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Ethics Opinions from the State Bar:

'You Were Serious About That?'

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RULE 1.2 SCOPE OF REPRESENTATION[1]

ETHICS OPINION 2010-01

May a lawyer participate in the "unbundling" of legal services?

In recent years, the practice of offering clients "unbundled" legal services has grown in popularity. "Unbundled" legal services are often referred to as "a la carte" legal services or "discrete task representation" and involve a lawyer providing a client with specific and limited services rather than the more traditional method of providing the client full representation in a legal matter. The unbundling of legal services falls into three general categories: consultation and advice; limited representation in court; and, document preparation. For example, the client and lawyer may agree that the lawyer will be available for consultation on an hourly basis regarding a specific matter, but the lawyer will not undertake to represent the client in the matter or file a notice of appearance in the case. Sometimes, the lawyer may agree to make a limited appearance on behalf of the client at a hearing, but will not represent the client in the actual trial of the matter. Most often, however, the lawyer agrees to prepare an initial complaint for a client that the client will then file pro se. In that instance, the lawyer's drafting of the complaint is most often referred to as "ghostwriting". Rule 1.2, Ala. R. Prof. C., allows a lawyer to limit the scope of his or her representation, and thereby, the services provided for the client. As such, a lawyer may participate in the "unbundling" of legal services.[2] Ordinarily, a lawyer is not required to disclose to the court that the

[1] **Alabama Rules of Professional Conduct: Client-Lawyer Relationship, Rule 1.2--Scope of Representation.** (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities. (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. (1) The client's informed consent must be confirmed in writing unless: (i) the representation of the client consists solely of telephone consultation; (ii) the representation is provided by a lawyer employed by a nonprofit legal-services program or participating in a pro bono program approved by the Alabama State Bar pursuant to Rule 6.6 and the lawyer's representation consists solely of providing information and advice or the preparation of legal documents; or (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order. (2) If the client gives informed consent in writing signed by the client, there shall be a presumption that: (i) the representation is limited to the attorney and the services described in the writing; and (ii) the attorney does not represent the client generally or in matters other than those identified in the writing. (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct. [Amended eff. 3-26-2012]

[2] The rationale behind offering clients the option of unbundled legal services is two-fold. First, the unbundling of legal services is viewed as a means of helping clients control the cost of litigation by allowing the client to pick and choose which services the lawyer will actually provide. Advocates of the unbundling of legal service contend that such limited representation provides lower and middle income individuals greater access to legal assistance than they would normally be able to afford. Advocates argue that many such individuals do not have the financial means to employ a lawyer under the more traditional full representation approach. Another proposed benefit is that the

lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.

2) The issue of the lawyer's involvement in the matter is not material to the litigation.

3) The lawyer is not required to disclose his involvement to the court by law or court rule.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue. Any agreement by a lawyer and his or her client to limit the scope of representation or the services to be performed by the lawyer should be reduced to a written document signed by both the client and the lawyer.

unbundling of legal services allows a lawyer to provide limited assistance to individuals when the lawyer may not have the time or resources to undertake full representation.

RULE 1.5: FEES

ETHICS OPINION R0-2015-01

May a lawyer representing a client on a contingency fee basis enter an agreement for, charge, or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter charge an additional contingent fee for the negotiation of a reduction of third party liens or claims, for example medical bills, statutory liens, and subrogated claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter?

Absent extraordinary circumstances, a lawyer may not enter into an agreement for, charge, or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter charge an additional contingent fee for the negotiation of a reduction of third party liens or claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter. Rule 1.S(a), Ala. R. Prof. C., states that "[a] lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee," and identifies nine factors to be considered when determining whether a fee is clearly excessive.[3] A lawyer may not, even if in writing and signed by the client, enter into an agreement

[3] **Alabama Rules of Professional Conduct** -- **Client-Lawyer Relationship Rule 1.5. Fees.** (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. (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. (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. (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. (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

or agreements which call for an attorney's fee based on the gross recovery or settlement of a matter and in the same matter charge an additional contingent fee for the negotiation of a reduction of third party liens or claims which are related to, and to be satisfied from, the gross settlement proceeds from that matter. This is because the negotiation of a reduction of third party liens and claims is incident to normal personal injury representation. Frequently necessary to reach a settlement of a client's personal injury claim, this service is a routine element of case management.

ETHICS OPINION # 2005-02

The Disciplinary Commission, in RO-94-02, addressed the issues surrounding a lawyer's billing a client for attorney's fees, costs and other expenses incurred during the representation of the client.

Incidental to the lawyer's fee are those expenses and costs incurred by the lawyer during the representation of the client. In those situations where there is no pre-existing lawyer-client relationship, Rule 1.5(b), Alabama Rules of Professional Conduct, encourages the lawyer to communicate to the client, preferably in writing, the basis or rate of the fee to be charged by the lawyer for representing the client. The Rule suggests that this communication occur "before or within a reasonable time after commencing the representation." A.R.P.C., 1.5(b). The Comment to Rule 1.5 encourages that "… an understanding as to the fee should be promptly established." The lawyer is also given an opportunity at the outset of representation to fully discuss and address any concerns which the client may have concerning the total fee, which would obviously include costs and expenses to be reimbursed to the lawyer by the client.

Rule 1.5(a), A.R.P.C., also prohibits a lawyer from entering into an agreement for, or charging, or collecting a clearly excessive fee. For that reason, the lawyer should, when assessing the reasonableness of the fee, take into consideration, not only the basic attorney fee, but the total amount to be paid by the client, including costs and expenses reimbursed to the lawyer. The primary focus of the assessment should be to determine whether the total charges to the client are reasonable.

The basic costs or expenses incurred by the lawyer in representing the client can be broken down into two basis categories: (1) Those costs which are incurred by the lawyer within the firm itself, e.g., photocopying, postage, audio and videotape creations, producing of exhibits and the like; and, (2) Costs incurred external of the law firm or outsourced by the law firm in further representation of the client, e.g., depositions, production of records from a third party, travel and lodging and the like. In ABA Formal Opinion 93-379, charges other than professional fees are broken down into three groups, for discussion: (A-1) General overhead[4]; (B-2) disbursements; and (C-3) in-house provision of services.

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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.

[4] With regard to overhead, the opinion states:
"In the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services."

That opinion does not consider overhead as an expense which is to be passed along to the client independent of the basic fee for professional legal services. With regard to disbursements (B-2) above, the opinion points out that it would be improper "… if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item." This would include, but not be limited to, litigation expenses such as jury consultants, mock trials, focus groups and the like. The opinion also points out that if a lawyer receives any type of discounted rate or benefit points, then those discounted rates or benefit points should be passed along to the client.

With regard to (C-3) above, the opinion states that "… the lawyer is obliged to charge the client no more than the direct cost associated with the service … plus a reasonable allocation of overhead expenses directly associated with the provision of the service …". The obvious reasoning behind this approach is that the lawyer should not utilize the lawyer-client relationship, beyond the fees for professional services, to "manufacture" a secondary source of income by inflating costs and expenses billed to a client.

In reviewing this aspect of the lawyer-client relationship, it is also necessary to consider possible abuses by lawyers of a lawyer-client relationship with regard to fees charges for the lawyer's professional services. ABA Formal Opinion 93-379 recognizes two possible scenarios where a lawyer's billing practices would contravene the Rules of Professional Conduct. In one situation, the lawyer bills more than one client for the same hours spent. If a lawyer appears on behalf of multiple clients for one docket call, with each client being a separate case file and separate lawyer-client relationship, may the lawyer bill each file for the total number of hours spent at the docket call? The obvious answer to this would be no. Otherwise, the lawyer would be guilty of using a multiplier for his time spent on behalf of a client which would be not only misleading, but, in some instances, rise to the level of fraud.

The classic example would be a lawyer appointed to represent indigent defendants in criminal cases. The lawyer receives notices that he has three separate clients on the same morning docket. The lawyer sits and participates throughout the docket which spans some two hours. Upon returning to his office, the lawyer then bills each of the client files the two hours expended in court, totaling hours in multiple of the number of client files presented during that docket. The situation would develop whereby a lawyer would actually be billing more hours than actually expended by the lawyer, which would contravene not only public policy, but also the Rules of Professional Conduct.

A second situation involves a lawyer who performs work for one client while engaged in an activity for which he bills another client. The classic example is the lawyer who flies from one city to another for a deposition on behalf of Client A. The time spent by the lawyer in traveling to and conducting the deposition would be billed to Client A. However, during the flight, the lawyer works on files for Client B. May the lawyer also charge Client B for the same time for which he is billing Client A? Again, the obvious answer would be no. To allow otherwise would constitute double billing by the lawyer for his or her time.

Lastly, there is a possibility that lawyers "recycle" documents and research on behalf of clients. The classic example arises where a lawyer has done a significant amount of research and drafted memoranda, pleadings, or other documents on behalf of a client. The client is billed for this research and these documents. Later, the lawyer is hired by a new client, but in discussing the case with the new client, the lawyer realizes that he or she may be able to utilize the research and documents created for the predecessor client. May the lawyer now charge the same number of hours billed to the initial client, to

this subsequent client, even though the actual time will not be necessary to recreate the research and documents in question? Again, the obvious answer would be no.

Other Ethics Opinions Regarding Fees and Expenses

- 2011-01--Lawyer's Indemnification of Defendants for Unpaid Liens (rev. 7/21/2017)
- 1998-01--Contingency fee contract in collection of child support arrearage cases impermissible absent extraordinary circumstances
- 1997-02--An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding
- 1996-01--A lawyer may not charge contingent fee in domestic relations matter–prohibition also applies to representation concerning antenuptial agreement which is inseparable from divorce proceedings
- 1995-08--Local bar association referral service may utilize percentage fee program if income thereby generated is used to defray costs of program or to support other public service programs
- 1995-02--In-house counsel for finance/title company may not remit attorney fees to company as such constitutes division of fees with nonlawyer
- 1994-07--Reasonableness of lawyer's percentage fee in foreclosure case must take into consideration factors enumerated in Rule 1.5
- 1994-03--Lawyer representing collections agency in pursuing child support arrearage for custodial parents must guard against fee-splitting with nonlawyer and possible solicitation by agency of prospective clients
- 1994-02--Guidelines for billing by lawyers for professional fees, disbursements, and other expenses (Adoption of ABA Formal Opinion 93-379)
- 1994-01--In-house counsel for banking company conducting real estate closings–division of fees with nonlawyers and possible unauthorized practice of law problems
- 1993-21--Lawyer may not characterize a fee as non-refundable or use other language in a fee agreement that suggests that any fee paid before services are rendered is not subject to refund or adjustment
- 1993-20--Rule 5.4 prohibits fee-splitting with non-lawyer, but lawyer may pay a non-lawyer for services rendered to the lawyer
- 1993-19--Lawyers may utilize "LAWCARD" as method of payment by clients for past or future legal fees
- 1992-17(1)-- Non-refundable retainers discussed(2) In abiding by client's decision regarding settlement, lawyer may participate in confidential settlement even though there may be possibility of adverse consequences on third parties or the public
- 1992-13--Fee-splitting with non-lawyer
- 1991-05--Lawyer may enter into contingent fee agreement to collect child support arrearage where client is unable to pay reasonable attorney's fee on a non-contingent basis (Modified by RO-98-01)
- 1990-86--Contingent fee – attorney lien – quantum meruit

- 1990-85--Lawyer's "selling" of his collections practice files to collections agency in which he has financial interest discussed
- 1990-48--Lawyer properly interplead disputed trust funds into court to allow adjudication of clients' and third-party creditors' rights to said funds
- 1990-12--Payment of lawyer's fees by third party must not impair independent professional judgment of lawyer
- 1990-08--Unclaimed client trust funds–lawyer's obligation to ascertain true owner, escheatment of unclaimed funds which appear to be lawyer's fees to lawyer
- 1990-02--Suspended or disbarred lawyer may receive, subsequent to the date of his suspension or disbarment, legal fees to which he was entitled for work performed prior to his suspension or disbarment.
- 1986-02--Subject to attorney's lien, attorney must provide copies of client's complete file to client upon request
- 1983-77--Payment to investigator for locating witnesses and documents relevant to lawsuit

RULE 1.6: CONFIDENTIALITY OF INFORMATION[5]

ETHICS OPINION 2010-03

When a lawyer is retained to assist in the administration or probate of an estate, whom does the lawyer represent?

Generally, the lawyer represents the individual that hired him or her to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the Personal Representative, the lawyer represents the Personal Representative individually, unless the Personal Representative and lawyer agree otherwise. As a result, the lawyer would owe the Personal Representative a duty of loyalty and confidentiality just as he would any other client pursuant to Rule 1.6, Ala. R. Prof. C.[6]

The lawyer must be careful not to, either by affirmative action or omission, give the impression that he or she also represents the beneficiaries of the estate. As a result, if the client is the Personal Representative only, the lawyer must advise the heirs and devisees and other interested parties in the estate known to the lawyer that the lawyer's only client is the Personal Representative in order to avoid violating Rule 4.3. Upon commencement of representation, the lawyer should clarify with the Personal Representative the role of the lawyer, the scope of representation, and the Personal Representative's responsibilities towards the lawyer, the court, beneficiaries, and other interested third parties. If the lawyer fails to provide such clarification, it could be found that he or she has undertaken to represent both the fiduciary and the beneficiaries of the estate.

