

Ethic-cetera

Birmingham Bar Association, Criminal
Justice Section
December 2, 2020

Topics:

- Pro Bono Representation and the Alabama Rules of Professional Conduct
- Attorney Wellness and Ethical Obligations
- Alabama State Bar Services
- Ethical Issues in Criminal Practice

Rule 6.1, *Ala. R. Prof. C.* Pro Bono Public Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Rule 6.6, *Ala. R. Prof. C.* Special Membership for Pro Bono Services

Any inactive member of the Alabama State Bar may render pro bono services by paying the special membership dues and becoming a special member of the Alabama State Bar as prescribed by the Alabama State Bar for the year in which the pro bono services are rendered. The provision of pro bono services by a special member of the Alabama State Bar shall not be deemed the active practice of law or the unauthorized practice of law under Rule 5.5. For purposes of this section, "pro bono services" are defined as legal services provided without fee or remuneration through an approved pro bono provider.

An approved pro bono provider for the purposes of this rule is a not-for-profit legal-aid organization, bar, or court sponsoring a pro bono program that is approved by the Alabama State Bar as set forth in this rule. A not-for-profit legal-aid organization, bar, or court seeking approval from the Alabama State Bar for purposes of this rule shall file a petition with the office of General Counsel of the Alabama State Bar certifying that it is a not-for-profit legal-aid organization, bar, or court sponsoring a pro bono program, and specifically stating:

- (a) The structure of the organization and whether it accepts funds from clients;
- (b) The major sources of funds used by the organization;
- (c) The criteria used to determine potential clients' eligibility for legal services performed by the organization;
- (d) The types of legal and nonlegal services performed by the organization;
- (e) The names of all members of the Alabama Bar who are employed by the organization or who regularly perform legal work for the organization; and
- (f) That the organization has in place professional liability insurance that will cover the attorney providing the pro bono services.

This rule shall not preclude an approved pro bono provider from recovering court-awarded attorney fees for representation provided by a pro bono attorney or from receiving reimbursement for otherwise recoverable costs incurred in representing a client pro bono.

Ala. Code § 34-3-6 Who may practice as attorneys

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

* * *

- (e) Each attorney licensed to practice law in the State of Alabama, whether the license is a special or a regular license, may provide pro bono legal services organized through or recognized by the Alabama State Bar Association.

Rule 7.3, *Ala. R. Prof. C.* 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.

....

Formal Opinion 2003-01

Answer Question Three:

... 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). The Commission's opinion is consistent with, and supported by, the decisions of the United States Supreme Court in *NAACP v. Button*, 371 U.S. 415 (1963)... and *In re Primus*, 436 U.S. 412 (1978)...



“The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys”

*Published in the February 2016 edition of the Journal of Addiction Medicine.

*Almost 15,000 lawyers from 19 states participated in this groundbreaking study.

*Found that 21% to 36% of attorneys revealed a score consistent with an alcohol use disorder. (Three to five times higher than the general population)

*28% reported concerns with mild or high levels of depression.

*19% reported mild or high levels of anxiety.

*23% reported mild or high levels of stress

ABA National Task Force on Lawyer Well-Being (2017)

To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. The two studies referenced above reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

ABA National Task Force on Lawyer Well-Being (2017)

"Lawyer well-being is part of a lawyer's ethical duty of competence. It includes lawyers' ability ... to help them make responsible decisions for their clients."

Rule 1.16, *Ala. R. Prof. C.*

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:

...

(2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ...

“Better Together”

Bar President Christy Crow’s theme for 2019-2020 year was “Better Together.” The focus was improving lawyer wellness, increasing the member benefits for state bar members, increasing civics education by having lawyers volunteer to provide school presentations on civics, and improving the image of lawyers through social media and news campaigns.

