Indigent Defense
Ethical Considerations

Madison County Bar Association
Indigent Defense Mentoring Program
Thursday September 24, 2020
Autumn A. Caudell

- Assistant Ethics Counsel
- Director of the Practice Management Assistance Program
- Native of Tuscaloosa, Alabama
- University of Alabama (2010)
- Jones School of Law (2013)
- Private Practice (2013-2019)
Office of General Counsel

• General Counsel
  – Roman Shaul

• Disciplinary Division
  – Jeremy McIntire
  – Mark Moody

• Ethics Division
  – Tripp Vickers
  – Autumn Caudell

• Numerous invaluable staff
What do we do?

**Disciplinary Counsel**

- Investigate & Prosecute
- Disability & Reinstatement
- Character & Fitness Appeals
- CLE Compliance
- CLE Presentations
- “Any other duty or responsibility conferred ... by the Executive Committee of the Board of Bar Commissioners of the Alabama State Bar.”
What do we do?

Ethics Counsel

• Ethics Opinion
• Represent the Bar in Litigation
• Support the Executive Director & Bar Departments
• CLE Presentations
• “Any other duty or responsibility conferred ... by the Executive Committee of the Board of Bar Commissioners of the Alabama State Bar.”
What can I help you with?

• Give you a confidential opinion regarding the ethical propriety of your own prospective conduct based upon a verifiable set of facts.
What I cannot do
Informal Ethics Opinion

• Call: 334-269-1515

• Email: ethics@alabar.org

• Write: Alabama State Bar Center for Professional Responsibilities
  Post Office Box 671
  Montgomery, AL 36104
How lawyers are viewed:
Ranking the Honesty and Ethical Standards of each Profession:

- Nurses: 85%
- Medical Doctors: 65%
- Pharmacist: 64%
- Police Officers: 54%
- Clergy: 40%
- Lawyers: 22%

**2019 Gallup Poll**
What can we do to change that?
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.
Legal Knowledge: Fastcase
• “The revocation procedure used by the circuit court was in complete disregard of Rule 7.5. The circuit court revoked Barnes's bail and ordered Barnes to be taken into custody immediately without the State having filed a motion, without issuing a warrant for Barnes's arrest, and without holding a hearing on matters asserted in a motion by the State.”

*Ex parte Barnes, - - - So.3d - - - (Ala. 2020).*
Competence: Thoroughness and Preparation
Managing Caseloads

• This obligation includes ensuring the attorney has adequate time to investigate each case, prepare the case through each stage of the representation, and research the applicable case law and statutes.

• If an attorney is overwhelmed with cases, it is likely the attorney is not providing competent legal representation and can quickly run afoul of the lawyer’s ethical responsibilities.
Managing Caseloads

• In 1973, the National Advisory Commission on Criminal Justice Standards recommended national annual maximum caseload numbers for indigent defense programs. The recommendation included on average not more than 150 felony cases per year per lawyer and not more than 400 misdemeanor cases per year per lawyer, excluding traffic offenses.

How much is too much?

• The Alabama State Bar has not established a set number of cases that an attorney can carry, but rather each attorney should routinely review their caseloads to determine if they are providing competent legal representation.
Caseload Studies


• Shapiro, B. The Rhode Island Project. (2017) (https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf)

• The American Bar Association Standing Committee on Legal Aid and Indigent Defendants. The Louisiana Project, A Study of the Louisiana Defender System and Attorney Workload Standards. (February 2017). (https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf)


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.
Keeping Clients Informed
What you cannot do
Does your client understand?

• Explain the process, players, facts, and terms to your client so they are informed and able to make competent decisions regarding their case.
• Do not assume your client understands even basic terms.
• Ask follow up questions to gauge your client’s understanding.
Rule 1.6
Confidentiality of Information

• (a) A lawyer shall not reveal information relating to the 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).
Confidentiality

• The rule of client-lawyer confidentiality is much broader and applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.
Attorney-Client Privilege

• The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.
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.
Balancing candor and loyalty

Father, I cannot tell a lie.

...But can I interest you in some alternative facts?
Actual Knowledge

• When a lawyer does not have actual knowledge, but rather only a reasonable belief that the client has lied or offered false evidence, then the lawyer would not have any obligation to disclose his suspicions to the court or the opposing party.
Rule 4.1
Truthfulness in Statements to Others

• In the course of representing a client a lawyer shall not knowingly: (a) Make a false statement of material fact or law to a third person; or (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
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.
Who can you contact?

- Witnesses?
- Police Officers?
- Victims?
- Co-Defendants?
Dos and Don’ts

• Explain who you are and your role
• Explain the reason for your call
• Explain that speaking to you is voluntary
• Maintain client’s confidences

• Do not leave out information to encourage disclosure
• Do not insinuate that you are disinterested or not an attorney
• Do not insinuate that the conversation is mandatory
Rule 1.15 Safekeeping Property

• (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. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. No funds of a lawyer shall be deposited in such a trust account, except (1) unearned attorney fees that are being held until earned, and (2) funds sufficient to pay bank service charges on that account or to obtain a waiver thereof. 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.
What goes where?
Operating Account

- Attorney’s personal funds to operate firm
- Earned fees for services already performed
- Reimbursement of expenses you previously paid
Trust Account

- Settlement Funds
- Damage Awards
- Unearned Fees
- Earnest Money
- Advancement of Expenses
Not just money
File Retention

• Formal Opinion 2010-02
• “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 relation to representation of a client.” the duty to maintain confidentiality includes a duty to segregate, protect a 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 1.15 and may also rise to the level of a breach of 1.6. The principals 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 breach of these principles.”
The Practice Management Assistance Program was established to help lawyers increase the quality of legal services they provide to their clients as well as avoid potential disciplinary problems stemming from poor law office management.
Practice Management Assistance

• Call: 334-269-1515

• Email: autumn.caudell@alabar.org

• Write: Alabama State Bar Practice Management Assistance Program
  Post Office Box 671
  Montgomery, AL 36104
Lawyers and Mental Health
Mental Health Statistics

• In the general population, 1 in 100 people are addicted to drugs or alcohol
• 2 in 100 attorneys are addicted to drugs or alcohol
• Lawyers are 3.6 times more likely to suffer from depression than non-lawyers
• Lawyers have the 7th highest suicide rate among any profession
Risk Factors

- Long work hours
- Isolation
- Self-generated pressure (perfectionism)
- High-stakes cases
- Exposure to dire life situations
- Dealing with difficult clients
- Pressure to make large sums of money
- A “dog eat dog” work environment
Lawyer Assistance Program

• Jeremy Rakes – ALAP Director

• Call: 334-517-2238

• Email: jeremy.rakes@alabar.org

• 24 Hour Helpline: 334-224-6920
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