

PROFESSIONAL ETHICS
BEASLEY ALLEN SEMINAR

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I. ORGANIZATION AS CLIENT

A. Organizational Client

"Rule 1.13 * * *

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

* * *

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

B. Clarifying Lawyer's Role

C. Identify Your True Client

II. CONFLICTS- -Conflict Questions are the Most Often Asked Question to OGC Attorneys

A. Present Client

1. "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.”

2. Adverse Parties – Same Case

3. Adverse Parties – Unrelated Case

4. Would a waiver be reasonable?

5. Other Clients

6. Lawyer’s Own Interests

7. Client Consent

8. Advance Waivers

B. Former Client-Rule Most Often Asked About-You Answer Your Own Questions with 1.9 Analysis

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. Duty of Loyalty and Confidentiality to Former Client
- 3. Rule 1.9(b) Analysis

RO 1994-13

"...Rule 1.9(b) is directed to the protection of client confidences gained by a lawyer during the former representation. Public information or information generally known is not encompassed in the rule. *There is a presumption that a lawyer has gained confidential information in the prior representation of a client.* That can be rebutted by the lawyer. There is also the presumption that if a lawyer possesses confidential information that he will potentially use it in a way adverse to the former client. In that sense, if the confidential information is in any possible way disadvantageous to the former client, the lawyer is disqualified.

If it is found that [the lawyer] could use the information he gathered during his short representation of [the former client], in any adverse way, or that he would have an advantage because of his acquired knowledge, then he and the firm are disqualified from representing [the subsequent client]. If an analysis of the information reveals that it could not be used by [the lawyer], in any way, in the [subsequent case], then the firm is not disqualified.

The Disciplinary Commission is not going to make any factual or other findings determinative of this question. There is a motion to disqualify pending in the trial court and those matters are for the court to decide...”

4. Cannot pick & choose –

You may not terminate a client, thereby relegating them to former client status, in order to avoid the Rule 1.7(a) requirement for conflicts involving current clients and instead apply the lesser Rule 1.9(b) standard.

C. Imputed Disqualification - Lawyers Moving

1. Lawyers

"Rule 1.10 Imputed Disqualification: General Rule

- (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."

2. Non-Lawyer Employees (RO-2002-01)

"A nonlawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a nonlawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and must therefore be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case."

III. WHO IS YOUR CLIENT?

A. Third Party Payor

"Rule 5.4 Professional Independence of a Lawyer

- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

B. Insurer & Insured -

1. *Primary Duty - Insured*
2. *Secondary Duty – Insurer*
3. *UNLESS – Reservation of Rights*

Nationwide Mutual Insurance Company v. Smith, 280 Ala. 343, 194 So.2d 505 (1966); *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988); and

***L & S Roofing Supply Co., Inc. v. St. Paul Fire and Marine Insurance Co.*, 521 So.2d 1298 (Ala. 1987):**

"Although you were retained to represent the insured by the insurance company and are paid by the company, your fiduciary duty of loyalty to the insured is the same as if he had directly engaged your services himself. See, RO-84-122; *Nationwide Mutual Insurance Company v. Smith*, 280 Ala. 343, 194 So.2d 505 (1966) and *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 536 F.2d 730, (7th Cir. 1976). Since the interests of the two clients, the insurance company and the insured, do not fully coincide, the attorney's duty is first and primarily to the insured."

Similar conclusions were reached in RO-90-99 and RO-81-533. Additionally, the Alabama Supreme Court discussed the insurer-insured relationship in *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988) and confirmed the Disciplinary Commission's analysis of that that relationship:

"It must be emphasized that the relationship between the insured and attorney is that of attorney and client. That relationship is the same as if the attorney were hired and paid directly by the insured and therefore it imposes upon the attorney the same professional responsibilities that would exist had the attorney been personally retained by the insured. These responsibilities include ethical and fiduciary obligations as well as maintaining the appropriate standard of care in defending the action against the insured." 533 So.2d at 199."

This relationship was also discussed at length in the opinion of the Alabama Supreme Court referenced in your inquiry, *L&S Roofing Supply Co., Inc. v. St. Paul Fire and Marine Insurance Co.*, 521 So.2d 1298 (Ala. 1987).

C. Confidential Information

"Rule 1.8 Prohibited Transactions

* * *

- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3."

IV. RULES 4.2 & 4.3-Can I Talk to That Person? With or Without Counsel?

A. Communication with Person Represented by Counsel

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 to do so..."

COMMENT

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with *persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.* If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(d)

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

2. Former Employees

RO 1992-12 “Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation’s lawyer.

With respect to any unrepresented former employee, of course, the potentially communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer’s counsel are protected by the privilege (a privilege not belonging to or for the benefit of the former employee, by the former employer). Such an attempt could violate Rule 4.4 (requiring respect for the rights of third persons).”

B. Unrepresented Parties

“Rule 4.3 Dealing with Unrepresented Persons

(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....”

V. “Rule 1.16 Declining or Terminating Representation

A. Withdrawal

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client, if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;

- (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(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.”

B. Fees, Files and Expenses

1. Hey, buddy, that's my client

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.”

2. That's my file

a. RO 2010-02 – “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.”

b. Attorney's Liens (Title § 34-3-61)

"34-3-61 Liens.

(a) Attorneys-at-law shall have a lien on all papers and money of their clients in their possession for services rendered to them, in reference thereto, and may retain such papers until said claims are satisfied, and may apply such money to the satisfaction of said claims."

VI. Multiple Clients

"Rule 1.8 Prohibited Transactions

* * *

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client, 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

the claims or pleas involved and of the participation of each person in the settlement."

VII. Avoid these pitfalls

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 matter."

2. You may state that you will "pursue all available legal remedies."

B. Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

* * *

- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

VIII. CALL US – 334.269.1515 / 800.354.6154

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A. Ethics Opinions

Rule 18, Alabama Rules of Disciplinary Procedure

"Rule 18 Conduct Not Subject to Disciplinary Action

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, to the Office of General Counsel, said inquiry shall be considered confidential. Additionally, if said lawyer receives a formal or informal opinion from the Office of General Counsel that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action.

[Amended 9-20-2016, eff. 1-1-2017.]

B. Informal Opinions

1. What can we do?

We'll give you informal opinions regarding your own prospective conduct.

2. What we cannot do?

- a. Comment on the conduct of another lawyer
- b. Comment on your past conduct
- c. Answer hypothetical questions
- d. Give legal advice

C. Write - Alabama State Bar, P.O. Box 671
Montgomery, Alabama 36101-0671

D. Call – 334-269-1515
800-354-6154

E. Explore our website – www.alabar.org

2017 – DISCIPLINARY STATS

Complaints Received	1161
Complaints Screened Out	847
Formal Investigative Files Opened	156
Private Reprimands	36
Public Reprimands	13
Suspensions	22
Disbarments	4
Consent to Disbarment	3
Transfer (under Rule 27)	18
Probation (in connection with discipline)	3
Surrender of License	3
Formal Opinions Issued	0
Informal Opinions Issued	3800