant factors and arrive at a fee that will be profitable for the lawyer; that will motivate the lawyer, and that will provide a sense of value to the client.

BILLING

Among the factors contributing to the poor public perception of lawyers, is over-billing. Over-billing is not charging an excessively high hourly rate or billing for work not performed, it includes billing for unnecessary work (excessive research, reviewing and revising, discovery), exaggerating time by block billing (billing for large blocks of time with no detailed description of work performed), or excessive minimum incremental billing (billing minimums of .25 hours, instead of .1 hours, i.e, rounding up to the nearest quarter-hour), or by using vague and useless descriptions (“T/C w/Client”), and by overstaffing.

It has been said that most lawyers, particularly young lawyers, cannot ethically achieve 2100+ billable hours per year. The ABA Commission on Billable Hours has suggested that firms consider a “Billable Hours Diet,” such as:

- Client work – 1900 hours
- Pro Bono – 100 hours
- Service to Firm 100 hours
- Client Development – 75 hours
- Training and Professional Development – 75 hours
- Service to Profession – 50 hours

ETHICS GUIDANCE

The single most effective tool in the preservation of our profession through self-regulation is the lawyer’s individual sense of professionalism, honor, and integrity. All other enforcement tools are comparatively ineffective. Lawyers who are solo practitioners or who practice in small firms or office-sharing arrangements are at a significant disadvantage because often they have to make decisions about procedure, strategy and ethics in isolation, unlike, their counterparts in large firms or government practice, who have the benefit of organizational oversight and convenient opportunities for consultation and collaboration with more experienced lawyers.

However, there is a danger that lawyers who practice together will be affected by the phenomenon of *Firm Culture*, which is present in medium to large firms. Firm Culture may work to the disadvantage of some young lawyers. Generally, lawyers have a natural tendency to conform their conduct to that of others in the firm. Although a firm may express formal systems and policy, there exists an informal system and practice that may, in practice, run counter to the expressed policy or system. Whether solo or in a firm, young lawyers should be

sensitive to their ethical obligations and remember that the privilege of self-regulation and maintenance integrity and standing of our profession depends on every ethical decision they make. The following are primary sources of ethical guidance for all lawyers:

- Rules of Professional Conduct
- Personal sense of honor
- Older lawyers
- Local bar commissioners
- Office of General Counsel

CLIENT DEVELOPMENT

Communications about lawyers' services are governed by Rules 7.1 through 7.6.

Public Relations – Personal Exposure

Rules 7.1, 7.2, 7.3, 7.4, *A.R.P.C.*, are particularly applicable.

- Cultivate relationships with:
 - Reporters
 - Community leaders
 - Chamber of Commerce
 - Service Clubs
 - Charitable Organizations
 - Other law firms
 - Accountants
 - Banks
 - Realtors
 - Developers
 - Financial planners

- Volunteer with:
 - Community Groups
 - Service Clubs
 - Speaker's Bureau
 - Local Schools
 - Charities

- Bar Association
- Pro bono programs
- Volunteer lawyers

- Seminars & Education Programs
 - Approved in RO-90-45
 - Advertising and solicitation rules apply to publicity about seminar
 - Do not state or imply expertise or specialty
 - Avoid appearance of representation of attendees
 - Do not charge for seminar, almost always improper, no “for-profit” educational seminars offered to general public
 - Nominal fee may be appropriate to cover costs of seminar provided for particular groups of clients or prospective clients
 - May divide reasonable cost among sponsors
 - Do not provide individualized legal advice
 - Clarify, *preferably in writing*, only offering general advice on general legal topics, and information offered is incomplete
 - Clarify, *preferably in writing*, individuals should consult their lawyer for specific legal advice on issues
 - Do not solicit business
 - Do not provide individual legal services
 - Engage only in appropriate follow up

- Firm Brochure

- Articles and Media Appearances
 - Permitted with limitations
 - No false, fraudulent or misleading, deceptive statements (RO -86 70)
 - No self-laudatory statements (RO -86 70)
 - May not pay for publication or appearance
 - Avoid representing specialty or expertise
 - May not emphasize experience or reputation (RO -86 70)
 - Do not solicit business (i.e., for more information send questions to: ...)
 - Do not include photo, accomplishments, or other superfluous or self-aggrandizing information (RO-82-577)
 - Clarify only offering general legal advice

- Concerns bona fide discussions of legal problems as they relate to the general public, not motivated by self-aggrandizement or advertising (RO -86 70)
- Do not provide specific advice (RO -86 70)
- Disclose general and incomplete nature of advice
- Do not comment on pending cases in violation of Rule 3.6

Public Service – Pro Bono

- Volunteer Lawyer Program
- Establish a limit for pro bono work

Rule 7.5 – Firm Names and Letterheads

- Must comply with Rule 7.1
 - Trade Names – AAA Aardvark Attorneys
 - “and associates”
 - “attorneys at law”
 - Trade names are permissible
 - Do not imply connection with:
 - Government agency
 - Public or charitable organization
- May use names of lawyers not licensed in Alabama, if disclosed on letterhead
- May indicate licensed in another jurisdiction
- May not use name of lawyer holding public office for any substantial period of time
- Announcements
- Tombstone announcements permitted (RO-88-52)
- Office signage
 - “Legal Arts Center” misleading if building is not predominately occupied by a number of other lawyers (RO-84-02)