ETHICS OPINION # 2007-02

Does an attorney have an affirmative duty to take reasonable precautions to ensure that confidential metadata is properly protected from inadvertent or inappropriate production via an electronic document before it is transmitted?

Lawyers have a duty under Rule 1.6 to use reasonable care when transmitting electronic documents to prevent the disclosure of metadata containing client confidences or secrets. The recent proliferation of electronic discovery, e-filing, and use of e-mail has created an ethical dilemma surrounding the disclosure and mining of metadata. Metadata may be loosely defined as data hidden in documents that is generated during the creation of those documents. Metadata is most often generated by software programs, such as Microsoft Word and Corel WordPerfect. These programs are frequently used by attorneys in the

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Alabama Rules of Professional Conduct Client-Lawyer Relationship Rule 1.6. Confidentiality of Information. (a) A lawyer shall not reveal information relating to 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). (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

creation and drafting of legal documents. The act of deliberately seeking out and viewing metadata embedded in a document is most often referred to as "mining" the document.[7]

For example, say your firm is filing a motion to summarily dismiss a lawsuit and the motion is electronically distributed among the firm's attorneys for review and comments. In reviewing the motion, the other attorneys insert comments critiquing the firm's position and discussing the strengths and weaknesses of various legal positions. The motion is then electronically transmitted to opposing counsel. If you failed to "scrub" or remove the hidden metadata prior to transmission, the opposing party could mine the document's metadata and discover which attorneys reviewed the motion, the critiques about the viability or strength of certain arguments, and the subsequent revisions made to the document.

A fundamental principle in the client-lawyer relationship is that the lawyer maintains confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. An attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences. The determination of whether an attorney exercised reasonable care will, of course, vary according to the circumstances.[8]

Absent express authorization from a court, it is ethically impermissible for an attorney to mine metadata from an electronic document he or she inadvertently or improperly receives from another party. Just as a sending lawyer has an ethical obligation to reasonably protect the confidences of a client, the receiving lawyer also has an ethical obligation to refrain from mining an electronic document. The Commission concluded that the use of computer technology to mine inadvertently transmitted metadata constitutes an impermissible intrusion on the attorney-client relationship in violation of the Alabama Rules of Professional Conduct.[9]

The unauthorized mining of metadata by an attorney to uncover confidential information would be a violation of Rule 8.4, Ala. R. Prof. C., involving attorney misconduct. In light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, the use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege,

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[7] Mining metadata allows a person to learn a variety of information about the history and evolution of an electronic document, including: the author, the name of previous document authors, template information, and hidden text. By mining an electronic document, a recipient attorney could also view revisions made to the document, comments added by other users that reviewed the document, and whether the document was drafted from a template. The disclosure of metadata contained in an electronic submission to an opposing party could lead to the disclosure of client confidences and secrets, litigation strategy, editorial comments, legal issues raised by the client, and other confidential information.

[8] Factors in determining whether reasonable care was exercised may include steps taken by the attorney to prevent the disclosure of metadata, the nature and scope of the metadata revealed, the subject matter of the document, and the intended recipient. For example, an attorney would need to exercise greater care in submitting an electronic document to an opposing party than he or she would if e-filing a pleading with the court. There is simply a much higher likelihood that an adverse party would attempt to mine metadata, than a neutral and detached court.

[9] Another example demonstrating the inherent danger of electronically transmitting documents involves the use of templates. Many attorneys routinely recycle templates for common filings, in which the current client's name is substituted in place of a prior client's name. If the document is later electronically transmitted to the opposing party, the opposing party could mine the document and discover the original client's name and information. Such disclosure of client identity and information could constitute a violation of Rule 1.6, Alabama Rules of Professional Conduct.

the work product doctrine or that may otherwise constitute a 'secret' of another lawyer's client would violate the letter and spirit of the rules of professional conduct. The mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.[10]

[10] One possible exception to the prohibition against the mining of metadata involves electronic discovery. Recent court decisions indicate that parties may be sanctioned for failing to provide metadata along with electronic discovery submissions. In certain cases, metadata evidence may be relevant and material to the issues at hand. For example, the mining of an email may be vital in determining the original author, who all received a copy of the email, and when the email was viewed by the recipient. In Enron type litigation, the mining of metadata may be a valuable tool in tracking the history of accounting decisions and financial transactions. The production of metadata during discovery will ordinarily be a legal matter within the sole discretion of the courts. Attorneys must be cognizant of the issue of disclosing metadata during discovery. The parties should seek direction from the court in determining whether a document's metadata is to be produced during discovery.

RULES 1.7: CONFLICTS OF INTEREST[11]

ETHICS OPINION RO 2011-02

May a criminal defendant's lawyer advise a client to enter into a plea agreement that includes a provision requiring the client to waive all ineffective assistance of counsel claims against that lawyer? May a prosecutor include in a plea agreement a provision that would require the defendant to waive all ineffective assistance of counsel claim against the defendant's lawyer?

Advising a criminal defendant to enter into an agreement prospectively waiving the client's right to bring an ineffective assistance of counsel claim against that lawyer would be a violation of Rules 1.7(b) and 1.8(h), Ala. R. Prof. C. Likewise, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea agreement because such would violate Rule 8.4(a), Ala. R. Prof. C., which prohibits an attorney from "induc(ing) another" to violate the Rules of Professional Conduct.

The Disciplinary Commission found that, pursuant to Rule 1.7(b), a conflict of interest exists where a lawyer must counsel his or her client on whether to waive any right to pursue an ineffective assistance of counsel claim. Under Rule 1.7(b), a conflict of interest exists where a client's interests conflict with the interests of his lawyer. It is hard to conceive of a situation where it would be in the interests of a lawyer for his or her client to file an ineffective assistance of counsel claim. Such claims against a lawyer can harm that lawyer's reputation and subject that lawyer to discipline by the Bar or the courts.

Hence, it would be inappropriate under any scenario for the lawyer against whom the claim may be brought to counsel the client as to whether to bring that claim or to waive the right to bring such a claim. This is especially so in the context of a criminal case where the client's freedom and liberty may be at stake. Accordingly, the lawyer may not counsel the client as to whether to waive his or her right to bring an ineffective assistance of counsel claim. Because a criminal defense lawyer may not advise a client whether to enter into a plea agreement waiving the right to bring an ineffective assistance of counsel claim, a prosecutor may not seek such a waiver from a criminal defendant represented by counsel. Rule 8.4(a), Ala. R. Prof. C. provides that is an ethical violation for any lawyer to "induce another" to "violate the Rules of Professional Conduct". If a prosecutor were to require a waiver of the right to bring an ineffective assistance of counsel claim in a plea agreement, the defense lawyer would be placed in the intolerable situation of either being forced to withdraw from representation or violate Rule 1.7(b) and 1.8(h).

[11] **Alabama Rules of Professional Conduct Client-Lawyer Relationship 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 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.

RULES 1.8: PROHIBITED TRANSACTIONS[12]

[12] **Alabama Rules of Professional Conduct: Client-Lawyer Relationship, Rule 1.8-- Conflict of Interest: Prohibited Transactions.** (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto. (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. (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; (3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and (4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, from his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred. (f) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6. (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, 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 claims or pleas involved and of the participation of each person in the settlement. (h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith. (i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship. (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case. (k) In no event shall a lawyer represent both parties in a divorce or domestic relations proceeding, or in matters involving custody of children, alimony, or child support, whether or not contested. In an uncontested proceeding of this nature a lawyer may have contact with the nonrepresented party and shall be deemed to have complied with this prohibition if the nonrepresented party knowingly executes a document that is filed in such proceeding acknowledging: (1) that the lawyer does not and cannot appear to serve as the lawyer for the nonrepresented party; (2) that the lawyer represents only the client and will use the lawyer's best efforts to protect the client's best interests; (3) that the nonrepresented party has the right to employ counsel of the party's own choosing and has been advised that it may be in the party's best interest to do so; and (4) that having been advised of the foregoing, the nonrepresented party has requested the lawyer to prepare an answer and waiver under which the cause may be submitted without notice and as may be appropriate. (l) A lawyer shall not engage in sexual conduct with a client or representative of a client that exploits or adversely

ETHICS OPINION # RO 2011-01

May a plaintiff's or claimant's lawyer, on behalf of his or her client, personally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses? May a lawyer request or require another lawyer to personally indemnify the lawyer's client against any unpaid liens or medical expenses as a condition of settlement?

Pursuant to Rules 1.7 and 1.8(e), a plaintiff's or claimant's lawyer, on behalf of his or her client, may not agree to personally indemnify the opposing party for any unpaid liens or medical expenses due to be paid from the settlement proceeds or underlying cause of action unless the liens or expenses are known and certain in amount at the time of the proposed settlement. Under Rule 1.8(e), a lawyer may not provide any financial assistance to a client except in limited circumstances as set out in the rule. An indemnification agreement in which the lawyer agrees to be personally liable for any outstanding liens or medical expenses incurred by the client would not fall under any of the exceptions to the rule and would, therefore, constitute impermissible financial assistance to the client.

If the amount of the lien or expense is known at the time of settlement, the plaintiff's attorney may agree on behalf of the client to use the settlement funds to satisfy such liens or expenses, and, thereby, relieve the defendant or his insurer of any further liability. The liens or expenses to be satisfied under the terms of the settlement must be included in the settlement agreement. Further, the client must agree, in writing, that the settlement funds will be used to satisfy those liens or expenses. Such an arrangement would be similar to the lawyer's issuing a letter of protection to the opposing party, their insurer or their lawyer that the settlement funds will be used to satisfy a particular lien or expense. Once an agreement has been entered into among the parties, the plaintiff's or claimant's lawyer would have an ethical obligation to ensure the payments are made.

However, a settlement agreement may not contain language requiring an attorney to indemnify an opposing party, their insurer or their lawyer for unknown liens or expenses or where the amount of such liens or expenses is unknown at the time of settlement. Such a request would violate Rule 8.4(a), Ala. R. Prof. C., which prohibits an attorney from "induc(ing) another" to violate the Rules of Professional Conduct.

affects the interests 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 legal representation; (2) continuing to represent a client if the lawyer's sexual relations with the client or the representative of the client cause the lawyer to render incompetent representation. (m) Except for a 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 (h) and in paragraphs (j) and (k) that applies to one of them shall apply to all of them. [Amended eff. 1-9-95; Amended eff. 6-23-2008.]

Other Conflicts Rules to Consider

Alabama Rules of Professional Conduct: Client-Lawyer Relationship, Rule 1.11-- Successive Government and Private Employment. (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule. (b) Except as may otherwise be permitted by law, a lawyer, having information concerning a person, which was acquired when the lawyer was a public officer or employee and which the lawyer knows to be confidential government information, may not represent a private client whose interests are adverse to that person in a matter in which such information could be used to that person's material disadvantage. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is precluded from any participation in the matter and is apportioned no part of the fee therefrom. (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: (1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or (2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b). (d) As used in this rule, the term “matter” includes: (1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and (2) Any other matter covered by the conflict of interest rules of the appropriate government agency. (e) As used in this rule, the term “confidential government information” means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Alabama Rules of Professional Conduct Client-Lawyer Relationship Rule 1.12. Former Judge or Arbitrator, Mediator, or Other Third-Party Neutral. (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, other third-party neutral, or law clerk to such a person, unless all parties to the proceeding consent after consultation. (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or

arbitrator. (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which the lawyer is associated may knowingly undertake or continue representation in the matter unless: (1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule. (d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party. [Amended eff. 6-23-2008.]