Quality of Life, Health, and Wellness Task Force (2019-2020)

The task force shall formulate an action plan to implement the recommendations of the American Bar Association Lawyer Well Being Report including:

- 1) Identifying stakeholders and the role they can place in reducing toxicity in the profession;
- 2) Ending the stigma surrounding help-seeking behaviors;
- 3) Emphasizing that well-being is an indispensable part of a lawyer's duty of competence;
- 4) Expanding educational outreach and programming on well-being issues;
- 5) Evaluate manners in which we can change the tone of the profession as it relates to well-being.

The task force will explore programs, accumulate information and educate members about wellness issues and resources and develop a CLE to be offered to members throughout the state. The task force will formulate a plan to celebrate May as Mental Health Awareness Month and provide content for the Communications Department of the Alabama State Bar to raise awareness through a Wellness Wednesday social media campaign.

<https://www.alabar.org/health-and-wellness/>

- Wellness Articles
- Task Force Information
- Links to Wellness CLE
- Gym Membership Information
- Alabama Chapter of the Mindfulness in Law Society

Lawyer Assistance Program

- **Jeremy Rakes, Director**



(334) 517-2238 - Phone

(334) 517-2239 - Fax

(334) 224-6920 - 24 Hour Confidential Helpline

jeremy.rakes@alabar.org

- <https://www.alabar.org/programs/alabama-lawyer-assistance-program/>

Purpose

The Alabama Lawyer Assistance Program (ALAP) provides immediate and continuing help to lawyers, judges, and law students who suffer from addictions and/or other types of mental health disorders such as depression, anxiety disorder and bipolar disorder. Our program is completely CONFIDENTIAL. We provide support and assistance, referrals for evaluation and treatment, monitoring for accountability and compliance and ongoing guidance and support. We have a dedicated committee of volunteer attorneys who assist with informal interventions, serve as a mentor to attorneys in early recovery and provide long-term direction and encouragement until a solid foundation in recovery has been established.

“ALAP Understands”

- Alcohol/drug addictions are progressive illnesses that only get worse without help. ALAP offers confidential intervention and assistance before ethical conduct is compromised or discipline warranted.
- Depression is a major illness and that the rate of depression in members of the legal community is substantially higher than that of the general population. ALAP offers intervention, monitoring and referral resources for legal professionals suffering from depression and stress.
- Educating the bench and bar about the signs and symptoms associated with these illnesses promotes awareness and encourages an atmosphere conducive to getting help. ALAP offers educational programs to local bar associations, judicial conferences and law schools throughout the state.

How it Works

- ALAP accepts anonymous referrals, as well as self-referrals, from any individual who has concerns regarding mental health or addiction. A person is allowed to call or email the program if they have a loved one or colleague who is a law student, lawyer or judge that is unable to handle the pressures of work/life. The person making the call may remain anonymous if they so desire.
- Once ALAP has been contacted, they reach out to the individual, via email or phone, to see if they are willing to meet with the director and/or one or more members of the committee. All information is strictly confidential. If the individual is willing, the director and/or committee members will meet with him or her to see what their needs are. They will listen non-judgmentally, share our own experience, strength and hope, and provide recommendations and support.

Ethics Division

- Practice Management Assistance Program
- Ethics Counsel

Practice Management Assistance Program (PMAP)

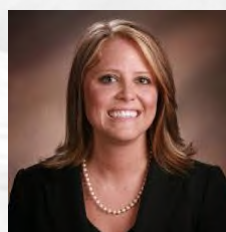
Autumn Caudell

(334) 517-2120

autumn.caudell@alabar.org

pmap@alabar.org

<https://www.alabar.org/programs/pmap/>



Practice Management Assistance Program

The Practice Management Assistance Program (PMAP) serves as a clearinghouse for the collection and dissemination of information about the effective management of the contemporary law office. The program was created to serve the needs of solo practitioners and lawyers practicing in small firms, and to protect the public from lawyers whose management skills are inadequate to allow them to deliver competent legal services in a timely manner.

