

J. Anthony McLain
Ethics Update 2012

25TH Annual Seminar of the Alabama State Bar Bankruptcy and Commercial Law Section
June 8 - 9, 2012

**2012 Bankruptcy At The Beach
Seminar
Sandestin, Florida
June 8 - 9, 2012**

Ethics Update
"Are You Really A Disinterested Person?"

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Ethical Issues in Bankruptcy

I. "Honesty Is The Best Policy, But Insanity Is A Better Defense"

A. Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

B. Rule 1.2. Scope of Representation

* * *

(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.

C. The New Limited Scope of Representation Rule (Appendix "A")

D. Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

E. Rule 3.1. Meritorious Claims and Contentions

(a) In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the lawyer's client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

F. The "Lying" Client - RO-2009-01 (Appendix "B")

II. Conflicts Of Interest - "Everything Is Okay In The End. If It's Not Okay, Then It's Not The End"

A. Rule 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

B. Rule 1.9. Conflict of Interest: Former Client

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

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."

C. Rule 1.8. Conflict of Interest: Prohibited Transactions

* * *

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement;

D. Rule 1.8. Conflict of Interest: Prohibited Transactions

(I) A lawyer shall not engage in sexual conduct with a client or representative of a client that exploits or adversely 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.

E. "Situational" Conflicts

F. "Positional" Conflicts

III. "Nothing Is Foolproof To A Sufficiently Talented Fool"

A. Client Identity [See V.]

B. Lawyer Identity

C. Scope of Representation - Again

D. Communication "Issues"

IV. "If You Think Nobody Cares For You, Try Missing A Couple Of Payments"

A. Willful Neglect (Rule 1.3, Ala. R. Prof. C.) - "Plan To Be Spontaneous Tomorrow"

1. Failure to communicate
2. Poor office management
3. Heavy workload

B. Failure to Communicate (Rule 1.4, Ala. R. Prof. C.) - "Two Wrongs Are Only The Beginning"

- (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."

1. Scope of representation
2. Basis or rate of fees and expenses
3. Case Status
4. Keep Client Informed

C. Trust Account Issues (Rule 1.15, Ala. R. Prof. C.) - **"If At First You Don't Succeed, Destroy All The Evidence That Shows You Tried"**

1. Mandatory IOLTA
2. Money and Property - Rule 1.15 includes any property belonging to a client or third party that is delivered to the lawyer. (Client files, documents, photos, physical evidence, videotapes and audiotapes, etc.)
3. Nominal, Short Term and Not Practicable - The IOLTA trust account is for funds that are nominal in amount or that will be held for a short term and the lawyer has determined that the funds cannot practicably be invested for the benefit of the client or third party.
4. Ownership at Receipt - Whether funds are deposited into a trust account or regular account depends on who owns the funds at the time they are received by the lawyer.
5. Separate - Money and property must be kept separate from the lawyer's personal or business property. Only client and third-party funds should be deposited into the trust account. No Personal or Business Funds, except funds to pay account expenses or funds jointly owned by lawyer and client and/or third party at time of receipt.
6. Trust Designation - Trust account checks and deposit slips must be designated as a trust account by use of terms such as "trust account," "fiduciary account," or "escrow account."
7. Other Designation - Business account that is not a trust account, its checks and deposit slips must be designated as a non-trust account by use of terms such as "business account," "professional account," "office account," "general account," "payroll account," or "regular account."

8. Complete Records - Complete records of the account must be maintained for a period of six years after termination of the representation. A checkbook register is NOT a "complete" record.
9. Prompt Notification - A lawyer must promptly notify the client or third party upon receipt of funds in which the client or third party has an interest.
10. Prompt Delivery - A lawyer must promptly deliver those funds to the person entitled to receive them.
11. Disputed Funds - When the ownership of funds is in dispute, the amount in dispute shall be held separately until there is an accounting and severance of the interests. Any amount not in dispute should be promptly disbursed.
12. Uncollected Funds - A lawyer should not make disbursements of uncollected funds. However, if the lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank will be collected promptly, then the lawyer may, at the lawyer's own risk, disburse uncollected funds. If the funds are not collected, then the lawyer must replace the funds within five (5) working days of notice of non-collection.
13. Automatic Overdraft Notification Agreement - A lawyer must execute an automatic overdraft notification request for all trust accounts. Automatic overdraft notification requires the financial institution to report every instance where a properly payable item is presented for payment and there are insufficient funds or the item is paid and an overdraft on the account is created and is not paid by the lawyer within three business days from the date notice is sent to the lawyer. An overdraft notification is a proper ground for further investigation by the Office of General Counsel.

V. "A Man Is Innocent Until Proven Broke"

- A. Fees
- B. "Expenses"
- C. Retainers
- D. THE Word - RO-2008-03 (Appendix "C")

VI. "If All Is Not Lost, Where Is It?"

- A. Client Files - Ownership

B. Client Files - What is a "file"? - RO-2010-02 (Appendix "D")

C. Captain of The Ship

D. Technology

1. Mining Metadata

2. The "Virtual" Lawyer/Law Firm

VII. "A Closed Mouth Gathers No Feet"

A. 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. Rule 1.8. Conflict of Interest: Prohibited Transactions

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

C. Rule 3.10. Threatening Criminal Prosecution

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

VIII. "Eagles May Soar But Weasels Aren't Sucked Into Jet Engines"

A. 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.

B. 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 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."

C. Rule 3.6. Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

D. Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

IX. "Never Attribute To Malice That Which Can Adequately Be Explained By Stupidity"

A. 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. Rule 3.4. Fairness to Opposing Party and Counsel

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;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; 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.