Other Ethics Opinions Regarding Conflicts

- 2005-01--City attorney who is also defense attorney in city court has waivable conflict of interest
- 2002-01--Imputed Disqualification of Law Firms When Nonlawyer Employees Change Firms
- 2000-03--Former city attorney may not represent party adverse to city while also representing city officials in unrelated matters without consent of city
- 1999-04--Impermissible conflict exists where law firm sells pre-paid legal insurance policies and also provides insureds with legal services required under the policies.
- 1999-03--Law partners of substitute municipal judge may represent clients in municipal court provided said matters are completely unrelated to those wherein partner presided as substitute judge
- 1996-06--Law firms not required to notify respective clients that one firm is representing the other if the attorneys involved determine such will not adversely affect their relationships with their clients
- 1996-03--Law firm may represent multiple plaintiffs against same defendant if different plaintiffs' interests are not adverse to or compete with one another
- 1996-02--DHR and Title IV-D service recipients–attorney represents agency and has no attorney-client relationship with service recipients (Modifies RO-87-57)
- 1995-10--Lawyer may prosecute criminal defendant being represented by lawyer's brother only if both the district attorney's office and the brother's client consent to such representation
- 1995-07--Lawyer may not represent criminal defendant where only eye-witness to crime is former client of lawyer about whom lawyer possesses impeaching confidential information gained during prior representation
- 1995-03--Lawyer may seek appointment of a guardian or take other protective action if lawyer reasonably believes that client cannot adequately act in client's own interest
- 1994-14--Former commissioner of state agency now representing plaintiffs in case adverse to said agency
- 1994-13--Lawyer who has formerly represented a client may not represent another person in the same or a substantially related matter where the present client's interests are materially adverse to the former client
- 1994-10--District attorney (and assistants) not vicariously disqualified even though newly employed assistant has participated in criminal cases as defense counsel so long as new assistant is adequately "screened" from participation
- 1993-14--Propriety of law firm's representation of children who are wards of the Department of Human Resources while also representing DHR discussed

- 1993-13--Assistant attorney general assigned to state agency owes duty of loyalty to attorney general and state agency which duty may create conflict where attorney general and agency head are adverse to one another
- 1993-12--Rule 8.4(e) prohibits an attorney who serves as a hearing officer for a state agency to likewise represent clients before that same state agency
- 1993-04--Judge in uncontested divorce may not thereafter represent one of the parties in related proceedings
- 1992-22--Partner of city councilman serving as city prosecutor
- 1992-21--Law firm cannot represent client in matter adverse to present client absent consultation/consent of present client
- 1992-20--Lawyer may represent subsidiary of corporation while simultaneously suing parent company if subsidiary and parent are separate corporate entities, confidential information will not be misused, and representation of subsidiary is not limited by the litigation involving the parent
- 1992-18--Attorney who served as DA when defendant investigated/indicted should not represent that defendant on said charges
- 1991-44--District Attorney's Office may prosecute criminal defendant where defendant is victim and prosecuting witness in another case
- 1991-42--Suit against former client
- 1991-41--Representing DHR and a client regarding a founded complaint of child abuse
- 1991-40--No conflict created through kinship by blood or marriage between attorneys
- 1991-08--Law firm may not "choose" between conflicting present clients and withdraw from representation so as to relegate one present client to "former client" status in order to take advantage of less stringent conflict rules
- 1990-99--Dual representation of insurance company and insured when coverage is questioned
- 1990-03--Lawyer should not undertake representation of client in matter adverse to former client which matter is substantially related to prior representation and where lawyer gained confidential information which may be used to detriment of former client
- 1989-99--Representing buyer and seller in real estate transaction
- 1984-190--Lawyer who serves as municipal judge may represent city police officer in possible criminal and civil proceedings involving officer's alleged misconduct if lawyer has no judicial role in any related facet of case(s)
- 1982-648--Lawyer's representation of clients in civil and criminal matters affected by lawyer's serving as city prosecutor
- 1982-591--Lawyer's representation of co-plaintiffs in civil litigation where there are sufficient assets to settle all potential claims
- 1981-533--In-house counsel for insurance carrier may represent insureds, subject to certain conditions

RULE 1.10: IMPUTED DISQUALIFICATION[13]

ETHICS OPINION # 2007-03

Under what conditions may a law firm employ a temporary lawyer? May a staffing agency act as a recruiter or agent ("agency" or "placement agency") to assist law firms and sole practitioners in locating and hiring qualified temporary or contract lawyers?

In Opinion #2007-03, the Disciplinary Commissions addressed certain key ethical issues raised by the placement and hiring of temporary lawyers. It determined that law firms may utilize the services of a temporary lawyer and a lawyer may participate in an arrangement with a temporary attorney staffing agency so long as: (1) the temporary lawyer and hiring law firm comply with all applicable conflict of interest requirements; (2) the temporary lawyer safeguards all confidential client information; (3) the client is informed that a temporary lawyer will be or has been hired to work on their case and the client consents; (4) the staffing agency and temporary lawyer do not split legal fees; and (5) the temporary lawyer and hiring law firm abide by all other provisions of the Alabama Rules of Professional Conduct.

Conflicts of Interest

For the purpose of determining whether a conflict of interest exists, a temporary lawyer who performs work for a client, even under the sole direction of the hiring law firm, represents that client. In other words, even if the temporary lawyer never meets or speaks with the client and all directions are issued by the hiring law firm, an attorney/client relationship is still formed between the temporary lawyer and the firm's client. As such, the temporary lawyer and hiring law firm must abide by Rules 1.7 and 1.9, Ala. R. Prof. C., regarding conflicts of interest involving current and former clients.

Imputed Disqualification

How should temporary lawyers stand vis-à-vis the firms employing them? Are they closely enough affiliated with the firm so that imputed disqualification (in both directions) will apply during the time they are on staff? Plainly, a "temp" lawyer who has formerly represented a particular client (whether or not as a law temp) cannot personally oppose that client in a substantially related matter, no matter what the practice setting . . . But would it be permissible for that lawyer to work for a firm as a law temp on matters not involving that client while permanent members of the firm (perhaps in the next room) either initiate or continue litigation against the law temp's former client?

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[13] **Alabama Rules of Professional Conduct: Client-Lawyer Relationship, Rule 1.10 -- Imputed Disqualification: General Rule.** (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them, practicing alone, would be prohibited from doing so by Rules 1.7, 1.8(a)-1.8(k), 1.9, or 2.2. (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. (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7. [Amended eff. 6-23-2008.]

The Disciplinary Commission saw no reason to differentiate between temporary lawyers and full-time lawyers. Consequently, for the purposes of Rule 1.10 and determining whether a conflict of interest exists, the Commission determined that a temporary lawyer would be treated as a member or associate of the firm while employed by the firm.[14]

Confidentiality

Under Rule 1.6, Ala. R. Prof. C., a lawyer has a duty to preserve the confidences and secrets of a client. It is the responsibility of the temporary lawyer to abide by Rule 1.6 by observing strict confidentiality regarding any confidences or secrets gained in the course of temporary employment. Absent client consent, a temporary lawyer may not reveal the subject matter and/or content of the services provided to clients of the hiring law firm to the staffing agency. Moreover, the temporary lawyer should not disclose any confidential information to the staffing agency in any time records submitted to the staffing agency.

Notice to Client

In determining whether the client must be informed and consent to the use of a temporary lawyer, the Disciplinary Commission reasoned that a client reasonably assumes that only attorneys within the firm are doing work on that client's case. Hence, a client should be informed that the firm is using temporary attorneys to do the client's work. Alabama lawyers thus have a duty under Rule 1.3, Ala. R. Prof. C, to inform the client of the law firm's intention – whether at the commencement or at a later point in the course of representation – to use a temporary lawyer's services on the client's case. The client should always be given the option of either consenting to or rejecting the use of the temporary lawyer. Additionally, if the law firm wishes to pass the agency placement fee on to the client, the fee should be separately identified when billed to the client.[15]

Fees

Regardless of whether a staffing agency is solely owned by an attorney or non-attorney, legal fees should not be split between the agency and the temporary attorney. For example, if non-attorneys have any

[14] The ABA and others have embraced the functional analysis test for temporary lawyers in ABA Op. 88-356, holding that whether a temporary lawyer is treated as being 'associated with a firm' while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm. The primary tenet of the functional analysis test is that the temporary lawyer may be screened from other matters while working for the hiring law firm and thus, avoid imputed disqualification. However, the effectiveness of using screens or "Chinese walls" has been questioned in recent years by several jurisdictions. In fact, in RO 2002-01, the Alabama State Bar Disciplinary Committee rejected the use of "Chinese walls" and determined that non-lawyer employees who change law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists.

[15] If the law firm intends to pass the costs of the temporary lawyer along to the client, the client must be so informed and consent to the fee arrangement. Any charge for the services of a temporary lawyer is subject to Rule 1.5, Ala. R. Prof. C., and therefore, must be reasonable. If the cost of the staffing agency is to be passed along to the client, the expense must be clearly communicated to the client and approved by the client at the outset of representation or when the hiring of a temporary lawyer from a staffing agency is first contemplated. Clearly, a payment to a staffing agency for the services of a temporary lawyer is not among those expenses that ordinarily could be anticipated by a client. The hiring law firm may only pass along the cost of the staffing agency to the client if the client has consented to the expense.

ownership interest in the staffing agency, any splitting of legal fees would be in violation of Rule 5.4, Ala. R. Prof. C., which forbids a lawyer or law firm from sharing legal fees with a non-lawyer. Likewise, even if the staffing agency is solely owned by an attorney, the splitting of legal fees would still be inappropriate. While Rule 5.4 would not apply to a lawyer-owned staffing agency, the practical effect of splitting legal fees between the agency and the temporary lawyer would be to create a de facto law firm.[16]

The better practice is for the hiring firm to pay the temporary lawyer directly and then pay a separate placement/administrative fee to the staffing agency for locating and placing the temporary lawyer with the requesting law firm. The ABA has approved "an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the lawyer's compensation,. . ." ABA Op. 88-356.

[16] This prohibition leads one to ask when is a payment to a staffing agency considered the splitting of a legal fee. One often used payment option involves the hiring law firm paying the staffing agency a certain amount per hour for the services of the temporary lawyer. The staffing agency then pays a portion of that amount to the temporary lawyer. In practical terms, the temporary lawyer is on the payroll of the staffing agency, not the law firm. Such a payment arrangement certainly suggests that a legal fee is being split between the staffing agency and the temporary lawyer.

RULE 1.13: ORGANIZATION AS A CLIENT[17]

ETHICS OPINION # 2007-04

May a lawyer represent a corporation, at the request and direction of the majority of the board of directors of the corporation, and also represent the directors of the corporation in their private dealings not related to the corporation?

There is no ethical impropriety in representing a corporation at the request and direction of a majority of the board of directors and at the same time representing certain of the directors in their private matters unrelated to the corporation. Rule 1.13(a) recognizes that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. The Comment to Rule 1.13 states that while communication of a constituent of an organizational client with the organization's lawyer is protected by Rule 1.6, this does not mean that constituents of an organization client are clients of the lawyer.

Accordingly, at the request and instructions of a majority of the board of directors, a lawyer may represent the directors and stockholders their individual capacities in a matter which is completely unconnected with any of the affairs of the corporation and which would not interfere with the lawyer's exercise of independent professional judgment on behalf of the corporation.[18] [This opinion modifies and supersedes previously issued opinion RO-81-518].

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[17] **Alabama Rules of Professional Conduct: Client-Lawyer Relationship, Rule 1.13 -- Organization as Client.** (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others: (1) Asking reconsideration of the matter; (2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and (3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law. (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16. (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. (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[18] The opinion also discussed the effect of the conflict of interest rule, Rule 1.7(b), Ala. R. Prof. C, which states that 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

RULE 1.15: SAFEKEEPING PROPERTY

ETHICS OPINION 2008-03; RO 1992-17; RO 1993-21

Should a flat fee that is received prior to the conclusion of representation be deposited into an attorney's IOLTA account or is it earned at the time of receipt?

A flat fee that is received prior to the conclusion of the representation or prior to the performance of services must be deposited in the attorney's IOLTA account until the fee is actually earned. In RO 1992-17, the Disciplinary Commission stated that:

> [T]he client has the absolute right to terminate the services of his or her lawyer, with or without cause, and to retain another lawyer of their choice. This right would be substantially limited if the client was required to pay the full amount of the agreed on fee without the services being performed. An attorney discharged without cause or otherwise prevented from full performance, is entitled to be reasonably compensated only for services rendered before such discharge. Mall v. Gunter, 157 Ala. 375, 47 So.2d 144 (1908). Likewise, in RO 1993-21, the Disciplinary Commission held that an attorney "may not characterize a fee as non-refundable or use other language in a fee agreement that suggests that any fee paid before services are rendered is not subject to refund or adjustment." The overriding principle of RO 1992-17 and RO 1993-21 is that a non-refundable fee would impinge on the right of the client to change lawyers at any time. Allowing an attorney to keep a fee, regardless of whether any service has been performed for the client, would certainly restrict the ability of a client to terminate the attorney and seek new counsel. The rule applies to all arrangements where fees are paid in advance of legal services being rendered.

Accordingly, all retainers and fees are refundable to the extent that they have not yet been earned.[19] Because a flat fee paid in advance of services is subject to being refunded, Rule 1.15(a), Ala. R. Prof. C., requires that the flat fee be deposited into an attorney's IOLTA account.[20]

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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 must include an explanation of the implications of the common representation and the advantages and risks involved. Rule 1.7 recognizes that the propriety of concurrent representation can depend on the nature of the litigation and the representation. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him or her in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that different interests are not present.

[19] The only exception to the rule that all fees are refundable would be a true availability-only retainer. An availability-only retainer is a payment that is made by a client solely to secure an attorney's future availability and would necessarily restrict the ability of the attorney to represent other clients. A true availability-only retainer is earned at the time of receipt, must be in writing, and must be approved by the client in advance of the payment.

[20] **Alabama Rules of Professional Conduct: Client-Lawyer Relationship, Rule 1.15 -- Safekeeping Property.**
Definitions. As used in this rule, the terms below shall have the following
meanings:
"IOLTA account" means a pooled interest- or dividend-bearing trust account
benefiting the Alabama Law Foundation or the Alabama Civil Justice Foundation
established in an eligible institution for the deposit of nominal or short-term funds of
clients or third persons.
"Eligible institution" means any bank or savings and loan association authorized

by federal or state laws to do business in Alabama, whose deposits are insured by an agency of the federal government, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Alabama. Eligible institutions must meet the requirements set out in subsection (k).

"Interest- or dividend-bearing trust account" means a federally insured checking account or a business checking account with an automated investment feature, such as an overnight sweep and investment in a government money-market fund or daily (overnight) financial-institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities. A daily financial-institution repurchase agreement may be established only with an eligible institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must hold itself out as a money-market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, have total assets of at least $250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay except as permitted by law.