A large part of the information distributed through PMAP is in the form of a lending library containing books, audio and video programs, and software directly relating to management issues, such as attorney compensation, billing, business planning, client relations, employee relations, ethics and professionalism, loss prevention, marketing, retirement planning, and technology. The program also handles the sale of American Bar Association publications, particularly those of the Law Practice Management Division, on a discounted basis to ASB members.

The program has created and also makes available a series of free informational packets, brochures and booklets on starting a new firm, handling your trust account, establishing standardized communications with your clients, budgeting, managing files, handling the law office calendar and docket system, selecting appropriate computer hardware, software and cloud-based service for the small law office.

The director of PMAP is available for confidential telephone, email or on-site office consultations with members as requested, and works with lawyers referred by the Office of the General Counsel, both pre-and post-discipline. Since the inception of the program, the director has worked individually with more than 2,700 Alabama lawyers — many of them on numerous occasions.

<http://www.alabar.org/programs/pmap/>

Informal Ethics Advice Upon Request

Call 334.269.1515 / 800.354.6154

Email ethics@alabar.org
tripp.vickers@alabar.org

Write Alabama State Bar
 Attn: Ethics Counsel
 P.O. Box 671
 Montgomery, Alabama 36104

What can we do?

Informal Ethics Opinion:

Provide Alabama lawyers with confidential opinions regarding the ethical propriety of their own prospective conduct based upon a verifiable set of facts.

Informal Ethics Advice

What we cannot do:

- Provide legal advice or conclusions
- Comment or opine on your past conduct
- Comment or opine on the conduct of another lawyer
- Answer hypothetical questions
- Advise regarding Judicial Canons or judges' obligations

Ethics Division Opinions

- Relate to your own proposed future conduct
- Shield not a sword
- Responses provided in the format requested
- Maintained in database
- Advisory in nature
- Not binding on a court
- Not binding on the Disciplinary Commission
- Do not purport to answer legal questions or adjudicate legal issues
- Confidential
- Service not a “hotline”

ASB Formal Opinion Database

www.alabar.org/office-of-general-counsel/formal-opinions/

The screenshot shows the ASB Formal Opinion Database website. At the top, there is a navigation bar with links to various resources. Below the navigation bar, the title "Opinions" is displayed, followed by a message stating "There are currently 139 Formal Opinions." and a prompt to use the search form. The search form includes a text input field labeled "Search" and a "Search" button. Below the search form, there is a list of opinions with columns for the year, the opinion number, and the title. The list includes opinions from 2015-01 to 2012-01.

Year	Opinion Number	Title
2015-01	139	Lien Reduction and Double Dipping
2014-01	138	A non-lawyer may not represent a party in a court-ordered arbitration proceeding in Alabama.
2013-01	137	Prosecuting a BP Claim: Ethical Considerations
2012-01	136	Advertising on Groupon and Similar Deal of the Day Websites

Reorganization of Office of General Counsel and Division of Duties

- Ethics Counsel does not investigate or prosecute Bar complaints
- Ethics Counsel does not have access to Disciplinary Files or information
- Disciplinary Counsel does not provide ethics advice
- Disciplinary Counsel does not have access to Ethics Counsel database or information
- Access controls and screening procedure

Other Ethics Resources

Supreme Court and State Law Library Rules of Court Page

<http://judicial.alabama.gov/library/rulesofcourt>

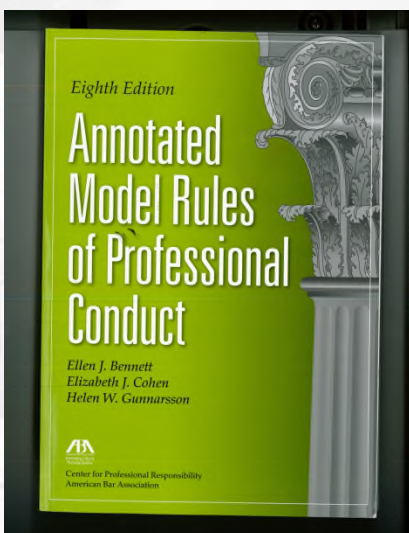
- Alabama Rules of Professional Conduct
- Alabama Rules of Disciplinary Procedure