C. 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.

X. "According To My Best Recollection, I Don't Remember"

A. Rule 18, Alabama Rules of Disciplinary Procedure

"If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, in writing, to the General Counsel, and receives there from a written opinion, concurred in by the Disciplinary Commission, that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action."

B. Formal and Informal Opinions

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

D. Call: 334-269-1515
800-354-6154

APPENDIX "A"

THE NEW LIMITED SCOPE OF REPRESENTATION RULE

IN THE SUPREME COURT OF ALABAMA
March 26, 2012

ORDER

WHEREAS the Alabama State Bar has recommended to this Court that it consider adopting rules relating to limited-scope representation by attorneys in this State; and

WHEREAS this Court has determined that provision for such limited-scope representation is advisable;

IT IS THEREFORE ORDERED that Rule 1.1, 1.2(c), Rule 4.2, and Rule 4.3, Alabama Rules of Professional Conduct, be amended to read in accordance with Appendices A, B, C, and D attached to this order;

IT IS FURTHER ORDERED that Rule 11, Alabama Rules of Civil Procedure, be amended to read in accordance with Appendix E to this order and that Rule 87, "Limited Scope Representation," Alabama Rules of Civil Procedure, be adopted to read in accordance with Appendix F to this order;

IT IS FURTHER ORDERED that the amendments of these rules and the adoption of Rule 87, Alabama Rules of Civil Procedure, be effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 1.1, Rule 1.2, Rule 4.2, and Rule 4.3, Alabama Rules of Professional Conduct, and Rule 11 and Rule 87, Alabama Rules of Civil Procedure:

"Note from the reporter of decisions: The order amending Rule 1.1, Rule 1.2(c), Rule 4.2, and Rule 4.3, Alabama Rules of Professional Conduct, and amending Rule 11, Alabama Rules of Civil Procedure, and adopting Rule 87, Alabama Rules of Civil

Procedure, is published in that volume of Alabama Reporter that contains Alabama cases from _____ So. 3d."

Malone, C.J., and Woodall, Stuart, Bolin, Parker, Murdock, Shaw, Main, and Wise, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 26th day of March, 2012.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX A
(Alabama Rules of Professional Conduct)

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer and client may agree, pursuant to Rule 1.2(c), to limit the scope of the representation with respect to a matter. In such circumstances, competence means the knowledge, skill, thoroughness, and preparation reasonably necessary for such limited representation.

APPENDIX B

(Rule 1.2(c), Alabama Rules of Professional Conduct)

(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.

APPENDIX C
(Alabama Rules of Professional Conduct)

Rule 4.2. Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a 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 to do so.

(b) A person to whom limited-scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited-scope representation. If such notice is provided, the opposing lawyer shall not communicate with the person regarding matters designated in the notice of limited-scope representation without consent or authorization as provided by Rule 4.2(a).

APPENDIX D
(Alabama Rules of Professional Conduct)

Rule 4.3. Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A person to whom limited-scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited-scope representation. If such notice is provided, the person is considered to be unrepresented regarding matters not designated in the notice of limited-scope representation.

APPENDIX E
(Alabama Rules of Civil Procedure)

Rule 11. Signing of Pleadings, Motions, and Other Papers

(a) Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other paper, and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings, motions, or other papers need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, motion, or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. As provided in Rule 30(G) of the Alabama Rules of Judicial Administration, an electronic signature is a "signature" under these Rules. If a pleading, motion, or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading, motion, or other paper had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(b) Limited-scope representation. An attorney may draft or help to draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney need not sign that pleading, motion, or other paper but shall include a notation at the end stating: "This document was prepared with the assistance of a licensed Alabama lawyer pursuant to Rule 1.2(c), Alabama Rules of Professional Conduct." In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of the facts, unless the attorney has reason to believe that such representation is false or materially insufficient.

(dc) District Court Rule. Rule 11 applies in the district courts.

APPENDIX F
(Alabama Rules of Civil Procedure)

87. Limited-Scope Representation

(a) Permitted. In accordance with Rule 1.2(c) of the Alabama Rules of Professional Conduct, an attorney may provide limited-scope representation to a person involved in a court proceeding.

(b) Notice. If specifically so stated in a notice of limited-scope representation filed and served prior to or simultaneously with the initiation of a proceeding, an attorney's role may be limited as set forth in the notice.

(c) Termination. The attorney's role terminates without the necessity of leave of court upon the attorney's filing a notice of completion of limited-scope representation with a certification of service on the client.

(d) Service. Service on an attorney providing limited-scope representation is required only for matters within the scope of the representation as set forth in the notice.

