

The Ethics of Professionalism

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Most Often Violated Rules

1. Failure to Communicate (Rule 1.4, Ala. R. Prof. C.)

- 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
 - Turn-down or Disengagement (Rule 1.16(d))
 - 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
- Information reasonably necessary to allow the client to make informed decisions regarding the representation

2. Lack of Diligence (Rule 1.3, Ala. R. Prof. C.)

- Failure to communicate
- Scope of representation
- Procrastination
- Poor office management
 - No case tracking

- No conflicts checks system
- No follow up
- No system
- Heavy workload
- A note about Incompetence (Rule 1.1, Ala. R. Prof. C.)

3. Client funds (Rule 1.15, Ala. R. Prof. C.)

- 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, misdirected documents)
- 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.
- 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.
- 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, except funds to pay account expenses or funds jointly owned by lawyer and client and/or third party at time of receipt.
- Trust Designation - 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 - 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."
- 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 three (3) business days of notice of non-collection.
- 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.

4. Bar Admission and Disciplinary Matters (Rule 8.1, Ala. R. Prof. C.)

- False statement of material fact
- Failure to disclose a material fact
- Failure to respond to requests for information

5. Misconduct (Rule 8.4, Ala. R. Prof. C.)

- Violate or attempt to violate a rule
- Assist or induce another to violate a rule
- Violate a rule through the acts of another
- Commit a criminal act
- Conduct involving dishonesty, fraud, deceit, misrepresentation
- Conduct prejudicial to the administration of justice
- Influence peddling
- Assist a judicial officer in the violation of the Canons of Judicial Ethics or other law
- Any other conduct that adversely reflects on fitness

Disciplinary Statistics 2016

Complaints Received	1149
Complaints Screened Out	839
Formal Investigation Files Opened	168
Private Reprimands	24
Public Reprimands	14
Suspensions	20 (in 25 files)
Disbarments	4 (in 17 files)
Consent to Disbarment	4
Transfer to Disability Inactive	7
Probation (in connection with discipline)	4
Formal Opinions Issued	0
Informal Opinions Issued	3,300 (approximately)

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. Conflicts issues always involve considerations of the principles of confidentiality, client loyalty, client trust, client choice, the lawyer's exercise of independent professional judgment, and the 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
 - “(1) 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 the client is highly sophisticated and the conflict as well as its effects were foreseen and discussed at the time the prospective waiver was obtained
 - The best practice is not to rely solely on a prospective waiver

RULE 1.15 AND TRUST ACCOUNTING

A. The Importance of Trust Account Management

The importance of trust account management cannot be overemphasized. Lawyers who accept client or third-party funds have a fiduciary duty to segregate and safeguard those funds and account for every penny.

It is *trust* accounting because of the high fiduciary responsibility that a lawyer assumes when he accepts client or third-party funds. The goal of trust accounting is to eliminate the actual loss and even the risk of loss of client funds while in the possession of the lawyer.

Trust accounting should not be viewed as an inconvenience that can be disregarded or a task that can be delegated. It is an integral part of the lawyer-client relationship and the practice of law.

Trust accounting is a professional obligation that cannot be ignored, delegated, transferred, or excused by the ignorance, inattention, incompetence, or dishonesty of the lawyer or the lawyer's employees or associates.

1. Trust account mismanagement adversely affects the lawyer client relationship.

A client expects their lawyer to account for every penny of money or other property held by the lawyer. Moreover, the client expects a prompt answer. If the client has to wait days or weeks for an answer, then that is a sure sign that the lawyer is not properly managing the trust account. The messages conveyed to the client are:

The client is not *important*.

The client matter is not *important*.

The lawyer is not *responsible*.

The lawyer is not *competent*.

The lawyer is not *honest or trustworthy*.

2. Trust account mismanagement affects the lawyer's professional reputation.

When a lawyer does not properly manage the trust account, the resulting disciplinary consequences and/or damaged client relationships adversely affect the lawyer's professional reputation. When a client has to wait days or weeks for a lawyer to provide an accounting of funds held in trust or when a client cannot negotiate a trust account check immediately upon receipt, that client most likely will never retain the lawyer again, will tell others about the experience, and may report that lawyer to the Bar.