ABA Model Rules and Resources

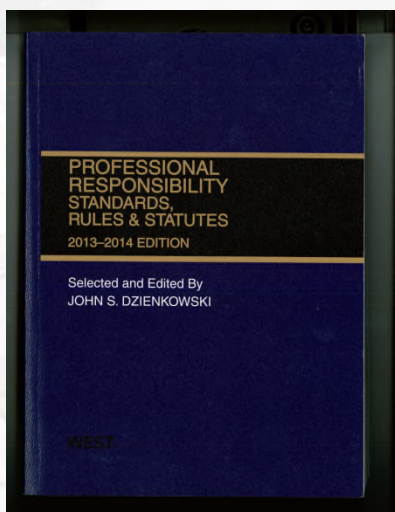
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

The screenshot shows the ABA Model Rules of Professional Conduct website. The header includes the ABA logo and navigation links. The sidebar on the left lists 'ABA GROUPS' with sub-links for Publications, Model Rules of Professional Conduct, and Ethics Opinions. The main content area is titled 'Model Rules of Professional Conduct' and includes a section 'About the Model Rules' with a list of resources like 'Model Rules Table of Contents' and 'Purchase a copy'. There is also a 'Most Recent Changes to the Model Rules' section with dates like February 2013 and August 2012.

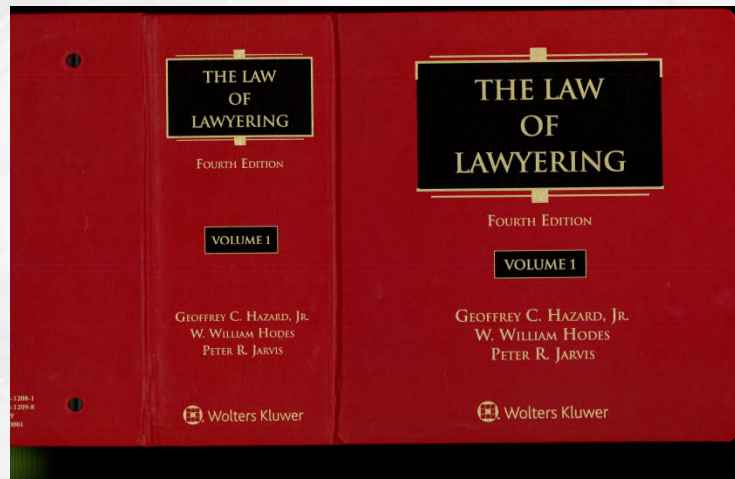
Annotated Model Rules of Professional Conduct