C - ## Rev. 7/11	Notice of Limited Scope Representation (Family Law Cases)	Case Number: _____
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In the (check one): ☐ Circuit ☐ Juvenile Court of _____ County, Alabama

_____ v. _____
 Plaintiff's Name Defendant's Name

① Lawyer's Information

name _____

address _____ city _____ state _____ zip code _____

phone # _____ e-mail _____ fax # _____

② I am the lawyer listed in ①. I agree to provide limited scope representation to the (check one): ☐ Plaintiff, whose contact information for service is: ☐ Defendant,

party's name _____

address _____ city _____ state _____ zip code _____

phone # _____ fax # _____

③ I agree to represent the party listed above (check all that apply):

☐ At the hearing (date): _____ ☐ and at any continuance of that hearing

☐ Until the court's order after that hearing

☐ Until issues checked in ④ below are settled, by agreement or by trial

☐ Other (explain and give dates): _____

④ I agree to be the lawyer for this case only for the following issues (check all that apply):

a. ☐ Child Support (check all that apply): ☐ Get an order ☐ Enforce an order
☐ Change an order (explain): _____

b. ☐ Spousal Support (check all that apply): ☐ Get an order ☐ Enforce an order
☐ Change an order (explain): _____

c. ☐ Restraining Order (check all that apply): ☐ Get an order ☐ Enforce an order
☐ Change an order (explain): _____

d. ☐ Custody / Visitation (check all that apply): ☐ Get an order ☐ Enforce an order
☐ Change an order (explain): _____

e. ☐ Property Division (explain): _____

f. ☐ Retirement Benefits (explain): _____

g. ☐ Contempt (explain): _____

h. ☐ Other (explain): _____

i. ☐ See attachment.

Notice of Limited Scope Representation
(Family Law Cases)

Case Number: _____

⑤ The party must read and sign below:

I agree to the limited scope representation checked above. I understand that I may be asked to agree to other terms not mentioned on this form in order for this lawyer to represent me. I also understand that when the services checked above have been completed, I must get a new lawyer or represent myself.

Party signs here: _____ Date: _____

Lawyer signs here: _____ Date: _____

⑥ After signing above, the lawyer must:

1. Fill out the box to the right, then
2. Mail or deliver a copy of this form to the other party or his/her lawyer.
3. File the original of this *Notice* with the court clerk.

Certificate of Service — I certify that a true copy of this *Notice* was delivered or mailed to the other parties or their lawyer(s) on (date): _____

Sign here: _____

C – ## Rev. 7/11	Notice of Limited Scope Representation (Not for Family Law Cases)	Case Number: _____
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In the (check one): ☐ Circuit ☐ District Court of _____ County, Alabama

_____ v. _____
 Plaintiff's Name Defendant's Name

① Lawyer's Information

name _____

address _____ city _____ state _____ zip code _____

() _____ () _____

phone # _____ e-mail _____ fax # _____

② I am the lawyer listed in ①. I agree to provide limited scope representation to the (check one): ☐ Plaintiff ☐ Defendant

My representation will include **only** the following services (check all that apply):

a. ☐ at the hearing (date): _____

☐ and at any continuance of that hearing

☐ until the court's order after that hearing

b. ☐ at the trial (date): _____

☐ and at any continuance of that trial

☐ until the judgment

c. ☐ Other (explain and give dates): _____

③ The contact information for service for the party I will represent is:

party's name _____

address _____ city _____ state _____ zip code _____

() _____ () _____

phone # _____ fax # _____

④ The party must read and sign below:

I agree to the limited scope representation checked above. I understand that I may be asked to agree to other terms not mentioned on this form in order for this lawyer to represent me. I also understand that when the services checked above have been completed, I must get a new lawyer or represent myself.

Party signs here: _____ Date: _____

Lawyer signs here: _____ Date: _____

⑤ After signing above, the lawyer must:

1. Fill out the box to the right, then
2. Mail or deliver a copy of this form to the other party or his/her lawyer.
3. File the original of this *Notice* with the court clerk.

Certificate of Service — I certify that a true copy of this *Notice* was delivered or mailed to the other parties or their lawyer(s) on (date): _____

Sign here: _____

C - ## Rev. 7/11	Notice of Completion of Limited Scope Representation	Case Number:
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In the (check one): ☐ Circuit ☐ District ☐ Juvenile Court of _____ County, Alabama

Plaintiff's Name v. Defendant's Name

① I (lawyer's name), _____, filed a Notice of Limited Scope Representation in this case on (date): _____, and agreed to provide limited scope representation to the (check one): ☐ Plaintiff ☐ Defendant, whose last known contact information is listed below:

_____ party's name

_____ address city state zip code phone #

② My work under the limited scope representation agreement has been completed. I am no longer the lawyer for the (check one): ☐ Plaintiff ☐ Defendant

Lawyer's signature: _____ Date: _____

③ After signing above, you must:

1. Fill out the box to the right, then
2. Mail or deliver a copy of this form to the other party or his/her lawyer and to the client whose representation has been completed.
3. File the original of this Notice with the court clerk.

Certificate of Service — I certify that a true copy of this Notice was delivered or mailed to the other parties or their lawyer(s) and to the client whose representation has been completed on (date): _____.

Sign here: _____

APPENDIX "B"

THE "LYING" CLIENT

ETHICS OPINION RO-2009-01

ETHICS OPINION

RO-2009-01

Ethical Obligations of a Lawyer When His Client Has Committed or Intends to Commit Perjury

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?

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.¹

DISCUSSION:

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 his loyalties to the client and his duties as an officer of the court. In the

¹ This opinion is consistent with ABA Formal Opinion 87-353.

context of the civil 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. Rule 3.3 provides as follows:

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.

