

Managing Ethical Issues In Your Day-to-Day Practice

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“Build Your Ethical Foundation”

A. Today’s Statutory Requirements for Ethics and Professionalism

Ethics rules represent the mandatory minimum standard of conduct below which no attorney may fall. By contrast, the idea of professionalism represents aspirational standards of conduct that surpass the threshold ethical requirements. The message of professionalism is a combination of competency and diligence, conformance to ethics, civility to others in the legal system and the improving of the legal system. The Preamble to the Alabama Rules of Professional Conduct (“ARPC”) states in pertinent part:

“Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.”

The Alabama Supreme Court adopted, effective January 1, 1991, the Alabama Rules of Professional Conduct (“ARPC”). The Court also has adopted Alabama State Bar Rules of Specialization (effective January 1, 1994); Alabama Rules of Disciplinary Procedure (effective January 1, 1991); Alabama Standards for Imposing Lawyer Discipline (effective January 1, 1999); Alabama State Bar Mandatory Continuing Legal Education Rules & Regulations (effective March 25, 1981); Alabama State Bar Client Security Fund Rules (effective October 1, 1987); Rules Governing Admission to the Alabama State Bar (revised December 19, 1990); Alabama Rules for Legal Internship by Law Students (effective

September 1, 1987); Canons of Judicial Ethics (effective February 1, 1976); and Rules of Procedure of the Judicial Inquiry Commission (effective April 25, 1975).

The Alabama State Bar promulgated two significant canons of conduct: the Lawyer's Creed and the Code of Professional Courtesy. In 1992, the Alabama Board of Bar Commissioners adopted the following statements:

Alabama State Bar Lawyer's Creed

To my clients, I offer faithfulness, competence, diligence and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

Alabama State Bar Code of Professional Courtesy

1. A lawyer should never knowingly deceive another lawyer.
2. A lawyer must honor promises and commitments made to another lawyer.
3. A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement.

4. A lawyer should maintain a cordial and respectful relationship with opposing counsel.
5. A lawyer should seek sanctions against opposing counsel only where required for the protection of the client and not for mere tactical advantage.
6. A lawyer should not make unfounded accusations of unethical conduct about opposing counsel.
7. A lawyer should never intentionally embarrass another lawyer and should avoid personal criticism of another lawyer.
8. A lawyer should always be punctual.
9. A lawyer should seek informal agreement on procedural and preliminary matters.
10. When each adversary proceeding ends, a lawyer should shake hands with the fellow lawyer who is the adversary; and the losing lawyer should refrain from engaging in any conduct which engenders disrespect for the court, the adversary or the parties.
11. A lawyer should recognize that adversaries should communicate to avoid litigation and remember their obligation to be courteous to each other.
12. A lawyer should recognize that advocacy does not include harassment.
13. A lawyer should recognize that advocacy does not include needless delay.
14. A lawyer should be ever mindful that any motion, trial, court appearance, deposition, pleading or legal technicality costs someone time and money.
15. A lawyer should believe that only attorneys, and not secretaries,, paralegals, investigators or other non-lawyers, should communicate with a judge or appear before the judge on substantive matters. These non-lawyers should not place themselves inside the bar in the courtroom unless permission to do so is granted by the judge then presiding.
16. A lawyer should stand to address the court, be courteous and not engage in recrimination with the court.
17. During any court proceeding, whether in the courtroom or chambers, a lawyer should dress in proper attire to show proper respect for the court and the law.

18. A lawyer should not become too closely associate with a client's activities, or emotionally involved with a client.

19. A lawyer should always remember that the purpose of the practice of law is neither an opportunity to make outrageous demands upon vulnerable opponents nor blind resistance to a just claim; being stubbornly litigious for a plaintiff or a defendant is not professional.

The members of the State Bar of Alabama are subject to regulation and discipline by the Alabama Supreme Court. The Court has promulgated Alabama Rules of Disciplinary Procedure and Standards for Imposing Lawyer Discipline. In addition, Ala. Code § 34-3-1, et seq., provides criminal penalties for the unauthorized practice of law in Alabama.

B. Examination of the Code of Professional Conduct and Other Ethical Canons That Govern Attorneys

The ARPC and comments thereto were largely drawn from the American Bar Association's Model Rules of Professional Conduct ("MRPC"). Certain modifications were made to the Model Rules and comments before they were approved by the Alabama Supreme Court. The ARPC and related regulatory provisions have been amended and modified from time to time.

The ARPC generally follows the ABA model rules with minor changes. For example, ARPC Rule 1.3 provides a "willful neglect standard" as opposed to the "reasonable" standard promulgated by MRPC Rule 1.3. In addition, ARPC Rule 7.3 relating to direct contact with prospective clients is substantially more detailed than MRPC Rule 7.3.