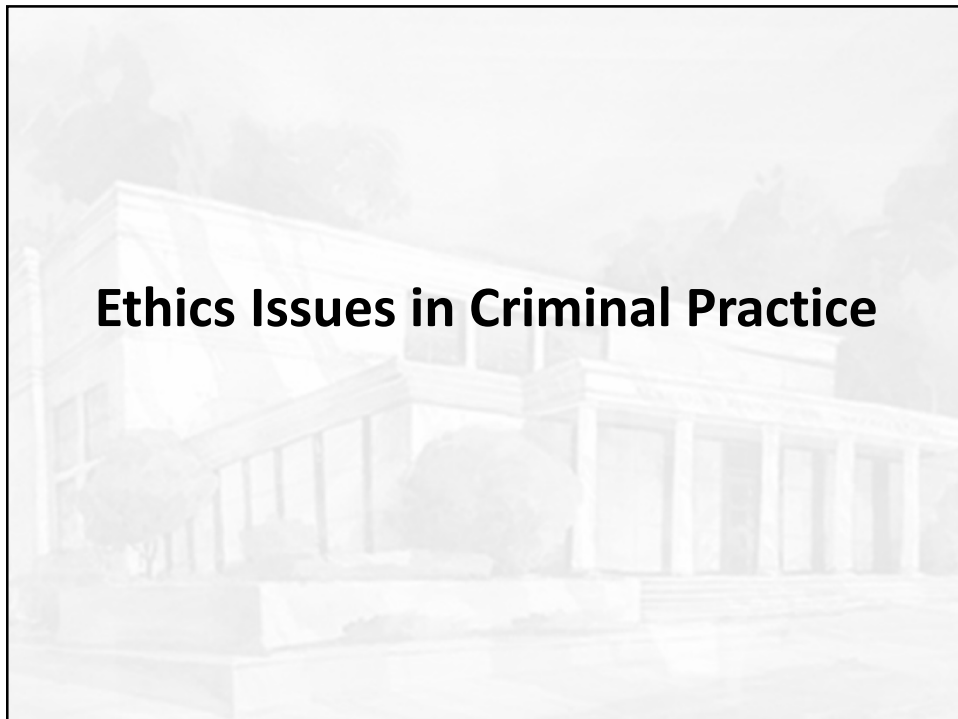
Professional Responsibility Standards Rules & Statutes (West)



The Law of Lawyering



Ethics Issues in Criminal Practice





Decisions Reserved for Client

Rule 1.2

Rule 1.2(a) [Scope of Representation], Ala. R. Prof. C.

(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.**



Communication

Rule 1.4

Rule 1.4 [Communication], Ala. R. Prof. C.

- (a) A lawyer shall keep a client **reasonably informed** about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent **reasonably necessary** to permit the client to make informed decisions regarding the representation.



Rule 1.4 [Communication], Ala. R. Prof. C.

COMMENT

... A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). ...



Fees

Rule 1.5

Rule 1.5(d) & (f) [Fees], Ala. R. Prof. C.

...

(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.**

...

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

Confidentiality – Permissive Disclosures

Rule 1.6

Rule 1.6 [Confidentiality of Information], Ala. R. Prof. C.

(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.

Rule 1.6(b)(1) [Confidentiality of Information], Ala. R. Prof. C.

COMMENT

[T]he lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Rule 1.6(b)(2) [Confidentiality of Information], Ala. R. Prof. C.

COMMENT

Dispute Concerning Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, **the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.** The same is true with respect to a claim involving the conduct or representation of a former client. **The lawyer's right to respond arises when an assertion of such complicity has been made.** Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. **In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.**

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. **A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it.** This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, **the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.**

Confidentiality vs. Privilege – Compelled Disclosures

Rule 1.6

Rule 1.6(b) [Confidentiality of Information], Ala. R. Prof. C.

COMMENT

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

Rule 1.6(b) [Confidentiality of Information], Ala. R. Prof. C.