The Comment to Rule 3.3 provides in pertinent part as follows:

Comment

* * *

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

* * *

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.

* * *

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

As such, a lawyer may not submit false evidence to a court or assist a client in doing so. When a lawyer learns that a client intends to commit perjury or to offer false testimony, the lawyer should counsel the client not to do so. The lawyer should inform the client that if he does testify falsely, the lawyer will have no choice but to withdraw from the matter and to inform the court of the client's misconduct. If the client insists on testifying falsely, the lawyer should refuse to offer the perjured testimony or should immediately move to withdraw from the representation.² In counseling the client, the lawyer should inform the client that if the client continues to insist on testifying falsely, then the lawyer will be required to withdraw. The lawyer should further explain that he may be required to disclose the client's intentions to the court, if the court requires the lawyer to disclose a specific reason for the withdrawal.

Some states, such as Florida, in Formal Opinion 04-1, require the lawyer to affirmatively disclose the client's intent to testify falsely to the court upon withdrawal. According to the opinion, "[i]f the lawyer knows that the client will testify falsely, withdrawal does not fulfill the lawyer's ethical obligations, because withdrawal alone does not prevent the client from committing perjury." However, Florida requires a lawyer to reveal any information that is necessary to prevent a client from committing a crime, including the crime of perjury.

² Hazard & Hodes, The Law of Lawyering, § 29.13. 3rd Edition (2005).

Alabama has no such counterpart in the Rules of Professional Conduct. Rather, Rule 1.6, Ala. R. Prof. C., provides as follows:

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.

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. As such, 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.

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.

Obviously, a lawyer's ethical responsibilities do not continue *ad infinitum*. Rule 3.3(b), Ala. R. Prof. C., provides that the duties under Rule 3.3 only continue to the conclusion of the proceeding. For example, if a lawyer learns that his client testified falsely after the conclusion of the case, the lawyer would not have a duty to disclose the fraud to the court. The Disciplinary Commission has determined that a proceeding is concluded when a certificate of judgment has been issued or the time has expired for all post-trial motions or pleadings.

It is also 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.

While the Comment to Rule 3.3 also addresses the ethical obligations of lawyers in their representation of criminal clients, the outcome is less clear. First and foremost, "[t]he level of knowledge sufficient to trigger the prohibition against presenting a client's false testimony is high for criminal defense counsel." ABA, Annotated Model Rules of Professional Conduct, 317, 6th Edition. (2007). Ordinarily, a lawyer must abide by the client's decision to testify unless he actually knows that the testimony will be false. In regard to the representation of criminal clients, the Alabama Comment provides, in pertinent part as follows:

Comment

* * *

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as open the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well,

to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Under the Comment to Rule 3.3, it is clear that a lawyer cannot actively assist a criminal client in presenting false evidence or false testimony to the court. The closer question, however, appears to be whether a criminal defense lawyer may use the narrative approach so as to not infringe upon his client's Sixth Amendment rights and still be in compliance with his ethical responsibilities under Rule 3.3.

Both the Annotated Model Rules of Professional Conduct, and The Law of Lawyering, note that the Supreme Court of the United States disapproved of the narrative approach in dictum in Nix v. Whiteside, 475 U.S. 157 (1986).³ In Nix, the Court granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel was violated when a lawyer refused to cooperate with the defendant in presenting perjured testimony. The defendant was on trial for murder. The defendant had stabbed the victim after he believed that the victim was reaching for a gun. Throughout the representation, the defendant repeatedly told his lawyer that he had not actually seen a gun in the victim's hand. However, just prior to trial, the defendant announced to his lawyer that he would testify that he saw something "metallic" in the victim's hand.

The lawyer told the defendant that such testimony would be perjury and that he would withdraw from representation if the client insisted on testifying as such. The lawyer also told the defendant that if he did so testify, he would inform the court of the perjury. Id. at 161. After testifying truthfully at trial and being convicted of murder, the defendant moved for a new trial based on the alleged denial of his Sixth Amendment right to effective assistance of counsel because his defense counsel would not allow him to testify that he saw a gun or something "metallic". Id. at 162.

In rejecting the defendant's claims, the Court noted that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely." Id. at 173. The Court went on to note that "the right to counsel includes no right to have a lawyer who will cooperate with

³ Hazard & Hodes, The Law of Lawyering, § 29.19, 3rd Edition (2005).

ABA, Annotated Model Rules of Professional Conduct, 317, Sixth Edition (2007).

planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment." Id. As such, a criminal defendant does not have a right to testify falsely on his own behalf or have the assistance of counsel in doing so.

It is the opinion of the Disciplinary Commission that a lawyer's use of the narrative approach to allow a client to testify falsely would be inconsistent with the requirements of Rule 3.3 and inconsistent with a lawyer's obligations as an officer of the court. As a result, the Disciplinary Commission has determined that 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.

The Disciplinary Commission has also determined that 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. The duty to disclose the false testimony of the witness would apply regardless of whether the prosecutor deems the false testimony as exculpatory or material under the Brady⁴ standard.

⁴ See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

APPENDIX "C"

TRUST ACCOUNTS & FEES

ETHICS OPINION RO-2008-03

ETHICS OPINION

RO 2008-03

Lawyers' Trust Account Obligations With Regard to Retainers and Set Fees

QUESTION:

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?

ANSWER:

In Alabama, 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.