3. Trust account mismanagement results in discipline.

Mismanagement of a trust account often results in serious disciplinary consequences. The requirements of Rule 1.15, *Alabama Rules of Professional Conduct*, are strictly enforced.

Disbarment is generally appropriate when a lawyer knowingly converts or “borrows” trust funds and causes injury or potential injury.

Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with trust funds and causes injury or potential injury.

Public reprimand is generally appropriate when a lawyer is negligent in dealing with trust funds and causes injury or potential injury.

B. What is Your Rule 1.15 IQ?

- 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. This includes closing funds.
- 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. Rule 1.15(a) Withdrawals shall be made only by check payable to a named payee or by authorized electronic transfer. Rule 1.15(f)(3) Checks may not be made out to cash.
- 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). Rule 1.15(a)
- 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.” Rule 1.15(a)
- 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.” Rule 1.15(a)

- 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. Formal Opinion 2008-03. Receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item. Rule 1.15(f)(2)
- 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. Complete records include:*
 1. Receipt and disbursement journals
 2. Ledger records for all client trust accounts
 3. Copies of Retainer and Compensation agreements
 4. Copies of Accounting Statements to clients or third persons
 5. Copies of Bills for legal fees and expenses rendered to clients
 6. Copies of Bank Statements, canceled checks and deposits

Rule 1.15(e) and (j)

- 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. Rule 1.15(b)
- Prompt Delivery - A lawyer must promptly deliver those funds to the person entitled to receive them. Rule 1.15(b)
- 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. Rule 1.15(b)
- 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. Rule 1.15(c)

- Prompt Resolution - When ownership is in dispute the lawyer should suggest means for prompt resolution of the dispute. Rule 1.15(c)
- 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 working days of notice of noncollection. Rule 1.15(d)
- 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. Rule 1.15(e)
- Direct Supervision Required – Only a lawyer or a person under the direct supervision of the lawyer may be an authorized signatory on a client trust account.
- 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.

C. Do's and Don'ts for Trust Account Management

- Read Rule 1.15, Alabama Rules of Professional Conduct.
- Do not withdraw funds with an ATM card or with a withdrawal slip at the teller window.
- Do not write checks payable to "Cash."

- Do not make split or cash-back deposits.
- Make copies of all items received and deposited.
- Transfer earned fees to the general account regularly with adequate notation or documentation to show the source of the fees.
- Pay all expenses not related to the client representation out of the general account.
- Reconcile the trust account monthly.
- All firm bank statements should be delivered unopened to you each month for review.
- Secure bank statements and trust account records and limit access to them.
- Keep a running list of outstanding checks and review it monthly. No check should remain outstanding for more than two months without investigation and resolution.
- If there is an irregularity in the account, then you are responsible to investigate and resolve it.

Retention, Storage, and Destruction of Client Files

- Lawyers should adopt a file retention policy and disclose such to clients at the outset of representation
- Generally, the file is the property of the client
- Segregate file from property of attorney and other clients
- Promptly produce to client upon request, except, if the attorney has a valid attorney's lien. (Ala. Code § 34-3-61 (1975))

- Providing contemporaneous copies during representation does not terminate lawyer's obligation to provide client full copy of file at the end of representation unless provided for in employment agreement
- Initial copy must be provided at no charge
- Must retain client's file for a minimum of six years
- May store client files electronically
- May use a cloud server for storage
- Must reproduce file in the format requested by the client
- Disciplinary Commission has adopted the entire file approach in determining what must be given to the client. Exceptions do exist, such as, client has a mental health disorder or where information in the file could endanger the safety and welfare of the client or others.
- 3 Categories of property
- Category 1 is intrinsically valuable property such as original wills and deeds. Such property may not be destroyed.
- Category 2 is valuable property of the client. Such property may be destroyed with the actual consent of the client or upon implied consent or within 60 days of a date established by the lawyer's file retention policy or as provided by notice to the client by the lawyer of the item's impending destruction. (Ex. Notifying client of such by written notice to client's last known address)
- Category 3 is property with no value. It may be destroyed after six years without notice to the client.
- Lawyer must maintain an index of all destroyed files and should identify the following: identity of client, nature or subject matter of the representation, date the file was opened and closed, court case number, general description of property destroyed, and the date of destruction.