COMMENT

Disclosures Otherwise Required or Authorized

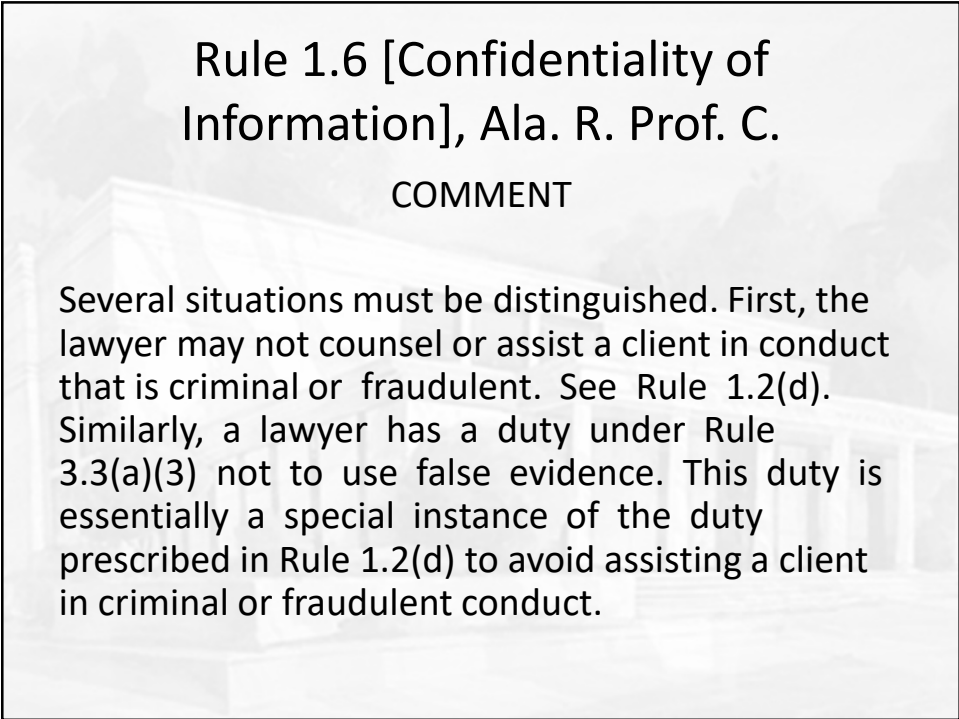
The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.



Confidentiality vs. Candor

Rules 1.2, 1.6 & 3.3



Rule 1.6 [Confidentiality of Information], Ala. R. Prof. C.

COMMENT

Several situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(3) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Rule 1.2(d) & (e) [Scope of Representation], Ala. R. Prof. C.

(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.

Rule 3.3(a) – (c) [Candor Toward the Tribunal], Ala. R. Prof. C.

(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. ...

Rule 3.3[Candor Toward the Tribunal], Ala. R. Prof. C.

COMMENT

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Rule 3.3[Candor Toward the Tribunal], Ala. R. Prof. C.

COMMENT

Constitutional Requirements

The general rule -- that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client -- **applies to defense counsel in criminal cases**, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Formal Opinion 2009-01

QUESTION:

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

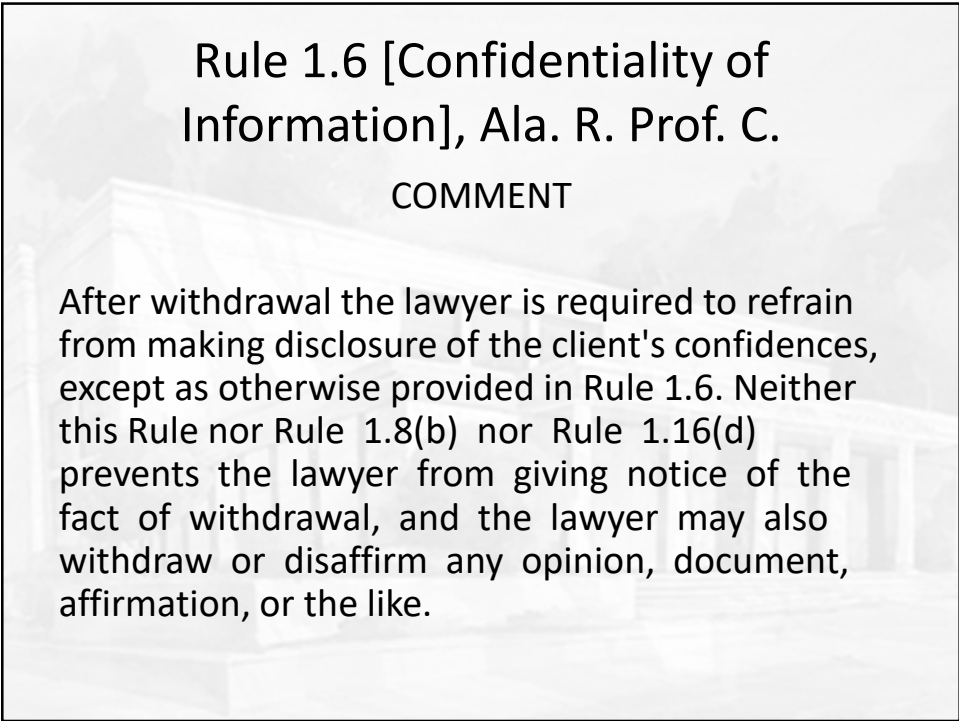
What are a lawyer's ethical obligations when a lawyer learns that a client has committed perjury?