DISCUSSION:

In RO 1992-17, the Disciplinary Commission previously 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. In Gaines, Gaines and Gaines v. Hare, Wynn, 554 So.2d 445 (Ala. Civ. App. 1989), the Alabama Court of Civil Appeals stated:

"The rule in Alabama is that 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."

As in RO 1993-21, the Commission noted that "non-refundable fee language is objectionable because it may chill a client from exercising his or her right to discharge his or her lawyer and, thus, force the client to proceed with a lawyer that the client no longer has confidence in." As such, 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. In reaching this conclusion, the Commission also made clear that the rule applied to all arrangements where fees are paid in advance of legal services being rendered. As such, all retainers and fees are refundable to the extent that they have not yet been earned. To conclude that a flat fee is earned at the time of receipt, where the contemplated services have yet to be performed or completed, would be in direct contradiction of this long standing principle.

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. To be clear, an attorney may not characterize a flat fee or other type fee that is being paid for future services as an availability-only retainer fee. Any attempt by an attorney to circumvent the rule that all retainers and fees are refundable by mischaracterizing a fee as an availability-only retainer would be an ethics violation.

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. Rule 1.15, Ala. R. Prof. C., provides in pertinent part, as follows:

RULE 1.15 SAFEKEEPING PROPERTY

(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 personal funds of a lawyer shall ever be deposited in such a trust account, except (1) **unearned attorney fees that are being held until earned**, and (2) funds sufficient to cover maintenance fees, such as service charges, on the account. Interest, 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(g), 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.

(emphasis added) Because flat fees are not earned at the time of receipt, they are unearned attorney fees that must be held in the attorney's IOLTA account until earned in accordance with Rule 1.15.

However, the entire flat fee is not required to be held in trust until the conclusion of the representation. Rather, an attorney may withdraw portions of the fee from the trust account as the fee is earned. Exactly when and what amount of the fee is earned during the representation is a question of reasonableness. It is generally recognized that the first yardstick used in assessing the reasonableness of an attorney fee is the

time consumed. Peebles v. Miley, 439 So.2d 137 (Ala. 1983). For example, an attorney may withdraw portions of the flat fee that have been earned based on the time the attorney has spent on the matter and his normal hourly rate. In doing so, the attorney should notify the client when portions of the fee are withdrawn from the trust account by sending a statement or invoice to the client stating the date and the amount of the withdrawal.

An attorney may also enter into a written agreement with the client setting forth milestones in the representation that entitle the attorney to receive a specified portion of the fee. The fee agreement may explicitly state that an attorney is entitled to specific portions of the fee after certain stages in the representation have been completed. For example, assume an attorney is representing a client in a criminal matter for a flat fee of \$5,000.00. The fee agreement may provide that the attorney is entitled to \$2,500.00 of the fee after arraignment or after the preliminary hearing has been held. Any such agreement between the attorney and the client should be set out, preferably in writing, at the outset of the representation.

JWM/s

12-5-08

APPENDIX "D"

RETENTION, DESTRUCTION

OF CLIENT FILES

ETHICS OPINION RO-2010-02

ETHICS OPINION 2010-02

Retention, Storage, Ownership, Production and Destruction of Client Files

Introduction

Formal Opinions 1986-02, 1993-10, 1994-01 are the most recent pronouncements of a lawyer's ethical obligations regarding client files. Since those opinions were issued, advances in technology, electronic filing, and internet-based electronic file storage and retrieval services have created issues that were not contemplated by those opinions. Realizing the need to provide guidance to lawyers that is relevant to the practice of law in today's technological world, the Disciplinary Commission offers the following opinion concerning a lawyer's ethical responsibilities relating to the retention, storage, ownership, production and destruction of client files.

Applicable Rules

The following rules must be considered when determining a lawyer's professional responsibilities relating to client file retention policies. Although most often considered a rule relating solely to lawyer trust accounting, Rule 1.15, Alabama Rules of Professional Conduct, sets out a lawyer's responsibilities relating to types of property of clients or third persons, other than money, and provides, in pertinent part:

"(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. [...] 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....

“(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.”

* * *

“COMMENT

“A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts....”

* * *

“Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.”

The issue relating to whom the file belongs was decided in Formal Opinion 1986-02, wherein we held that the materials in the file furnished by or for the client are the property of the client. Therefore, Rule 1.15, Ala. R. Prof. C., imposes an ethical and fiduciary duty on the lawyer to properly identify a client's file as such, segregate the file from the lawyer's business and personal property, as well as from the property of other clients and third persons, safeguard and account for its contents, and promptly produce it upon request by the client.

Although specifically addressing the issues relating to declining or terminating representation, Rule 1.16(d), Ala. R. Prof. C., also refers to client property and provides, in pertinent part:

"(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."

As we explained in Formal Opinion 1986-02, the file belongs to the client. However, the client's possessory rights to the file are subject to an attorney's lien created by Ala. Code §34-3-61 (1975, as amended), for unpaid fees and expenses. We take this opportunity to reiterate that where a lawyer is asserting a valid attorney's lien pursuant to the Attorney's Lien Statute to secure payment for reasonable fees and expenses that the client has not paid, the lawyer has a statutory right to withhold a client's papers and

property in his possession until such time as the client satisfies the lien by tendering payment or makes reasonable and satisfactory arrangements to protect or otherwise secure the lawyer's interest in the unpaid fees and expenses.