"Allowable reasonable fees" means: (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) Federal deposit insurance fees, (5) sweep fees, and (6) a reasonable IOLTA account administrative fee.

"U.S. Government Securities" means U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

(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.

Interest or dividends, if any, on funds, less fees charged to the account, other than overdraft and returned item charges, shall belong to the client or third person, except as provided in Rule 1.15(k), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation.

A lawyer shall designate all such trust accounts, whether general or specific, as well as deposit slips and all checks drawn thereon, as either an "Attorney Trust Account," an "Attorney Escrow Account," or an "Attorney Fiduciary Account." A lawyer shall designate all business accounts, as well as other deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," or a "Regular Account." However, nothing in this rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account, including, for example, fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, or agent or in any other fiduciary capacity.

(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly

notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall not make disbursements of a client's funds from separate accounts containing the funds of more than one client unless the client's funds are collected funds; provided, however, that if a lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank representing the client's funds will be collected promptly, then the lawyer may, at the lawyer's own risk, disburse the client's uncollected funds. If collection does not occur, then the lawyer shall, as soon as practical, but in no event more than five (5) working days after notice of noncollection, replace the funds in the separate account.

(e) A lawyer who practices in Alabama shall maintain current financial records as provided in these Rules and as required by Rule 1.15 of these Rules and shall retain the following records for a period of six (6) years after termination of the representation:

1. Receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee, and purpose of each disbursement;

2. Ledger records for all client trust accounts showing, for each separate trust client or third person, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;

3. Copies of retainer and compensation agreements with clients as required by Rule 1.5 of these Rules;

4. Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

5. Copies of bills for legal fees and expenses rendered;

6. Copies of records showing disbursements on behalf of clients;

7. The physical or electronic equivalents of all trust-account checkbook registers, bank statements, records of deposit, prenumbered canceled checks, and substitute checks provided by a financial institution;

8. Records of all electronic transfers from client trust accounts, including the name of the person authorizing the transfer, the date of transfer, the name of the recipient, and confirmation from the financial institution of the trust-account number from which money was withdrawn and the date and the time the transfer was completed;

9. Copies of monthly trial balances and quarterly reconciliations of the client trust accounts maintained by the lawyers; and

10. Copies of those portions of client files that are reasonably related to client trust-account transactions.

(f) With respect to client trust accounts required by Rule 1.15 of these Rules:

1. Only a lawyer admitted to practice in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or shall authorize

transfers from a client trust account;
2. Receipts shall be deposited intact, and records of deposit should be sufficiently detailed to identify each item; and
3. Withdrawals shall be made only by check payable to a named payee, and not to cash, or by authorized electronic transfer.
(g) Records required by Rule 1.15 may be maintained by electronic, photographic, or other media, provided that they otherwise comply with these Rules and that printed copies can be produced. These records shall be readily accessible to the lawyer.
(h) Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trustaccount records specified in these Rules.
(i) A lawyer shall request that the financial institution where the lawyer maintains a trust account file a report to the Office of General Counsel of the Alabama State Bar in every instance where a properly payable item or order to pay is presented against a lawyer's trust account with insufficient funds to pay the item or order when presented and either (1) the item or payment order is returned because there are insufficient funds in the account to pay the item or order or (2) if the request is honored by the financial institution and the overdraft created thereby is not paid within three (3) business days of the date the financial institution sends notification of the overdraft to the lawyer. The report of the financial institution shall contain the same information, or a copy of that information, forwarded to the lawyer who presented the item or order.
A lawyer shall enter into an agreement with the financial institution that holds the lawyer's trust account pursuant to which the financial institution agrees to file the report required by this rule. Every lawyer shall have the duty to assure that his or her trust accounts maintained with a financial institution in Alabama are pursuant to such an agreement. This duty belongs to the lawyer and not to the financial institution. The filing of a report with the Office of General Counsel pursuant to this paragraph shall constitute a proper basis for an investigation by the Office of General Counsel of the lawyer who is the subject of the report, pursuant to the Alabama Rules of Disciplinary Procedure.
Nothing in this rule shall preclude a financial institution from charging a lawyer or a law firm a fee for producing the report and maintaining the records required by this rule.
Every lawyer and law firm maintaining a trust account in Alabama shall hereby be conclusively deemed to have consented to the reporting and production requirements mandated by this rule and shall hold harmless the financial institution for its compliance with the aforesaid reporting and production requirements. Neither the agreement with the financial institution nor the reporting or production of records by a financial institution made pursuant to this rule shall be deemed to create in the financial institution a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of a lawyer's overdrawing a trust account.
A lawyer shall not fail to produce any of the records required to be maintained by these Rules at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or Rules of Disciplinary Procedure for the production of documents and evidence.
(j) A lawyer, except a lawyer not engaged in active practice pursuant to Alabama Code 1975, §§ 34-3-17 and -18, shall maintain a separate account to hold funds of a client or third person. Every lawyer admitted to practice in this State shall annually certify to the Secretary of the Alabama State Bar that all IOLTA eligible funds are held in an IOLTA Account, or that the lawyer is exempt because the lawyer: does not have an office within the State of Alabama; does not hold funds for clients or third persons; is not

engaged in the active practice of law; is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state, or federal government, and is not otherwise engaged in the private practice of law; or is a corporate or other in-house counsel or teacher of law and is not otherwise engaged in the private practice of law. Certification may be made by a firm on behalf of all lawyers in a firm.

(k) Lawyers shall hold in IOLTA accounts all funds of clients or third persons that are nominal in amount or that the lawyer expects to be held for a short period and from which no income could be earned for the client or third person in excess of the costs incurred to secure such income. In no event shall a lawyer receive the interest on an IOLTA account.

In determining whether to deposit funds into an IOLTA account, a lawyer shall consider the following factors: the amount of interest or dividends likely to be earned during the period the funds are expected to be deposited; the estimated cost of establishing and administering a non-IOLTA trust account for the benefit of the client or third person, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to the benefit of a client or third person; the ability of financial institutions or lawyers or law firms to calculate and pay interest to individual clients or third persons; and any other circumstances that affect the ability of the client or third-person funds to earn income in excess of the costs incurred to secure such funds. A lawyer shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

The determination whether the funds of a client or third person can earn income in excess of costs as provided in (k) above shall rest in the sound judgment of the lawyer or law firm, and no lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good-faith exercise of such judgment.

Offering IOLTA accounts is voluntary for financial institutions. Lawyers may place trust accounts only in eligible institutions that meet the requirements of this rule, including:

Interest Rates: Eligible institutions shall pay on IOLTA accounts the highest interest rate or dividend the financial institution offers to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance and other eligibility requirements, if any.

A financial institution shall pay on IOLTA accounts the highest interest rate or dividend generally available among the following product types or any comparable product type (if the product type is available from the financial institution to its nonIOLTA customers) by either using the identified product type as an IOLTA account or

paying the equivalent interest rate or dividend on the existing IOLTA account in lieu of actually establishing the highest interest rate or dividend product:

1. An interest-bearing checking account, such as a negotiable order of withdrawal (NOW) account, or business checking account with interest.
2. A business checking account with an automated investment feature, such as an overnight sweep and investment in repurchase agreements or money-market funds as described in the definitions.
3. A government (such as for municipal deposits) interest-bearing checking account.
4. A checking account paying preferred interest rates, such as money-market or indexed rates.
5. Any other suitable interest- or dividend-bearing deposit account offered by the institution to its non-IOLTA customers.

As an alternative, the financial institution may pay:
6. An amount on funds, net of allowable reasonable fees, that would otherwise qualify for investment options described in 1 through 4 above equal to 55% of the Federal Funds Target Rate as of the first business day of the quarter or other IOLTA remitting period.
The following considerations will apply to determinations of comparability:
1. Accounts that have limited check-writing capability required by law or government regulation may not be considered as comparable to IOLTA accounts in Alabama. Such accounts, however, are distinguished from checking accounts that pay money-market interest rates on account balances without the check-writing limitations. Such accounts are included in the option 4 class identified above. Additionally, rates that are not generally available to other account holders, such as special promotional rates used to attract new customers, are not considered for comparability in Alabama.
2. For the purpose of determining compliance with the above provisions, all participating financial institutions shall report in a form and manner prescribed by the Alabama Law Foundation and Alabama Civil Justice Foundation the highest interest or dividend rate for each of the accounts they offer within the above-listed account types. The foundations will certify participating financial institutions' compliance with this rule on an annual basis.
3. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the eligible institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that those factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and provided further that those factors do not include that the account is an IOLTA account.
Pursuant to a written agreement between the lawyer and the eligible institution, interest on the IOLTA account shall be remitted at least quarterly to the Alabama Law Foundation or the Alabama Civil Justice Foundation, as the lawyer shall designate. Interest or dividends shall be calculated in accordance with the institution's standard practice for non-IOLTA account customers, less reasonable fees, if any, in connection with the deposited funds.
Allowable reasonable fees, as defined in this rule, are the only service charges or fees permitted to be deducted from interest or dividend earned on IOLTA accounts. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA account only at such rates and under such circumstances as is the eligible institution's customary practice for its non-IOLTA customers. All other fees and charges shall not be assessed against the interest or dividends earned on the IOLTA account, but rather shall be the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.
Fees or charges in excess of the interest or dividend earned on the account for any month or quarter shall not be taken from interest or dividend earned on other IOLTA accounts or from the principal of the account.
Financial institutions may elect to pay higher rates than required by this rule or to waive any or all fees on IOLTA accounts.
A statement should be transmitted to the Alabama Law Foundation or the Alabama Civil Justice Foundation with each remittance showing the period for which the remittance is made, the name of the lawyer or law firm from whose IOLTA account the remittance is being sent, the IOLTA account number, the rate of interest applied, the gross interest or dividend earned during the period, the amount and description of any

service charges or fees assessed during the remittance period, if any, the average account balance for the remittance period, and the net amount of interest or dividend remitted for the period. A copy of the statement shall also be sent to the lawyer.

(l) All interest or dividends transmitted to and received by the Alabama Law Foundation pursuant to Rule 1.15(k) shall be distributed by it for one or more of the following purposes:

1. To provide legal aid to the poor;
2. To provide law-student loans;
3. To provide for the administration of justice;
4. To provide law-related educational programs to the public;
5. To help maintain public law libraries; and
6. For such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(m) All interest or dividends transmitted to and received by the Alabama Civil Justice Foundation pursuant to Rule 1.15(k) shall be distributed by it for one or more of the following purposes:

(1) to provide financial assistance to organizations or groups providing aid or assistance to:

(A) underprivileged children;
(B) traumatically injured children or adults;
(C) the needy;
(D) handicapped children or adults; or
(E) drug and alcohol rehabilitation programs;

(2) to be used in such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(n) A lawyer shall not fail to produce, at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board, any of the records required to be maintained by these Rules. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or the Rules of Disciplinary Procedure for the production of documents and evidence.

[Amended 8-21-92; Amended 8-28-92; Amended 8-1-97; Amended 4-14-2003; Amended 9-27-2007, eff. 1-1-2008; Amended 7-16-2012, eff. 1-1-2013; Amended 1-12-15.]

RULE 3.3: CANDOR TOWARD THE TRIBUNAL[21]

ETHICS OPINION 2010-01

Must a lawyer who only "ghostwrites" a pleading or complaint on behalf of a pro se litigant reveal his or her involvement to the court?

In "ghostwriting" situations, the question is whether a lawyer must disclose his assistance to the court when the lawyer prepares or drafts pleadings on behalf of a pro se litigant. A number of bar associations, including the American Bar Association, have concluded that no such duty of disclosure exists. The ABA has concluded that, absent a law or local court rule requiring disclosure, the fact that a lawyer drafted the legal documents for a pro se litigant is "not material to the merits of the litigation" and does not need to be disclosed to the court. In essence, the American Bar Association held that the duty of candor to the court does not impose an affirmative duty on a lawyer to disclose to the court that he drafted a particular legal document for a client.

In Alabama, the duty of candor to the court is encompassed within Rule 3.3, Ala. R. Prof. C. Ordinarily, the drafting of a legal document by a lawyer for filing by a pro se litigant does not constitute a false statement of material fact. Accordingly, a lawyer is not required to disclose to the court that the lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.

2) The issue of the lawyer's involvement in the matter is not material to the litigation.

3) The lawyer is not required to disclose his or her involvement to the court by law or court rule.

ETHICS OPINION RO-2009-01

What are a lawyer's ethical obligations when a client reveals his or her intent to commit perjury?

Where a client informs counsel of his or her *intent* to commit perjury, a lawyer's first duty is to attempt to dissuade the client from committing perjury. Having a client threaten to commit perjury or actually committing perjury is one of the most difficult ethical dilemmas a lawyer can face. The lawyer is torn between loyalty to the client and his or her duties as an officer of the court. In the context of the civil

[21] **Alabama Rules of Professional Conduct: Advocate 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. (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. (d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

client, however, Rule 3.3, Ala. R. Prof. C., and its Comment clearly require the lawyer to place his duties as an officer of the court above his duties of loyalty and confidentiality to the client. The lawyer should advise the client that if the client insists on committing the proposed perjury then the lawyer will be forced to move to withdraw from representation.[22] The lawyer should further explain that he or she may be required to disclose the specific reason for withdrawal if required to do so by the court. If the client continues to insist that they will provide false testimony, the lawyer should move to withdraw from representation. [23]

What are a lawyer's ethical obligations when a lawyer learns that a client has committed perjury?