The ARPC consists of eight (8) sections:

- Client-Lawyer Relationship

- Counselor
- Advocate
- Transactions with persons other than clients
- Law firms and associations
- Public service
- Information about legal services
- Maintaining the integrity of the profession

Even a brief synopsis of each rule in the ARPC would take volumes. This paper only examines § 1, “Client-Lawyer Relationship”. This section contains, by far, the most substance of any other section in the ARPC and is the most frequently encountered in everyday practice. The following rules are the most pertinent in § 1: Communication (Rule 1.4), Fees (Rule 1.5) and Conflict of Interest (Rule 1.7).

a. *Communication*

1.4:

(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.

Rule 1.4, ARPC

The Comment to Rule 1.4 states:

“The guiding principle under this Rule is that the lawyer should fulfill the reasonable expectation of the client for information. In determining what is reasonable, the lawyer must consider that the lawyer

has a duty to act in the client's best interests. However, each client will have different levels of willingness, ability, and desire to participate intelligently in the representation. These levels are often dependent upon the kind of representation. Thus, the guiding principle is contingent upon the client's reasonable expectation but is limited or expanded by the client's willingness, ability and desire to participate in the particular representation, and by the practicability of the lawyer's meeting the client's expectations."

Rule 1.4, ARPC

Communication is fundamental in managing client expectation. Lawyers have been trained to be effective communicators who must make certain that their clients have a sufficient understanding of pertinent issues in a timely manner. Effective communication between lawyer and client will buttress the relationship, thus minimizing misunderstandings. Perhaps more critical, it protects the lawyer from fee disputes, grievances and malpractice claims.

b. Fees

ARPC 1.5 has six subparts as set forth below. Subpart "a" addresses the reasonableness of a fee (i.e.-whether a fee is excessive). 1.5(a) states:

(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 requisite 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.*

In *Carver v. Foster*, 928 So. 2d 1017 (Ala. 2005), a case involving an award of attorney fees, the Alabama Supreme Court, citing *Peebles v. Miley*, 439 So. 2d 137 (Ala. 1983), noted 12 factors a trial court needs to consider in awarding an attorney fee:

"(1) the nature and subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of the attorney's responsibility; (6) the measure of success achieved; (7) the reasonable expenses incurred by the attorney; (8) whether the fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances."

928 So. 2d at 1025.

The Alabama Supreme Court addressed the "reasonableness" of a contingency fee in *Smesler v. Trent*, 698 So.2d 1094 (Ala. 1997). In *Smesler*, the Court upheld a one-third contingent fee arrangement on the sale price of a farm focusing on the nature and extent of the attorney's work, the amount involved and the results obtained. *Id* at 1095.

1.5(b) and (c) stress communication of the fee to the client. They state:

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 1.5(b) suggests, but does not require that lawyers provide their clients with a written statement detailing the basis or rate for the fee. However, ARPC 1.5(c) requires a lawyer to put a contingent fee agreement in writing. The writing must include: the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from recovery, and whether such expenses shall be deducted before or after the contingent fee is calculated. The lawyer must also provide the client with a written statement indicating the outcome of the matter and in the case of recovery, a showing of the remittance to the client how it was determined.

1.5(d) provides the situations in which a lawyer may not charge a contingency fee. 1.5(d) states:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

Contingency fee arrangements in initial divorce proceedings are prohibited. One concern is that a contingent fee in such a situation is unnecessary since the spouse retaining the majority of the property will have sufficient funds to compensate the lawyer and the spouse without assets will also be protected by a court order directing the spouse with the greater assets to pay the other spouse's attorney's fees. RO-96-01. In addition to fairness concerns, the rules take into account a fear that allowing a contingent fee arrangement would give the lawyer an interest in discouraging or thwarting reconciliation of the parties. 54 Alabama Lawyer 20 (1993).

Rule 1.5(e) addresses the division of fees between lawyers. It states as follows:

(e) A division of fee between lawyers who are not in the same [firm](#), including a division of fees with a referring lawyer, may be made only if:

(1) either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;

(2) the client is advised of and does not object to the participation of all the lawyers involved;

(3) the client is advised that a division of fee will occur; and

(4) the total fee is not clearly excessive.

An attorney who refers a case because of a conflict of interest should not share in the fee eventually recovered. See *generally*, 1.5:101.

Finally, 1.5(f) addresses the handling of fees when representing an indigent criminal defendant. 1.5(f) states as follows:

(f) Without prior notification to and prior approval of the appointing court, no lawyer appointed to represent an indigent criminal defendant shall accept any fee in the matter from the defendant or anyone on the defendant's behalf. A lawyer appointed to represent an indigent criminal defendant may separately hold property or funds received from the defendant or on the defendant's behalf which are intended as a fee for the representation, as provided for by Rule 1.15, only if the lawyer promptly notifies the appointing court and promptly seeks its approval for accepting the property or funds as a fee.

a. *Conflicts of Interest*

ARPC 1.9 addresses conflicts involving former clients and is often the subject of litigation. Rule 1.9 provides:

"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."