Rule 1.6, Ala. R. Prof. C., embodies one of the most fundamental principles of our profession and requires that, with few exceptions, a "lawyer shall not reveal information relating to representation of a client." The duty to maintain confidentiality includes the duty to segregate, protect and safeguard a client's file and the information it contains. The obligation to maintain a client's file contemporaneously organized and orderly filing and indexing system is inherent in the duty of confidentiality and explicit in Rule 1.15. The failure to do so is a breach of Rule 1.15 and may also rise to the level of a breach of Rule 1.6. The principles of confidentiality, loyalty and fidelity are so fundamental to the practice of law that these rules must be enforced to eliminate even the risk of a breach of these principles.

However, a lawyer's obligation to identify and segregate a client's file, safeguard its contents, maintain its confidentiality, and promptly account for and produce it upon request from the client, does not create an obligation to preserve permanently all files of the lawyer's clients or former clients. See, D.C. Bar Opinion 206; ABA Informal Op. 1384 (1989). Lawyers do not have unlimited space to store files and what limited space is available is often expensive. Lawyers do have an ethical obligation to prevent the premature or inappropriate destruction of client files. See, D.C. Bar Opinion 205 (1989).

Clients may reasonably expect lawyers to maintain valuable and useful information, not otherwise readily available to the client, in their files for a reasonable period of time.

ABA Committee on Ethics and Professional Responsibility, Formal Opinion 13384
(March 14, 1977).

Adopt File Retention Policies

The best practice is for a lawyer to adopt and follow a file retention policy that best fits the needs of the lawyer's practice and the lawyer's clients. File retention policies may vary from lawyer to lawyer and even from client to client, but they must be consistent with the guidelines expressed in this opinion. Additionally, the policy must be communicated to the client in writing at the outset of the representation. Upon conclusion of the representation, the lawyer should reiterate the policy and engage in appropriate follow up with the client regarding retention and destruction of the client's file. The lawyer's file retention policy may be included in the retainer or engagement agreement. In certain situations, it may be necessary and appropriate for a lawyer to create a separate file retention and destruction policy, tailored to meet the specific needs of a client or a client matter, or the lawyer's practice. In developing a file retention and destruction policy, the lawyer must abide by the guidelines expressed in this opinion and should also consider the individual client's level of education, sophistication, resources and other relevant circumstances.

Although as a general rule the file belongs to the client and must be produced promptly upon request, circumstances may exist that would make production of a copy of the entire client's file inappropriate. Absent a court order, a lawyer should not tender the entire file to a client, who has diminished capacity or serious mental health disorders, or to juvenile clients or to clients who have a propensity for violence. A lawyer may also refuse to tender the entire client file to clients who are violent criminal defendants, sex-offenders, or other clients where the information contained in the file would endanger the safety and welfare of the client or others. In these circumstances, it is reasonable and appropriate for the lawyer to redact or remove documents containing sensitive mental health or medical records, descriptions of crimes, photographs of crime scenes or victims, sensitive or salacious information, and personal or other identifying information relating to jurors, victims, witnesses or others. A lawyer's retention and destruction policy should allow for these exceptional situations.

How long must a file be retained?

Generally, a lawyer should maintain a copy of the client's file for a minimum of six (6) years from termination of the representation or conclusion of the matter. A lawyer's failure to maintain a file for this minimum period of time is presumptively unreasonable based upon consideration of the statute of limitations under the Alabama Legal Services Liability Act (Ala. Code §6-6-574) and the six-year period of limitations for the filing of formal charges in lawyer disciplinary matters (Rule 31, Alabama Rules

of Disciplinary Procedure). Six (6) years is the absolute minimum period, but special circumstances may exist that require a longer, even indefinite, period of retention. Files relating to minors, probate matters, estate planning, tax, criminal law, business entities and transactional matters should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer, or the administration of justice.

What is considered part of the client's file?

In general, there are two approaches to determine what constitutes the client's file. The "entire file" approach provides that the client owns and is, therefore, entitled to all of the documents within the client's file, unless the lawyer establishes that withholding items would not result in foreseeable prejudice to the client or would, as previously discussed, endanger the health, safety or welfare of the client or others. *In the Matter of Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP*, 91 N.Y. 2d 30, 666 N.Y.S. 2d 985, 689 N.E. 2d 879, 883 (1997); *Clark v. Milam*, 847 F. Supp. 424, 426 (D. W.Va. 1994); *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992); *Martin v. Valley Nat. Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991); *Resolution Trust Corp. v. H--*, P.C., 128 F.R.D. 647 (N.D. Tex. 1989). The "end product" approach divides ownership of documents in the file between the client and the lawyer and permits a lawyer to retain certain documents, such as notes by the lawyer to himself made in preparation for deposition, trials, or interviews or blemished drafts of other documents, which may contain the lawyer's