When a lawyer has actual knowledge[24] that a client *has committed* perjury or submitted false evidence, the lawyer's first duty is to remonstrate with the client in an effort to convince the client to voluntarily

[22] Withdrawai is governed by **Alabama Rules of Professional Conduct Client-Lawyer Relationship Rule 1.16. Declining or Terminating Representation.** (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.

[23] The lawyer is not, upon withdrawal, required to disclose the client's intent to commit perjury. However, if the court requires the lawyer to disclose the specific reason for his withdrawal, the lawyer may disclose the client's intent to commit perjury. Under Rule 1.6, a lawyer is permissively allowed to disclose confidential information only when disclosure is required to prevent a client from committing a criminal act that is "likely to result in imminent death or substantial bodily harm . . ." The crime of perjury does not fall within this narrow exception to Rule 1.6.

[24] It is important to distinguish between a lawyer's actual knowledge versus a reasonable belief or suspicion that the client has lied or offered false evidence. Where a lawyer has actual knowledge that a client has testified falsely, then the lawyer would be required to comply with Rule 3.3. When a lawyer does not have actual knowledge, but rather only a reasonable belief that the client has lied or offered false evidence, then lawyer would not have any obligation to disclose his suspicions to the court or the opposing party. Rather, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. . . a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client. . ." ABA Annotated Model Rules of Professional Conduct, 316-317, 6th Edition. (2007). However, Rule 3.3(c), Ala. R. Prof. C., does allow a lawyer to refuse to offer evidence on behalf of a client that the lawyer reasonably believes to be false.

correct the perjured testimony or false evidence. If the client refuses to do so, the lawyer has an ethical obligation to disclose the perjured testimony and/or submission of false evidence to the court.

When a lawyer learns of the client's perjury after the fact, Rule 3.3 requires the lawyer to immediately take remedial measures to correct the client's misconduct. Ordinarily, the lawyer should first remonstrate with the client in an attempt to convince the client to, of his own volition, inform the court and/or the opposing party of his misconduct. In doing so, the lawyer should explain that if the client refuses to do so, the lawyer will have no choice but to inform the court of the client's actions. If the client refuses to disclose his misconduct, then the lawyer has a duty to inform the court and/or opposing party of the false evidence or testimony. Under Rule 3.3, a lawyer's ethical obligations remain the same, regardless of whether the lawyer is representing a criminal client or a client in a civil matter. These obligations apply equally to prosecutors in a criminal case. Just as a defense attorney would have an obligation to disclose perjury committed by a criminal defendant, a prosecutor would have a duty to disclose perjury committed by a prosecution witness during direct examination.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS[25]

ETHICS OPINION # 2003-02

Does an attorney have an ethical obligation to honor "protection letters" sent by the attorney to the creditors of a client, either at the client's request or with the client's knowledge and approval, when the client subsequently instructs the attorney not to pay the creditors?

An attorney is ethically compelled to fulfill commitments made to a client's creditors pursuant to Rules 4.1(a), 8.4(c), 1.15(b) and 1.2(d) of the Rules of Professional Conduct. Attorneys frequently represent clients who have incurred medical expenses for treatment of the injuries which form the basis of the cause of action, an indebtedness as a result of the client's inability to work due to such injuries, or for some other reason the client is unable to meet his or her financial obligations. If the anticipated recovery on behalf of the client would be sufficient to pay the client's debts, the client may ask the attorney to contact the client's creditors and request forbearance in collection efforts in exchange for promise of payment upon receipt of settlement or judgment proceeds from the client's pending cause of action. Such written commitments on the part of the attorney are commonly referred to as "protection letters". It sometimes happens that upon receipt of the proceeds the client will have a change of heart and, despite the previous instruction or authorization, will instruct the attorney not to pay the client's creditors, thus placing the attorney in an ethical dilemma. The attorney is faced with the choice of either disregarding the client's express directive or giving the appearance of having lied to the client's creditors.

An attorney may be guilty of violating Rule 4.1(a) and Rule 8.4(c) if, at the time protection letters were sent, the attorney had reason to believe, or even suspect, that the client did not really intend to pay the creditor. Additionally, Rule 1.15(b) addresses an attorney's ethical obligations upon receipt of funds or other property in which a third person has an interest. Hence, an attorney who has sent a protection letter to a client's creditor and who is holding in trust, funds to pay the creditor, is ethically obligated to pay the creditor those funds which the creditor is entitled to receive. This predicament can be avoided by obtaining from the client written authorization to pay creditors. Such authorization should include language to the effect that the client acknowledges that the authorization is irrevocable and the client understands that, when the attorney has made a commitment to pay the creditor pursuant to that authorization, the attorney is ethically obligated to do so, regardless of whether the client's preference in the matter may change. This language may be included in the attorney's employment contract with the client.

However, this ethical obligation exists only where the debt, and the amount thereof, is reasonable and undisputed. If there is a legitimate question concerning the debt, or the amount of the debt, the attorney

[25] **Alabama Rules of Professional Conduct: Transactions with Persons Other Than Clients, 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.

should interplead the disputed funds and let the court reach a determination regarding the creditor's claim.[26]

[26] In RO-90-48, the Disciplinary Commission concluded that an attorney who releases all settlement or judgment proceeds to the client, after having told the client's creditors that the proceeds would be used to pay the client's debts, has assisted the client in a fraudulent act as expressly prohibited by Disciplinary Rule 7-102(A)(7), which is the verbatim predecessor, under the previous Code of Professional Responsibility, to the above-quoted Rule 1.2(d). However, the Disciplinary Commission concluded that RO-90-48 was due to be modified in one respect. The inquiry of the attorney requesting that opinion was whether he could ethically interplead the money claimed by a client's creditor when the client refused to authorize payment to the creditor. The Disciplinary Commission opined that he could ethically do so. The Commission refined this position by holding that money which an attorney has promised to pay creditors should not be interpled unless there is a dispute between the client and the creditor as to existence of the debt, the amount of the debt or the reasonableness of the debt..

Ethics Opinions Regarding Communications with Employees of Opposing and Unrepresented Persons: Rules 4.2 and 4.3

2003-03--Communication with represented government officials permitted

2002-03--Contact permitted with employees of opposing party who are non-managerial, who are not responsible for act for which opposing party could be liable and who have no authority to make decisions about the litigation

2000-02--Attorney appointed guardian ad litem is ethically prohibited from communicating ex parte with trial judge concerning any substantive issue before the court.

1994-11--Lawyer representing managerial employees of opposing party in unrelated matter may communicate ex parte only as to those matters wherein he represents said employees and not as to the other pending matter

1994-04--Lawyer may communicate ex parte with employees of adverse party if employees do not have managerial responsibility and are not in a position to bind employer in civil or criminal matter

1990-79--Lawyer may not communicate with employee of opposing party if employee has managerial responsibility on behalf of the opposing party and can bind the opposing party

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS[27]

ETHICS OPINION # 2008-01

If an attorney uses a nonlawyer employee to communicate with clients in a foreign language, what ethical obligations and responsibilities are imposed upon the supervising attorney?

Any attorney using a nonlawyer employee to communicate with a client in a foreign language should also be aware that Rule 5.3, Ala. R. Prof. C. makes an attorney responsible for the conduct of any non-lawyer employee to the same extent as if the attorney engaged in the conduct himself or herself. By using a nonlawyer employee to communicate with a client, the lawyer is under a duty to ensure that information received from the client is accurately communicated to the lawyer through the nonlawyer employee. Likewise, the lawyer is also responsible for ensuring that the nonlawyer employee accurately relays the lawyer's communications to the client. Any failure by the nonlawyer employee to accurately relay information between the client and the lawyer that adversely affects the rights or interests of the client could constitute an ethics violation by the lawyer.

Furthermore, pursuant to Rule 5.5(b), Ala. R. Prof. C., the lawyer employing the nonlawyer employee as a translator must also be careful to avoid assisting the nonlawyer employee in the performance of activities that constitute the unauthorized practice of law. For example, while legal advice may be relayed to a client through the use of a translator, the legal advice given must be that of the lawyer and not the translator. As such, the lawyer should always be present during conferences with the client and should not allow the nonlawyer employee to meet privately with the client. In addition, when making court appearances, the approval of the court should be sought in order to use the non-lawyer employee to translate information between the client and the lawyer and/or the court.

[27] **Alabama Rules of Professional Conduct: Law Firms and Associations, Rule 5.3 -- Responsibilities Regarding Nonlawyer Assistants.** With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if: (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER[28]

ETHICS OPINION 2013-01

May an attorney share legal fees with a non-lawyer earned while prosecuting a BP claim?

No. The sharing of a legal fee with a non-lawyer while prosecuting a BP claim violates Rules 5.4(a), 5.5, and 7.2(c) Ala. R. Prof. C. Both Rules 5.4(a) and 7.2(c), Ala. R. Prof. C., prohibit attorneys from sharing legal fees with non-attorney and/or paying a non-lawyer anything of value in exchange for a referral of a legal client. The argument raised by some concerning the prosecution of BP claims is that the filing and prosecution of a BP claim is not the practice of law and, therefore, the ethical prohibitions prescribed by Rules 5.4(a) and 7.2(c) do not apply. In the opinion of the Disciplinary Commission, the filing or prosecution of BP claims on behalf of another is the practice of law. The process of shepherding a claim through the BP claims process, to the extent it includes the advising of parties of their legal right, acting on parties' behalf in a representative capacity to enforce those rights and/or seek redress for violations of the same, the filing of claims, or the appearance before a body authorized to take evidence and settle or determine controversies, is the "practice of law" as defined by § 34-3-36, Ala. Code 1975. Therefore, Rule 5.4(a), Ala. R. Prof. C., prohibits an attorney from sharing fees with a non-lawyer or other consideration paid by a client for those services provided in conjunction with the prosecution of a BP claim.

Additionally, an attorney in violation of Rule 5.4(a), Ala. R. Prof. C., by virtue of such impermissible fee-splitting would also be guilty of violating Rule 5.5, Ala. R. Prof. C., which prohibits a lawyer from assisting another in the unauthorized practice of law.[29]

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[28] **Alabama Rules of Professional Conduct: Law Firms and Associations, Rule 5.4. -- Professional Independence of a Lawyer.** (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and (3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement. (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. (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. (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) A nonlawyer is a corporate director or officer thereof; or (3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

[29] While an attorney cannot share a fee with a non-lawyer or assist a non-lawyer in the unauthorized practice of law, an attorney may employ the services of an accountant or other professional to assist in supporting or proving the

ETHICS OPINION R0 2012-01

May an attorney use websites such as Groupon or other "daily deal" websites to market discounted legal services in the form of redeemable certificates to prospective clients?

No. The use of daily deal websites, such as Groupon, violates or potentially violates a number of rules of professional conduct. These "daily deal" websites typically contact the consumer via email and give the consumer the opportunity to purchase a certificate for services or products from a retailer at a discounted rate of 50% or greater. The proceeds from each sale are typically divided on a 50-50 split between the website and the retailer. For example, a law firm would agree to sell a coupon entitling the purchaser to $500 worth of legal services for a discounted rate of $250. The purchaser or prospective client would pay the website $250 and would receive a certificate for $500 to redeem for legal services with the law firm. The certificate may or may not have an expiration date. From the sale, the website would keep 50% of the revenue, $125 in this case, and remit the remaining $125 to the law firm.

Marketing discounted legal services through these sites is fraught with ethical landmines. First and foremost among the issues raised is whether the use of Groupon to market and sell legal services constitutes the sharing of legal fees with a non-lawyer in violation of Rule 5.4(a).

In Alabama State Bar Association v. R.W. Lynch Company, Inc., the Supreme Court of Alabama addressed whether a television advertisement touting the "Injury Helpline" was a for-profit referral service in violation of Rule 7.2(c), Ala. R. Prof. C. 655 So. 2d 982 (Ala. 1995). While there is no claim that sites like Groupon are for-profit referral services, R.W. Lynch is instructive on whether the fees charged by such sites are truly "advertising fees". The Supreme Court concluded that R.W. Lynch's "Injury Helpline" was not a "for-profit" referral system but rather a permissible form of group advertising. In reaching its decision, the Court noted that lawyers who participate in the helpline pay a flat-rate fee for the advertising, regardless of the number of calls forwarded to them. Id. Pursuant to Rule 7.2(c), a lawyer "may pay the reasonable cost of any advertisement".

Groupon and other similar sites do not charge a flat rate fee or even a fee based on the website's traffic. Instead, Groupon and other sites take a percentage (usually 50%) of each and every purchase. The percentage taken by the site is not tied in any manner to the "reasonable cost" of the advertisement. As a result, the use of such sites to sell legal services is a violation of Rule 5.4 because legal fees are shared with a non-lawyer.[30]

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client's claim. In Formal Opinion 1993-20, the Disciplinary Commission previously held that an Alabama attorney may, consistent with the Alabama Rules of Professional Conduct, compensate a non-lawyer for services rendered in connection with its representation of certain plaintiffs in litigation. Therefore, an attorney hired to prosecute a BP claim may hire an accountant to perform loss calculation services as described in In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, Doc. 6430-1 (E.D. La. filed May 3, 2012). However, the attorney may not split or share any contingency fee with the non-lawyer as a means for compensating the non-lawyer for their services. If the accountant or non-lawyer has a separate fee agreement with the client, the attorney may not agree to protect the fee of the accountant or non-lawyer in exchange for a referral of that accountant's or non-lawyer's client.