Rule 1.9, ARPC

The party moving for an attorney's disqualification under Rule 1.9 bears the burden of proving the existence of a conflict of interest. See, *Ex parte Tiffin*, 879 So. 2d 1160. "A former client seeking disqualification for the conflict addressed in Rule 1.9 must demonstrate (1) that it had an attorney-client relationship with the attorney the former client seeks to disqualify and (2) that the attorney represented the former client in a (3) substantially related matter." *Ex parte Intergraph Corp.*, 670 So. 2d 858, 860 (Ala. 1995).

If the former client satisfies this burden, the attorney's disqualification/incapacity may be imputed to the entire firm, as stated in Rule 1.10(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."

"The substantial relationship test is the keystone of the law on conflicts of interests involving former clients." 1 *Lawyers' Manual on Professional Conduct* (ABA/BNA) 51:221 (2004) (hereinafter "*Lawyers' Manual*"). "The test entails inquiry into the similarity between the factual situations, the legal issues posed, and the nature and extent of the attorney's involvement to see if information from the prior representation is material to the new representation." *Lawyers' Manual*

51:225. See also *Ex parte State Farm Mut. Auto. Ins. Co.*, 469 So. 2d 574, 575-76 (Ala. 1985) The Comment to Rule 1.9 states:

"The scope of a 'matter' for purposes of paragraph (a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. ... The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."

Mere "blanket statements" will not suffice to satisfy the former client's burden. *Ex parte Rush*, 574 So. 2d 808, 810 (Ala. Civ. App. 1990). "Only when the moving party delineates with specificity the subject matters, issues, and causes of action presented in former representation can the ... court determine if the substantial relationship test has been met. Merely pointing to a superficial resemblance between the present and prior representations will not suffice." *Ex parte State Farm Mut. Auto. Ins. Co.*, 469 So. 2d at 575-76 (emphasis added) (quoting *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1029 (5th Cir. 1981)).

C. The Statutes, Codes and Canons to Everyday Life

The Alabama Supreme Court has adopted the rules discussed above to regulate the practice of law in the State of Alabama. In addition, Ala. Code § 34-

3-1, *et seq.* addresses the unauthorized practice of law. In addition, the Office of General Counsel of the Alabama State Bar issues ethics opinions regarding their interpretation of the ARPC. Frequently requested opinions are maintained on-line at the Alabama State Bar web page which can be found at: www.alabar.org.

In the last three years the Alabama State Bar Office of General Counsel (“OGC”) has released three public opinions. The OGC released two opinions last year. The first, Opinion Number: 2005-1, addressed whether a city attorney, whom is also a defense attorney in city court, may waive a conflict of interest. A municipal judge, and an attorney whose law firm represents the municipality in civil matters only, both submitted opinion requests concerning the conflict of interest the attorney, and the other attorneys in his firm, would have if they undertake to defend criminal clients in Municipal Court. The city attorney acknowledged that he and his firm would have a conflict, however, the mutual inquiry from both the attorney and the judge is whether, and subject to what conditions, this conflict may be waived. The following answer is the OGC’s joint response to both requests. “It is the opinion of the Office of General Counsel that this conflict situation is so fraught with potential ethical pitfalls that the advisability of waiver and consent appears to be, at best, highly questionable. However, this office will not go so far as to hold this conflict to be absolutely unwaivable, despite the many ethical concerns discussed below.” OGC Opinion Number: 2005-1.

The second and last opinion from 2005, Opinion Number: 2005-2, essentially reaffirmed the OGC adoption of ABA Formal Opinion 93-379. Said

opinion addressed the issues surrounding a lawyer's billing for attorney's fees, costs and other expenses incurred during the representation of the client.

The OGC released a formal opinion this year involving the direct solicitation of former and present clients. Formal Opinion Number: 2006-1 provided the circumstances in which an attorney may conduct direct solicitation - via in-person contact or by telephone - for professional employment under Rule 7.3(a), Alabama Rules of Professional Conduct. The opinion states: "Rule 7.3(a), Ala. R. Prof. C., expressly authorizes an attorney to directly solicit any family member (related by blood or marriage), former client, or current client."

Conclusion

All lawyers should familiarize themselves with the rules that govern ethical conduct. While a lawyer can avoid professional sanctions by following professional ethical standards, minimal compliance with ethical rules alone is not the final goal. The drafters of the proposed Model Rules for Professional Conduct recognized this and pointed out in the preface that such rules "do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."