mental impressions, opinions, and legal theories, some of which may not be flattering or palatable to the client or the lawyer. *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, et al.*, 824 S.W.2d 92 (Mo. App. E.D. 1992); Minnesota Lawyers Professional Responsibility Board Opinion 13 (June 15, 1989); ABA Informal Ethics Op. 1376 (Feb. 18, 1977). Either approach requires weighing the protections of both a lawyer's right to think and practice freely during the representation and the client's right to demand an accounting of the actions of his lawyer. The rationale supporting the "end product" approach is that unless the lawyer's recorded thoughts are protected, he will not provide effective representation. The "entire file" approach, which is the majority view, fosters open and forthright lawyer-client relations. The rationale supporting this approach is that a lawyer's fiduciary relationship with a client requires full, candid disclosure. The relationship would be impaired if lawyers withheld any and all documents from their clients without good cause. *Henry v. Swift, Currie, McGhee & Hiers, LLP, et al.*, 581 S.E.2d 37 (Ga. 2003) (Adopting the majority view.) The Disciplinary Commission agrees with the majority of jurisdictions that the "entire file" approach is the best approach. The lawyer is in possession of the file, knows its contents, and is best able to determine the appropriateness of redaction or removal of some of its contents. In those situations where the lawyer determines that production of the entire file is unreasonable or inappropriate, the lawyer must provide reasonable notice to the client that portions of the file have been redacted or items removed for good cause.

What contents of a client's file may be destroyed?

We have consistently opined that six (6) years is the minimum period of time a lawyer must retain a client's file after the file is closed or after final disposition of the matter. See, Formal Opinions 1994-91 and 1993-10. Although we have opined that six (6) years was generally a reasonable minimum period of time, we are aware that most have assumed that the six (6) year minimum period of time applied to all client files. Today, we emphasize that six (6) years is the minimum period of time that a client's file must be retained, but circumstances may extend that minimum period of time indefinitely. Even when the passage of time and other circumstances render destruction of a client's file appropriate, there are some contents that should never be destroyed.

In Formal Opinion 1993-10, we described the nature of documents that might be contained in a client's file and opined that it was the nature of those documents that determined whether they could be destroyed. We stated that those documents fall into four (4) basic categories. Today, we modify that categorization to simplify the analysis; the results are unchanged.

Category 1 property is "intrinsically valuable property." Its "value" is inherent in its nature. Value is not dependent upon certainty of ownership or its source. The fact that the property may be a copy or duplicate, rather than an original, may minimize its value, but this factor, without more, does not change its character as a Category 1 documents. Copies of Category 1 documents must be retained indefinitely, unless the

lawyer determines that the copy can be lawfully destroyed because it has been rendered useless and of no value by the client's possession of the original, or by the proper recording of the original, or at the specific written instruction of the client, under circumstances where destruction of the property would not otherwise be illegal or improper. However, the best practice is that the lawyer should never destroy originals of Category 1 property. Where destruction is necessary and appropriate, the lawyer should deliver the original to the client or deposit it with the court. Examples of such property include, but are not limited to: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, stock certificates, bonds, cash, negotiable instruments, certificates of title, abstracts of title, deeds, official corporate or other business and financial records, and settlement agreements.

Category 2 property is "valuable property." Its value is dependent upon the present circumstances or upon the reasonably foreseeable probability of a change in future circumstances. Factors that the lawyer may consider are certainty and identity of ownership, source of the property, its intended purpose, its planned or possible use, its character as an original or copy, its form and size, the practicality of preserving or storing it, and the reasonable expectations of the client or owner regarding its ultimate disposition. Category 2 property may be destroyed with the actual consent of the client or upon the client's implied consent, which may be obtained by the client's failure to take possession of the property on or within 60 days of a date established by the

lawyer's written file retention policy or as provided in a separate written notice, sent to the client's last known address, advising of the date of the lawyer's planned destruction or disposal of the property. Notice provided as part of the lawyer's written file retention policy, which is affirmatively acknowledged in writing at the outset of the representation or upon termination of the representation, is presumed sufficient and no further notice or attempted notice is required prior to destruction or final disposition of the property. Examples of Category 2 property include, but are not limited to: tangible personal property, photographs, audio and video recordings, pleadings, correspondence, discovery, demonstrative aids, written statements, notes, memoranda, voluminous financial, accounting, or business records, and any other property, the premature or unauthorized destruction of which would be detrimental to the client's present or reasonably foreseeable future interests.

Category 3 property is property that has no value or reasonably foreseeable future value. It does not fall into either Category 1 or Category 2. It may be destroyed after the minimum required period of time without notice to or authorization by the client. However, the best practice is for the lawyer to use the same notice procedure for Category 3 property as prescribed for Category 2 property.

Documents which fall into category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of

which reasonable attempts should be made to contact the client and deliver the documents to him. After the minimum retention period of six (6) years, those documents may be appropriately destroyed. There is no longer a category 4 for purposes of the analysis.

Before destroying or disposing of any client file, it is the lawyer's responsibility to review and screen the file to ensure that Category 1 property is not being destroyed. The lawyer must maintain an index of all destroyed files, which index must contain information sufficient to identify the client, the nature or subject matter of the representation, the date the file was opened and closed, the court case number associated with the file, a general description of the type of property destroyed, e.g., "Pleadings, Correspondence, Notes, Legal Research, Videotapes, Photographs," a notation that the file was reviewed for Category 1 property, by whom, whether or not such property was contained in the file, and if so, its location or disposition, and the date and method of destruction of the file.

What are the ethical considerations relating to electronic files?

The practice of law today often requires legal documents and many other components of a client's file to be converted to, created, transmitted, stored, and reproduced electronically. Moving from "the paper chase" to "the paperless office" presents practical concerns. Converting existing paper files to electronic format is

usually accomplished by “scanning” the paper file, which converts it to a format that can be stored, transmitted, and reproduced electronically.