[30] The use of sites like Groupon would also violate a number of other ethics rules. For example, it is well-settled that pursuant to Rule 1.15(a), all unearned fees must be placed into a lawyer's trust account until earned. However, under the fee model employed by Groupon, half of the legal fee paid by the purchaser is claimed by Groupon at the time of the purchase making it impossible for the lawyer to place the entire unearned legal fee into trust as required

by Rule 1.15(a). Further, if the purchaser were to demand a refund prior to any services being performed by the lawyer, the purchaser would be entitled to a complete refund regardless of the fact that half of the fees were claimed by Groupon. Failure to make a full refund would be considered charging a clearly excessive fee in violation of Rule 1.5(a) [Fees] and/or failing to return the client's property as mandated by Rule 1.16(d) [Declining or Terminating Representation].

Another ethical dilemma created by the use of daily deal websites is the inability of the lawyer to perform any conflict check prior to the payment of legal fees by the potential client. Under the Groupon model, the lawyer is selling future legal services and receiving the fees for such future services without ever having spoken with or having met with the client. Because the lawyer cannot perform a conflict check prior to being retained, the potential for conflicts of interest among the lawyer's former and current clients is great.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW[31]

ETHICS OPINION R0 2014-01

May a non-lawyer represent a party in a court-ordered arbitration proceeding in Alabama?

No. Absent a federal or state statute, the representation of a party by a non-lawyer in a court-ordered arbitration proceeding in Alabama constitutes the unauthorized practice of law. Moreover, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and, where appropriate, to the attention of the court.

Canon IV(C) of the Alabama Code of Ethics for Arbitrators and the American Arbitration Association Code of Ethics provides that "[t]he arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party." Some have interpreted this provision as allowing the representation of a party to a arbitration by a non-lawyer. However, the preamble to the Alabama Code of Ethics for Arbitrators also states that all provisions of the Code should be read in conjunction with applicable law. In addition, Rule 26 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures states that a party may be represented by "any other representative of the party's choosing, unless such choice is prohibited by law." [32]

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[31] **Alabama Rules of Professional Conduct: Law Firms and Associations, Rule 5.5 -- Unauthorized Practice of Law.** (a) A lawyer shall not: (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. (b) Subject to the requirements of Rule VII, Rules Governing Admission to the Alabama State Bar (Admission of Foreign Attorneys Pro Hac Vice), a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services: (1) are performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, including transactional, counseling, or other nonlitigation services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; (2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or (3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the Rules Governing Admission to the Alabama State Bar and who is performing only those services defined in that rule. (c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama. (d) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in the State of Alabama shall not (1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama. (e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the Rules Governing Admission to the Alabama State Bar, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law. [Amended eff. 9-19-2006.]

[32] Section 34-3-6, Ala. Code 1975, which defines the practice of law, provides, in pertinent part, as follows:

(a) Only such persons as are regularly licensed have authority to practice law.

(b) For the purposes of this chapter, the practice of law is defined as follows:

The unauthorized practice of law statute provides that a non-lawyer may not represent a party during a arbitration absent authorization by an express federal or state statute. A non-lawyer representative would be making an appearance in a representative capacity. Moreover, it is presumed that during the arbitration, the non-lawyer representative would be introducing exhibits, conducting examination of witnesses, including expert witnesses, objecting to exhibits and making legal arguments on behalf of the party and/or providing legal advice to the party. Such activities generally require the skill and judgment of a licensed attorney and under the UPL statute constitutes the practice of law.

Whoever,

(1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or

(2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or

(3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.

(c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded.

In addition, Rule 5.5, Ala. R. Prof. C., prohibits a licensed Alabama lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." If a lawyer were to stay silent and allow a non-lawyer to represent a party in an arbitration, that lawyer would be aiding and abetting that non-lawyer in the unauthorized practice of law. As such, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court and the Office of General Counsel.

ETHICS OPINION # 2008-01

If an attorney uses a nonlawyer employee to communicate with clients in a foreign language, what ethical obligations and responsibilities are imposed upon the supervising attorney?

A lawyer using a nonlawyer employee as a translator must be careful to avoid assisting the nonlawyer employee in the performance of activities that constitute the unauthorized practice of law. For example, while legal advice may be relayed to a client through the use of a translator, the legal advice given must be that of the lawyer and not the translator. As such, the lawyer should always be present during conferences with the client and should not allow the nonlawyer employee to meet privately with the client. In addition, when making court appearances, the approval of the court should be sought in order to use the non-lawyer employee to translate information between the client and the lawyer and/or the court.

The Complex Problem of In-House Insurance Counsel

ETHICS OPINION #RO-2007-01

The Disciplinary Commission's further consideration of the conclusions reached in RO-1981-533 which addressed the issue of whether and/or to what extent liability insurers may employ staff counsel to represent insureds.[33]

The Commission first addressed a question that was not addressed in RO-1981-533: whether the utilization of staff counsel by an insurance carrier constitutes the unauthorized practice of law. Rule 5.5, Ala. R. Prof. C., prohibits attorneys from assisting a non-lawyer entity in the "performance of activity that constitutes the unauthorized practice of law." The Supreme Court of Alabama has stated that "the specific acts which constitute the unauthorized practice of law are and must be determined on a case-by-case

[33] In RO-1981-533, the Disciplinary Commission determined that it was ethically permissible for a liability insurer carrier to prosecute subrogation actions on behalf of the carrier and the insureds' deductible, to handle worker's compensation claims against the carrier's insureds, and to represent the insured wherein the carrier is made a direct party to the civil action. At the time RO-1981-533 was released, Alabama was operating under the former Alabama Code of Professional Responsibility. Alabama has since adopted a new code based primarily on the ABA's Model Rules of Professional Conduct. The Disciplinary Commission deemed it to be an appropriate time to revisit the holding of RO-1981-533 in light of the current Alabama Rules of Professional Conduct and evolving standards of ethical conduct.

basis." *Coffee Cty. Abstract and Title Co. v. State, ex rel. Norwood*, 445 So. 2d 852, 856 (Ala. 1983).[34] The Supreme Court of Alabama has repeatedly held that the purpose of prohibiting the unauthorized practice of law is to ensure that laymen do not serve others in a representative capacity in areas that require the skill and judgment of a licensed attorney. Porter v. Alabama Ass'n of Credit Executives, 338 So.2d 812 (Ala.1976).

Moreover, the Alabama Rules of Professional Conduct expressly recognize that corporations may employ in-house to represent their own interests in litigation. The term "firm" is defined in the Alabama Rules of Professional Conduct to include "lawyers employed in the legal department of a corporation." Rule 1.13, Ala. R. Prof. C., specifically applies to attorneys employed or retained by a corporation or other organization. As a result, staff attorneys are subject to the same ethical obligations that apply to attorneys in other forms of practice. There is no dispute that properly admitted staff attorneys may practice law in

[34] As a starting point, § 34-3-6, Ala. Code 1975, which defines the practice of law, provides, in pertinent part, as follows:

(a) Only such persons as are regularly licensed have authority to practice law.

(b) For the purposes of this chapter, the practice of law is defined as follows:

Whoever,

(1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or

(2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or

(3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.

(c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded.

representing their employer and, as such, are subject to the Rules of Professional Conduct. The question then becomes whether the staff attorney for an insurance company may also represent an insured.

The Disciplinary Commission noted that the insurer is not employing staff counsel as a means of generating revenue, but as a means of limiting the financial liability of its insureds. Staff counsel are employed to limit costs and losses associated with the employer's primary business of issuing insurance policies. In Alabama, the insurer, absent an actual conflict of interest, is traditionally viewed as a co-client with the insured. The Comment to Rule 1.8, Ala. R. Prof. C., states that, "[i]n the normal insurance defense relationship where, for example, there are no coverage issues, appointed counsel has two clients, the insured and the insurer. Hence, the insurer is not a third party." Accordingly, the utilization of staff counsel to represent insureds, where the interests of the insured and the insurer are fully aligned and where the insurer has a direct financial interest in the outcome of the litigation, does not constitute the unauthorized practice of law.

The Disciplinary Commission then turned its attention to the question of whether the use of staff counsel violates other provisions of the Alabama Rules of Professional Conduct. The primary question, as it was in RO-1981-533, is whether an inherent conflict of interest exists when an insurer's staff attorney represents an insured. In RO-1981-553, the Commission found no reason to differentiate -under the former code of professional responsibility – between staff counsel and outside counsel when determining whether an inherent conflict of interest exists.

Under the current Alabama Rules of Professional Conduct, the Disciplinary Commission found no reason to distinguish between staff counsel and outside counsel. The potential for actual conflicts of interest remains the same in either arrangement as it was under the former code. An insurer's use of staff counsel to represent an insured against a third party's lawsuit does not create an inherent conflict of interest in violation of the Rules of Professional Conduct. As discussed earlier, the Alabama Rules of Professional Conduct have previously defined the relationship between insurer and insured as one in which the parties are co-clients. Where the interests of the insured and the insurer are fully aligned and where the insurer has a direct financial interest in the outcome of the litigation, there is not a conflict of interest that would prevent staff counsel for the insured from representing the insurer.

"Staff counsel, however, should be mindful of their unique status when undertaking representation of insureds. The Rules of Professional Conduct apply to staff counsel to the same extent as any other attorney. As such, the following measures should be taken by staff counsel when undertaking representation of insureds.

> "1) The staff attorney should, soon after commencing representation of an insured, disclose any nd all limitations upon the representation. Rule 1.2(c), Ala. R. Prof. C. Examples of such limitations may include provisions in the insurance policy that authorize the insurer to control the defense and/or to settle within policy limits.
>
> 2) The staff attorney must disclose that he/she is a full-time salaried employee of the insurer. It is mpermissible for in-house attorneys who are employed to represent insureds to state or imply that they practice in a separate independent law firm. The relationship between the attorney and the insurer should be disclosed, in writing, to the client at the outset of representation.

3) A staff attorney may not permit the insurance company to direct or regulate the staff attorney's professional judgment in rendering legal services to the client. Rule 5.4(c), Ala. R. Prof. C. Rule 5.4(c), Ala. R. Prof. C., provides as follows:

> 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.

4) To comply with the confidentiality requirements of Rule 1.6, Ala. R. Prof. C., staff attorney offices should be maintained in a manner that is physically and organizationally distinct from other offices of the insurer. Where staff attorney offices are housed in the same building as other offices of the insurer, care should be taken to ensure that only staff attorneys and their administrative personnel have access to an insured's files and confidential information.

5) Where staff attorneys operate under a separate "firm name", the nature of the relationship between the attorneys and the insurer must be clearly disclosed on the letterhead and/or business card of the attorney. The relationship should also be disclosed at office entrances, phone book listings, and when answering the phone.

The American Bar Association and other ethics committees have found that it is unethical and deceptive for salaried in-house attorneys, employed by an insurance company, to represent themselves to be outside counsel. See ABA Opinion 03-430. Rule 7.5(a), Ala. R. Prof. C., states, in pertinent part, as follows:

> RULE 7.5: FIRM NAMES AND LETTERHEADS
>
> (a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable organization and is not otherwise in violation of Rule 7.1 or Rule 7.4.
>
> Rule 7.1, provides, in part, as follows:
>
> A lawyer shall not make or cause to be made a false or misleading communication about the lwyer or the lawyer's services. A communication is false or misleading if it: (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; . . .

Many times staff attorney offices are operated under "firm names" that do not specifically reference the insurer. For example, a staff attorney's office may operate under the name of "XYZ Law Offices". One justification for the practice of using "firm names" for a staff attorney's office is to prevent the issue of insurance from being disclosed to juries or third parties during litigation. However, the use of "firm names" by staff attorneys may constitute a misleading communication about the true nature and independence of the "firm". As such, all letterhead and/or business cards must clearly disclose that the "firm" is an office of the insurer and its attorneys and staff are

employees of the insurer. The relationship between the "firm" and the insurer should also be disclosed at office entrances, phone book listings, and when answering the phone.

6) To avoid loss of a counterclaim, insurance defense counsel should inform the insured about potential counterclaims that may be available to the insured.

"The Disciplinary Commission finds it difficult to imagine an instance where an insured, represented by staff counsel, would have the legal acumen to consult with a private attorney concerning potential counterclaims. Rather, an insured would most often, and rightfully so, rely on the staff attorney to advise him of his legal rights, including the potential for counterclaims. As such, by undertaking representation of the insured, staff attorneys also acquire a duty to advise insureds about potential counterclaims. If a staff attorney determines that a potentially valid counterclaim exists, he must advise the insured of the potential counter claim. In most cases, the staff attorney should recommend that the insured consult with another attorney about the possibility of pursing the counterclaim on the insured's behalf.

"The Disciplinary Commission does not believe that an insurer's staff attorney may ethically represent an insured on a counterclaim. First, the potential for conflict of interest between the insured and the insurance company is even greater. For example, if the insurance company desires to settle the case, but the insured wishes to pursue the counterclaim, a conflict would arise. Secondly, the insurer would not have a direct financial interest in the counter claim. As such, the insurer's use of staff counsel to pursue a counterclaim on behalf of an insured may constitute the unauthorized practice of law.