Formal Opinion 2009-01

ANSWER:

Regardless of whether the lawyer is representing a civil client or a criminal client, the lawyer's ethical obligations remain the same. Where a client informs counsel of his intent to commit perjury, a lawyer's first duty is to attempt to dissuade the client from committing perjury. In doing so, 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. The lawyer should further explain that he 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.

When a lawyer has actual knowledge 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 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.



Rule 1.6 [Confidentiality of Information], Ala. R. Prof. C.

COMMENT

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.



Conflicts – Representing Multiple Defendants

Rule 1.7

Rule 1.7(b) [Conflict of Interest: General Rule], Ala. R. Prof. C.

...

(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.

Rule 1.7(b) [Conflict of Interest: General Rule], Ala. R. Prof. C.

COMMENT

Loyalty to a client is ... impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations.

Rule 1.7(b) [Conflict of Interest: General Rule], Ala. R. Prof. C.

COMMENT

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Rule 1.7(b) [Conflict of Interest: General Rule], Ala. R. Prof. C.

COMMENT

Conflicts in Litigation

... Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. **The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.**

Rule 1.7(b) [Conflict of Interest: General Rule], Ala. R. Prof. C.

COMMENT

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. **In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants.** Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Conflicts – Former Clients

Rule 1.9

Rule 1.9 [Conflict of Interest: Former Client], Ala. R. Prof. C.

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or
- (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Rule 1.9 [Conflict of Interest: Former Client], Ala. R. Prof. C.

COMMENT

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Formal Opinion 1995-07

... Attorney John states all he knows about Client A is his criminal history (at the time of the DUI), and facts about that offense. If it is likely that there would be a disclosure of this information, that is enough. The rule is not violated only when a lawyer actually uses confidential information to a former client's disadvantage. Whenever there is a real risk of disclosure, there should be a disqualification. In the setting of a trial, an adverse disclosure can be inadvertent as well as intentional.

There is no question that being impeached or having your credibility attacked is a disadvantageous use of information, as far as Client A is concerned. Attorney John has a duty to provide his present client with an effective criminal defense. However, he may be limited in his ability to cross-examine an eyewitness. Therein lies a true conflict, and Attorney John must withdraw as defense counsel. ...

Conflicts – Prospective Clients & Consultations

Rule 1.9(b)

Compare Rule 1.18, Model Rules of Professional Conduct

Rule 1.18 [Duties to Prospective Clients], ABA Model Rules of Professional Conduct

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

...

Matters Criminal and Civil

Rules 3.4 & 3.10

Rule 3.10 [Threatening Criminal Prosecution], Ala. R. Prof. C.

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Rule 3.10 [Threatening Criminal Prosecution], Ala. R. Prof. C.

COMMENT

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his or her legal rights and when that happens the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of the criminal process tends to diminish public confidence in our legal system.

Rule 3.4 [Fairness to Opposing Party and Counsel], Ala. R. Prof. C.

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

...; or

(d) Request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) The person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(2) The person may be required by law to refrain from disclosing the information; or

(3) The information pertains to covert law enforcement investigations in process, such as the use of undercover law enforcement agents.



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