- Legal directories
- Premiums
- Entertainment/sponsorships
- Charitable donation of legal services
 - May donate legal services to charitable organization (RO-90-51)
 - May not donate legal services as a prize in a radio promotion, in which lawyer will receive on-air credit for the donation (RO-89-116)

Rule 7.6 – Business Cards for Nonlawyers

- Web site – Homepage design
- Must comply with Rule 7.1
- Must state that the person is a nonlawyer
- It is not false or misleading if it clearly identifies the nonlawyer as a “legal assistant,” provided nonlawyer is employed in that capacity and supervised by a lawyer who authorized the use of the business card
- May use “Paralegal,” “Investigator,” and “Professional Legal Secretary”
- Constitute advertising
- May not be distributed to the public by leaving in offices of doctors, accountants, bail bondsmen, and other businesses or professions. (RO-03-01)

5. Safekeeping Property (Rule 1.15)

- Mandatory IOLTA
- Money and Property - Rule 1.15 includes any property belonging to a client or third party that is delivered to the lawyer. (Client files, documents, photos, physical evidence, videotapes and audiotapes, etc.)
- Nominal, Short Term and Not Practicable - The IOLTA trust account is for funds that are nominal in amount or that will be held for a short term and the lawyer has determined that the funds cannot practicably be invested for the benefit of the client or third party.

- Separate - Money and property must be kept separate from the lawyer's personal or business property. Only client and third-party funds should be deposited into the trust account.
- No Personal or Business Funds - A lawyer must not deposit personal or business funds into an IOLTA account, except that the lawyer must deposit: (1) unearned attorney's fees that the lawyer expects to earn; and (2) funds sufficient to cover account charges (credit card charges, NSF fees, stop payment charges, wire transfer charges, check charges).
- Trust Designation - A trust account, checks and deposit slips must be designated as a trust account by use of terms such as "trust account," "fiduciary account," or "escrow account."
- Other Designation - A business account that is not a trust account, its checks and deposit slips, must be designated as a non-trust account, by use of terms such as "business account," "professional account," "office account," "general account," "payroll account," or "regular account."
- Ownership at Receipt - Whether funds are deposited into a trust account or regular account depends on who owns the funds at the time they are received by the lawyer.
- Complete Records - Complete records of the account must be maintained for a period of six years after termination of the representation. *A checkbook register is NOT a "complete" record.*
- Prompt Notification - A lawyer must promptly notify the client or third party upon receipt of funds in which the client or third party has an interest.
- Prompt Delivery - A lawyer must promptly deliver those funds to the person entitled to receive them.
- Prompt Accounting - A lawyer shall promptly render an accounting of the funds upon request. However, Rule 1.5(c) requires that in contingency fee cases an accounting be provided to the client upon disbursement, even in the absence of a specific request.
- Disputed Funds - When the ownership of funds is in dispute, the amount in dispute shall be held separately until there is an accounting and severance of the interests. Any amount not in dispute should be promptly disbursed.
- Prompt Resolution - When ownership is in dispute the lawyer should suggest means for prompt resolution of the dispute.
- Uncollected Funds - A lawyer should not make disbursements of uncollected funds. However, if the lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank will be collected promptly, then the lawyer may, *at the lawyer's own risk*, disburse uncollected funds. If the funds are not collected, then the lawyer must replace the funds within five (5) working days of notice of noncollection.

- Automatic Overdraft Notification Agreement - A lawyer must execute an automatic overdraft notification request for all trust accounts. Automatic overdraft notification requires the financial institution to report every instance where a properly payable item is presented for payment and there are insufficient funds or the item is paid and an overdraft on the account is created and is not paid by the lawyer within three business days from the date notice is sent to the lawyer. An overdraft notification is a proper ground for further investigation by the Office of General Counsel.
- No Trust Account Notice - A lawyer engaged in the active practice of law shall maintain a trust account to hold client and third-party funds. If they do not hold funds of clients or third parties, then they must provide written notice to the Secretary of the Alabama State Bar that they will not maintain such an account. This notice must be provided within six months of admission or return to active practice. If they establish a trust account, the lawyer must immediately give notice to the Secretary of the Alabama State Bar.
- No Interest - A lawyer shall not receive interest on the trust funds under any circumstances.
- Interest to ALF or ACJF – Interest generated on IOLTA accounts goes, at the lawyer’s election, to either the Alabama Law Foundation or the Alabama Civil Justice Foundation to be distributed to provide legal aid to the poor, law student loans, law related educational programs, maintain public law libraries, provide for the administration of justice, assist underprivileged children, traumatically injured children and adults, needy, handicapped children and adults, or drug and alcohol rehabilitation programs.

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