"If the insured retains private counsel for representation on a counterclaim, the staff attorney representing the insured on the original claim should not take any action that is detrimental to the insured's interest in the counterclaim, unless the insured consents. If the insured refuses to consent because of the effect it will have on his counterclaim, then the staff attorney must either withdraw due to the conflict of interest or forgo the proposed course of action.

CONCLUSION:

"In summation, the Disciplinary Commission finds that the utilization of staff counsel to represent insureds, where the interests of the insured and the insurer are fully aligned and where the insurer has a direct financial interest in the outcome of the litigation, does not constitute the unauthorized practice of law and is not prohibited by the Alabama Rules of Professional Conduct. At the outset of representation, however, a staff attorney must disclose that he is a full-time employee of the insurer and disclose any limitations upon the representation. In representing an insured, a staff attorney should ensure that the insurer does not interfere with the lawyer's independence of professional judgment, and must otherwise comply with the Rules of Professional Conduct.

"To comply with the confidentiality requirements of Rule 1.6, Ala. R. Prof. C., staff attorney offices should be maintained in a manner that is physically and organizationally distinct from other offices of the insurer. Where staff attorney offices are housed in the same building as other offices of the insurer, care should be taken to ensure that only staff attorneys and their administrative personnel have access to an insured's files and confidential information. Staff attorney offices that employ a "firm" name must disclose that the "firm" is an office of the insurer and its attorneys and staff are employees of the insurer at office entrances, in phone book listings, when answering the phone, and on all letterhead and business cards. Finally, a staff attorney has an ethical obligation to notify and advise the insured of possible counterclaims

that may be available to the insured. Ordinarily, staff counsel may not represent the insured on the counterclaim, but should, instead, advise the insured to consult with a private attorney."

Other Ethics Opinions Regarding Practice Structure

2002-02--Affiliation agreements with foreign lawyers are ethically permissible

2002-01--Imputed Disqualification of Law Firms When Nonlawyer Employees Change Firms

2001-01--Attorney may barter legal services in exchange for services from other professionals and may refer clients to other professionals subject to certain conditions

1999-01--Attorney may not pay for advertising of another attorney in exchange for referrals

1997-01--Participation in National Attorney Network

1996-09--Alabama lawyers may form limited liability partnership with other lawyers or professional

1996-06--Law firms not required to notify respective clients that one firm is representing the other if the attorneys involved determine such will not adversely affect their relationships with their clients

1993-23--Law firm may not establish a separate and distinct law firm and pay for advertising and other operating expenses in return for the referral of cases from said firm(Modified by RO-99-01)

1993-22--Rule 1.11 applied to state agency conducting grand jury investigation and pursuing civil action against same party

1993-16--Alabama lawyers may utilize provisions of Alabama Limited Liability Company ("LLC") Act for organization of law firm

1993-11--Use of the terms "Associates", "Law Firm", and "Law Offices" in law firm name

1993-03--Lawyer changing firms

1992-23--Law firm's paying of advertising budget of solo practitioner who refers cases to law firm discussed (Modified by RO-99-01)

1992-22--Partner of city councilman serving as city prosecutor

1992-06--National Board of Trial Advocacy

1991-06--Required notice to client when attorney leaves law firm

1990-85--Lawyer's "selling" of his collections practice files to collections agency in which he has financial interest discussed

1990-100--Lawyer or law firm operating under trade name must include trade name in all other permissible communications made pursuant to Rule 7, A.R.P.C.

1990-05--Imputed disqualification rule as applied to district attorneys and part-time district attorneys handling child support arrearage (Title IV/DHR) cases involving former clients

1990-01--Business cards of paralegal must contain identification of the non-lawyer employee as “non-lawyer assistant.”

1987-161--Dual professions – attorney and real estate broker.

1987-158--Referrals from credit bureau partially owned by attorney.

1986-52--Limitations on in-house counsel of corporation who is not admitted to practice law in Alabama

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES[35]

ETHICS OPINION # 2008-01

May an attorney advertise the ability to communicate in a foreign language if an employee of the attorney, and not the attorney, will be communicating with clients in the second language? If so, what ethical obligations and responsibilities are imposed upon the supervising attorney?

An attorney may advertise the ability of a nonlawyer employee to communicate in a foreign language if the advertisement makes it clear that the nonlawyer employee and not the attorney will be communicating with the client in the foreign language. Additionally, if the advertisement is placed using the foreign language being advertised, then the disclaimer required by Rule 7.2(e) must also be in that same foreign language. If the advertisement being placed uses both English and the foreign language, then the disclaimer must be communicated through both the foreign language and English. Finally, any attorney using a nonlawyer employee to communicate with a client in a foreign language assumes all responsibility for the accuracy of the information relayed between the nonlawyer employee and client.

[35] **Alabama Rules of Professional Conduct: Information About Legal Services, Rule 7.1--Communications Concerning a Lawyer's Services.** A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; (c) Compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Rule 7.4; or (d) communicated the certification of the lawyer by a certifying organization, except as provided in Rule 7.4. [Amended eff. 8-23-2000.]

RULE 7.2: ADVERTISING[36]

ETHICS OPINION # 2003-01: Various Advertising Issues Addressed

Are an attorney's business cards considered advertising? May an attorney leave his business cards in the offices of other professionals such as doctors and accountants?

The business cards of an attorney can constitute advertising if the cards are distributed to the public in such a way as to, or with the intent to, directly solicit prospective clients. In formal opinion RO-91-17, the Disciplinary Commission concluded that it was impermissible for an attorney to participate in a Welcome Wagon sponsorship whereby the attorney's brochure and other advertising material would be distributed by a Chamber of Commerce employee to new residents in the community. The Commission determined that such participation would constitute solicitation by an agent acting on the lawyer's behalf in violation of Rule 7.3 of the Rules of Professional Conduct. Additionally, the Office of General Counsel has held in various informal opinions that attorneys may not leave their business cards or other advertising materials in bars and nightclubs, doctors' offices or the offices of bail bondsmen because to do so would constitute face-to-face solicitation by an agent. It is, therefore, the opinion of the Disciplinary Commission that it would be ethically impermissible for an attorney to provide business cards to other professionals for distribution to their clients, customers or patients.

* * * * * * * * * * * * *

May an attorney print an advertisement for legal services on the exterior of prescription bags which a pharmacy will disperse to customers?

The Commission opined that the ethical concerns discussed in RO-91-17, cited in the previous question, are equally applicable to this inquiry. The Commission determined that attorney participation in Welcome

[36] **Alabama Rules of Professional Conduct: Information About Legal Services, Rule 7.2--Advertising.** A lawyer who advertises concerning legal services shall comply with the following: (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor displays, radio, television, or written communication not involving solicitation as defined in Rule 7.3. (b) A true copy or recording of any such advertisement shall be delivered or mailed to the office of the general counsel of the Alabama State Bar at its then current headquarters within three (3) days after the date on which any such advertisement is first disseminated; the contemplated duration thereof and the identity of the publisher or broadcaster of such advertisement, either within the advertisement or by separate communication accompanying said advertisement, shall be stated. Also, a copy or recording of any such advertisement shall be kept by the lawyer responsible for its content, as provided hereinafter by Rule 7.2(d), for six (6) years after its last dissemination. (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service. (d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content. (e) No communication concerning a lawyer's services shall be published or broadcast, unless it contains the following language, which shall be clearly legible or audible, as the case may be: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers." (f) If fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure of the lawyer and/or law firm advertising to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer or law firm advertising shall be bound to perform the advertised services for the advertised fee and expenses for a period of not less than sixty (60) days following the date of the last publication or broadcast.

Wagon sponsorships is prohibited because such participation constitutes solicitation by an agent. In this instance, the pharmacist would be soliciting on behalf of the attorney in much the same manner, and to the same extent, as the Chamber of Commerce employee in RO-91-17. Furthermore, the attorney is obviously paying the pharmacist for the right to place his advertisement on the prescription bags. The fact that the attorney's advertisement is on the pharmacist's prescription bags constitutes, or could readily be construed to constitute, an endorsement or recommendation of the attorney by the pharmacist. Rule 7.2 (c) provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyers services . . .". Accordingly, it is the opinion of the Disciplinary Commission that it would be ethically improper for an attorney to place an advertisement for legal services on the exterior of a prescription bag or on any other item which is to be distributed to the public by a third party.

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Is an offer to provide legal services on a pro bono basis subject to the Rules governing advertising and solicitation?

It is the opinion of the Disciplinary Commission that when attorneys provide, free of charge, their time, advice or other legal services for a charitable or eleemosynary purpose, the motive for offering those services is not one of "pecuniary gain" within the meaning of the above-quoted Rule. Accordingly, offers to provide such services need not comply with the requirements of subdivision (b)(2) of Rule 7.3 and need not contain the disclaimer required by Rule 7.2(e).

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Must written communications sent to former or existing clients for the purpose of soliciting representation of those clients in matters wholly unrelated to the existing or previous representation comply with the direct-mail solicitations requirements of Rule 7.3?

Direct mail solicitation of prospective clients is governed by Rule 7.3 of the Rules of Professional Conduct. Paragraph (a) of that Rule provides, in pertinent part, as follows:

> "A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

It is the opinion of the Disciplinary Commission that the above-quoted language exempts written communication directed to former or existing clients from the requirements of Rule 7.3 regardless of whether the communication relates to the existing or prior representation or is for the purpose of soliciting the recipient as a client in a new and unrelated matter.

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Are communications which are solicited by the recipient covered by the direct mail Rule?

"Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule." This comment refers to communications which have been solicited by the recipient. For example, if someone who needs legal assistance and, in the process of attempting to determine which attorney to employ, contacts one or more attorneys asking for information on their background and experience, the

response to such a request need not comply with the Rule governing direct mail solicitation. Conversely, communications which are sent to prospective clients on an unsolicited basis must comply with the Rule.

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A lawyer proposes to publish an advertisement which contains the following language: "Experienced, Driven & Knows the System – The Lawyer You Choose Makes A Difference". Is this language permissible?

It is the opinion of the Disciplinary Commission that such "comparative" language is directly contrary to the intent and purpose of the disclaimer required by paragraph (e) of Rule 7.2, i.e., "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers." The message conveyed to the public by comparative advertisements, either directly or by implication, is that the advertising attorney does, in fact, provide legal services of greater quality than other attorneys. Such advertisements are, therefore, ethically impermissible.

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An attorney proposes to send a brochure to prospective clients with a cover letter worded as follows:

> "Enclosed is a courtesy copy of my firm's July/August 2003 newsletter. I hope that you find it informative. If you would like to receive additional copies of the newsletter in the future, please take a moment to complete and return the enclosed postcard to me, and I will see to it that additional copies are sent to you."

Must the cover letter and brochure comply with the requirements of Rule 7.3 of the Rules of Professional Conduct which govern direct mail solicitation of prospective clients by attorneys?

The proposed cover letter and brochure are "written form[s] of communication directed to a specific recipient". Moreover, the intended recipient appears to be someone "with whom the lawyer has no familial or current or prior professional relationship". Accordingly, the letter and brochure must comply with Rules 7.2 and 7.3. However, written communication sent to former or existing clients or family members are exempt from all advertising and solicitation requirements.

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An attorney proposes to send a calendar to prospective clients which would have printed on it the attorney's name, address, telephone number, fax number and a sketch of the attorney's office building. Must this proposed calendar comply with Rule 7.3?

It is the opinion of the Disciplinary Commission that the proposed calendar is not a "written form of communication" within the meaning of Rule 7.3 and, therefore, need not comply with the requirements thereof. However, if the calendar includes any reference to the attorney's areas of practice, it must contain the disclaimer as required by Rule 7.2(e).

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May advertisements contain "success stories" about cases the attorney has successfully litigated and amounts recovered on behalf of clients? May advertisements contain "client testimonials" relating favorable comments from satisfied clients?

In a prior informal opinion, the Office of General Counsel approved an advertisement which included those elements expressly prohibited in the Comments to the advertising rules, i.e., references to successful litigation, information concerning amounts recovered and favorable comments from satisfied clients. However, the General Counsel's opinion was predicated on the fact that the advertisement contained the following disclaimer:

> "These recoveries and testimonials are not an indication of future results. Every case is different, and regardless of what friends, family, or other individuals may say about what a case is worth, each case must be evaluated on its own facts and circumstances as they apply to the law. The valuation of a case depends on the facts, the injuries, the jurisdiction, the venue, the witnesses, the parties, and the testimony, among other factors. Furthermore, no representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

The Disciplinary Commission concurred in the opinion of the General Counsel that such "success story" and "testimonial" advertisements are permissible, provided such permission is expressly conditioned upon the inclusion of an explicit, comprehensive and appropriately worded disclaimer and provided, of course, that the statements made in the advertisements are true and accurate.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

ETHICS OPINION # 2006-01

Under what circumstances may an attorney conduct direct solicitation – via in-person contact or by telephone – for professional employment under Rule 7.3(a), Alabama Rules of Professional Conduct?

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. Rule 7.3(a) continues the traditional prohibition against direct solicitation of legal employment. The rule provides that a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Nor shall a lawyer permit employees or agents to solicit on the lawyer's behalf. "Solicit" includes contact in person, by telephone, telegraph, fax, or by other communication directed to a specific recipient and includes contact by certain written forms of communication directed to a specific recipient. Direct solicitation is disfavored, in part, because the contact between attorney and prospective client is in private and therefore, not subject to public scrutiny. As such, the attorney can overreach and "can more readily mix misleading speech with factual statements."[37]

Rule 7.3(a), Ala. R. Prof. C. expressly exempts from the ban against solicitation those persons with whom the attorney has a familial relationship and/or a current or prior professional relationship. It is presumed less likely that an attorney would engage in abusive or misleading practices against a person with whom he enjoys a familial relationship. Current and former clients are also excluded from the prohibition against direct solicitation. Due to their previous or ongoing interaction with the attorney, current or former clients will have a sufficient basis upon which to judge whether to continue or reactivate a professional relationship with a particular attorney.[38] To the extent that RO-93-02 opined otherwise or conflicts with this opinion, it was withdrawn.

The text of Rule 7.3 is set forth in the below footnote.[39]

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[37] The reason for prohibiting direct solicitation is also discussed in the Comment to Rule 7.3: There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile trans- mission of prospective clients known to need legal services. Direct solicitation subjects the non-lawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect. The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

[38] The United States Supreme Court held in *In Re Primus*, 436 U.S. 412 (1978) that the solicitation of prospective clients by nonprofit organizations that engage in litigation as a form of political expression are entitled to First Amendment protection and not subject to disciplinary action under the First Amendment for improper solicitation. The ban against direct solicitation also may not apply when the attorney is not seeking and will not receive any type of financial benefit from the representation.

[39] **Alabama Rules of Professional Conduct: Information About Legal Services, Rule 7.3.-- Direct Contact with Prospective Clients.** (a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive

for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule. (b) Written Communication (1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if: (i) the written communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days prior to the mailing of the communication; (ii) the written communication concerns a civil proceeding pending in a state or federal court, unless service of process was obtained on the defendant or other potential client more than seven (7) days prior to the mailing of the communication; (iii) the written communication concerns a criminal proceeding pending in a state or federal court, unless the defendant or other potential client was served with a warrant or information more than seven (7) days prior to the mailing of the communication; (iv) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; (v) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication; (vi) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer; (vii) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under Rule 7.1; or (viii) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or is incompetent, or that the person's physical, emotional, or mental state makes it unlikely that the person would exercise reasonable judgment in employing a lawyer. (2) In addition to the requirements of Rule 7.2, written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements: (i) a sample copy of each written communication and a sample of the envelope to be used in conjunction with the communication, along with a list of the names and addresses of the recipients, shall be filed with the office of general counsel of the Alabama State Bar before or concurrently with the first dissemination of the communication to the prospective client or clients. A copy of the written communication must be retained by the lawyer for six (6) years. If the communication is subsequently sent to additional prospective clients, the lawyer shall file with the office of general counsel of the Alabama State Bar a list of the names and addresses of those clients either before or concurrently with that subsequent dissemination. If the lawyer regularly sends the identical communication to additional prospective clients, the lawyer shall, once a month, file with the office of general counsel a list of the names and addresses of those clients contacted since the previous list was filed; (ii) written communications mailed to prospective clients shall be sent only by regular mail, and shall not be sent by registered mail or by any other form of restricted delivery or by express mail; (iii) no reference shall be made either on the envelope or in the written communication that the communication is approved by the Alabama State Bar; (iv) the written communication shall not resemble a legal pleading, official government form or document (federal or state), or other legal document, and the manner of mailing the written communication shall not make it appear to be an official document; (v) the word "Advertisement" shall appear prominently in red ink on each page of the written communication, and the word "Advertisement" shall also appear in the lower left-hand corner of the envelope in 14-point or larger type and in red ink. If the communication is a self-mailing brochure or pamphlet, the word "Advertisement" shall appear prominently in red ink on the address panel in 14-point or larger type; (vi) if a contract for representation is mailed with the written communication, it will be considered a sample contract and the top of each page of the contract shall be marked "SAMPLE." The word "SAMPLE" shall be in red ink in a type size at least one point larger than the largest type used in the contract. The words "DO NOT SIGN" shall appear on the line provided for the client's signature; (vii) the first sentence of the written communication shall state: "If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure, or written communication]"; (viii) if the written communication is prompted by a specific occurrence (e.g., death, recorded judgment, garnishment) the communication shall disclose how the lawyer

OTHER SIGNIFICANT ADVERTISING RULES:

Alabama Rules of Professional Conduct: Information About Legal Services, Rule 7.4-- Communication of Fields of Practice. A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows: (a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation; (b) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation; or (c) A lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority, but only if such certification is granted by an organization previously approved by the Alabama State Bar Board of Legal Certification to grant such certifications. [Amended 8-31-93, eff. 1-1-94.]

Alabama Rules of Professional Conduct: Information About Legal Services, Rule 7.5--Firm Names and Letterheads. (a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable organization and is not otherwise in violation of Rule 7.1 or Rule 7.4. (b) A law firm with offices in another jurisdiction may use in Alabama the name it uses in the other jurisdiction, provided the use of that name would comply with these rules. A firm with any lawyers not licensed to practice in Alabama must, if such lawyer's name appears on the firm's letterhead, state that the lawyer is not licensed to practice in Alabama. (c) A lawyer or law firm may indicate on any letterhead or other communication permitted by these rules other jurisdictions in which the lawyer or the members or associates of the law firm are admitted to practice. (d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not practicing with the firm.

Alabama Rules of Professional Conduct: Information About Legal Services, Rule 7.6--Professional Cards of Nonlawyers. A lawyer shall not cause or permit a business card of a nonlawyer which contains the lawyer's or firm's name to contain a false or misleading statement or omission to the effect that the nonlawyer is a lawyer. A business card of a nonlawyer is not false and misleading which clearly identifies the nonlawyer as a "Legal Assistant," provided that the individual is employed in that capacity by a lawyer or law firm, that the lawyer or law firm supervises and is responsible for the law related tasks assigned to and performed by such individual, and that the lawyer or law firm has authorized the use of such cards.

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obtained the information prompting the communication; (ix) a written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem; and (x) a lawyer who uses a written communication must be able to prove the truthfulness of all the information contained in the written communication. [Amended eff. 5-1-1996; Amended eff. 2-19-2009.]

Other Ethics Opinions Regarding Advertising

1999-01--Attorney may not pay for advertising of another attorney in exchange for referrals

1996-07--Alabama Rules of Professional conduct apply to lawyer advertising on the Internet and private on-liner services

1996-05--Direct mail advertising

1994-12--Lawyer's communicating on letterhead and business cards fact that he has been certified as an arbitrator by the American Arbitration Association does not violate Rules 7.1 and 7.7

1993-23--Law firm may not establish a separate and distinct law firm and pay for advertising and other operating expenses in return for the referral of cases from said firm(Modified by RO-99-01)

1993-15--Law firm endorsed by union may purchase ad in union directory and may provide business cards of law firm's lawyers for dissemination to union members

1993-11--Use of the terms "Associates", "Law Firm", and "Law Offices" in law firm name

1992-23--Law firm's paying of advertising budget of solo practitioner who refers cases to law firm discussed (Modified by RO-99-01)

1992-14--Single disclaimer for multiple ads

1992-06--National Board of Trial Advocacy

1991-43--Attorney Hotline

1990-100--Lawyer or law firm operating under trade name must include trade name in all other permissible communications made pursuant to Rule 7, A.R.P.C.

1990-09--Review of lawyer brochure–applicable rules (Code of Professional Responsibility) governing advertising quoted

1990-01--Business cards of paralegal must contain identification of the non-lawyer employee as "non-lawyer assistant."

1988-52--Lawyer may utilize names of clients in "tombstone announcements" if clients consent to such use

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT[40]

ETHICS OPINION #1992-09

Do lawyers have a duty to report a judge's "bizarre behavior" to the Judicial Inquiry Commission?

Under Rule 8.3, Reporting Professional Misconduct, a lawyer possessing unprivileged knowledge or evidence concerning another lawyer or judge shall reveal fully such knowledge or evidence upon proper request. This deals with reporting of "misconduct" as identified in Rule 8.4. The duty is a limited one because it only requires that lawyers reveal evidence "upon proper request", presumably by an authority empowered to investigate the type of conduct involved. ABA Model Rule 8.3(b) [not adopted by Alabama] provides that a lawyer must report a judicial violation of applicable rules, only when it raises "a substantial question as to the judge's fitness for office." To that extent, even the Model Rule is limited in its requirement of affirmative reporting of judicial conduct. There is no duty to report merely "bizarre" judicial behavior. Therefore, in this situation, it is not ethically required that a report be to the Judicial Inquiry Commission.

ETHICS OPINION # 1990-11

Is there an obligation to advise a client that he or she may have a basis for filing a grievance against the client's former lawyer when the complaint involves malpractice but not necessarily misconduct?

"Malpractice" and unethical conduct are not the same thing. The Supreme Court of Alabama has held that a violation of the Code of Professional Responsibility, in and of itself, does not form the basis of a malpractice action. Likewise, the Disciplinary Commission has held on many occasions that bare malpractice does not, in and of itself, constitute a violation of the Code of Professional Responsibility. The Code of Professional Responsibility speaks to the issue of the impropriety of taking an action that is without basis in the law or taking action merely to harass or vex another party. Accordingly, while an attorney is under an affirmative ethical obligation to report unprivileged knowledge of alleged ethical

[40] **Alabama Rules of Professional Conduct: Maintaining the Integrity of the Profession, Rule 8.3 -- Reporting Professional Misconduct.** (a) A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. (b) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request. (c) A lawyer who is on the Alabama Lawyer Assistance Program Committee or who is a member of any committee or subcommittee of the Alabama Lawyer Assistance Program designed to assist lawyers with addiction and other mental-health-related disorders shall not be under any obligation to disclose any knowledge or evidence acquired from any other person (including judges and lawyers) during communications made by that other person for the purpose of seeking help of the sort the Alabama Lawyer Assistance Program Committee was intended to give. Any statement made by either party during such communications shall be privileged, and no claims or disciplinary action based on the lawyer's failure to disclose the knowledge or evidence acquired during such communications may be instituted. (d) Inquiries or information received by any lawyer staffing a position with the Alabama State Bar Practice Management Assistance Program shall not be disclosed to the disciplinary authority without written permission of the lawyer seeking assistance. Any statement made by either party during such communications shall be privileged, and no claims or disciplinary action based on the lawyer's failure to disclose the knowledge or evidence acquired during such communication may be instituted. (e) This rule does not require disclosure of information otherwise protected by Rule 1.6. [Amended eff. 4-7-92; Amended 7-13-2011, eff. 8-1-2011.]

misconduct a reasonableness standard must be applied such that an attorney, for himself or herself or on behalf of a client, should reasonably believe that there has been a breach of the Code of Professional Responsibility before initiating a disciplinary inquiry. Of course, should the client initiate a discussion regarding the ethical behavior of another attorney, then an attorney should provide complete advice to the client to enable the client to initiate the decision-making process.

RULE 8.4: MISCONDUCT[41]

ETHICS OPINION # 2007-05

During pre-investigation of possible infringement of intellectual property rights, may a lawyer employ private investigators to pose as potential customers under the pretext of seeking services of the suspected infringers in the same manner as a member of the general public?

A lawyer may not circumvent the rules of professional conduct by inducing another to engage in conduct that is prohibited by the rules of professional conduct. Therefore, where a lawyer engages a private investigator or any other third party and that person engages in conduct that is prohibited by the rules of professional conduct, the lawyer does not escape the disciplinary consequences as the misconduct committed by the private investigator or other party may be imputed to the lawyer. Whether the proposed conduct is a violation of the rules depends on consideration of the following:

> **Rule 4.2 Communication With Person Represented by Counsel**
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.

It is significant that Alabama Rule 4.2 uses the term "party" as opposed to the term "person." "Party is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or a defendant, whether composed of one or more individuals or whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties." Black's Law Dictionary 1010 (5th Ed. 1979) citing Golatte v. Matthews, 394 F. Supp. 1203, 1207 (M.D. Ala. 1975). Rule 4.2 has no application to contact between a lawyer or private investigators and persons who may potentially be parties in litigation that has yet to be filed.

Moreover, Rule 4.3, Ala. R. Prof. C. provides that 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. In the pre-litigation context, where a lawyer or his or her investigator is acting in the capacity of an investigator and merely presenting to targets as potential customers under the pretext of seeking services as any other member of the general public, they are not acting as a lawyer and Rule 4.3, Ala. R. Prof. C., does not apply.

Nor does Rule 8.4(c), Ala. R. Prof. C. apply. It provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. In the pre-litigation context a private lawyer may use an undercover investigator to investigate possible infringement of intellectual

[41] **Alabama Rules of Professional Conduct Maintaining the Integrity of the Profession Rule 8.4. Misconduct.** It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) Engage in conduct that is prejudicial to the administration of justice; (e) State or imply an ability to influence improperly a government agency or official; (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Canons of Judicial Ethics or other law; or (g) Engage in any other conduct that adversely reflects on his fitness to practice law.

property rights posing as customers under the pretext of seeking services of the suspected infringers and may misrepresent their identity and purpose as long as their contact with suspected infringers occur in the same manner and on the same basis as those of a member of the general public seeking such services.