When paper files are converted to electronic format, destruction of the paper file is not without limits or conditions. Even after Category 1 documents are scanned and converted to electronic format, the lawyer cannot destroy the paper Category 1 document. After scanning and conversion, Category 2 and 3 documents may be destroyed, but the best practice is to follow the procedure used for ordinary paper documents.

Like documents that are converted, documents that are originally created and maintained electronically must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document. The lawyer must ensure that the process is at least as secure as that required for traditional paper files. The lawyer must have reasonable measures in place to protect the integrity and security of the electronic file. This requires the lawyer to ensure that only authorized individuals have access to the electronic files. The lawyer should also take reasonable steps to ensure that the files are secure from outside intrusion. Such steps may include the installation of firewalls and intrusion detection software. Although not required for traditional paper files, a lawyer must “back up” all electronically stored files onto another computer or media that can be accessed to restore data in case the lawyer’s computer crashes, the file is corrupted, or his office is damaged or destroyed.

A lawyer may also choose to store or "back-up" client files via a third-party provider or internet-based server, provided that the lawyer exercises reasonable care in doing so. These third-party or internet-based servers may include what is commonly referred to as "cloud computing." According to a recent ABA Journal article on the subject, "cloud computing" is a "sophisticated form of remote electronic data storage on the internet. Unlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large servers located elsewhere and maintained by a vendor." Richard Acello, *Get Your Head in the Cloud*, ABA Journal, April 2010, at 28-29.

The obvious advantage to "cloud computing" is the lawyer's increased access to client data. As long as there is an internet connection available, the lawyer would have the capability of accessing client data whether he was out of the office, out of the state, or even out of the country. In addition, "cloud computing" may also allow clients greater access to their own files over the internet. However, there are also confidentiality issues that arise with the use of "cloud computing." Client confidences and secrets are no longer under the direct control of the lawyer or his law firm; rather, client data is now in the hands of a third-party that is free to access the data and move it from location to location. Additionally, there is always the possibility that a third party could illegally gain access to the server and confidential client data through the internet.

However, such confidentiality concerns have not deterred other states from approving the use of third-party vendors for the storage of client information. In Formal Opinion No. 33, the Nevada State Bar stated that:

"[A]n attorney may use an outside agency to store confidential client information in electronic forms, and on hardware located outside the attorney's direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent."

In approving on-line file storage, the Arizona State Bar noted in Formal Opinion 09-04 that:

"[T]echnology advances may make certain protective measures obsolete over time. Therefore, the Committee does not suggest that the protective measures at issue in Ethics Op. 05-04 or in this opinion necessarily satisfy ER 1.6's requirements indefinitely. Instead, whether a particular system provides reasonable protective measures must be "informed by the technology reasonably available at the time to secure data against unintentional disclosure." N.J. Ethics Op. 701. As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients' documents and information."

In their opinions, the Bars of Arizona and Nevada recognize that just as with traditional storage and retention of client files, a lawyer cannot guarantee that client confidentiality will never be breached, whether by an employee or some other third-party. Rather, both Arizona and Nevada adopt the approach that a lawyer only has a duty of

reasonable care in selecting and entrusting the storage of confidential client data to a third-party vendor. The Disciplinary Commission agrees and has determined that a lawyer may use "cloud computing" or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.

The duty of reasonable care requires the lawyer to become knowledgeable about how the provider will handle the storage and security of the data being stored and to reasonably ensure that the provider will abide by a confidentiality agreement in handling the data. Additionally, because technology is constantly evolving, the lawyer will have a continuing duty to stay abreast of appropriate security safeguards that should be employed by the lawyer and the third-party provider. If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third party provider.

In whatever format the lawyer chooses to store client documents, the format must allow the lawyer to reproduce the documents in their original paper format. If a lawyer electronically stores a client's file and the client later requests a copy of the file, the lawyer must abide by the client's decision in whether to produce the file in its electronic format, such as on a compact disc or in its original paper format.

When a lawyer discards laptops, computers, or other electronic devices, he must take adequate reasonable measures to ensure that client files and/or confidential information have been erased from those items. Failure to do so could result in the

disclosure of confidential information to a subsequent user. If such disclosure occurs, the lawyer could be subject to disciplinary action for a violation of Rule 1.6 of the Alabama Rules of Professional Conduct.

In what format must the client's file be delivered?

There are various possible combinations of client file formats, including original paper files scanned and converted to electronic document format, original e-documents, and e-mails. Often client files are maintained in part in paper format and electronic format. Rarely is it possible to originate and maintain a client file in electronic format. Therefore, the best practice is to develop a procedure that integrates the various file formats into an organized, indexed and searchable, unified system, so that prompt access to and production of the complete file, regardless of its various formats, can be reasonably assured.

Where a client has requested a copy of his file, the file may be produced in the format in which it is maintained by the lawyer, unless otherwise agreed upon or requested by the client. If the client requests that the electronic documents be produced in paper format, then the lawyer must accommodate the client, unless the lawyer's written file retention policy agreed to by the client provides otherwise. Even in cases where the lawyer's file retention policy provides that the file will be produced in only electronic format, where the client's level of education, sophistication, or technological ability, or lack of financial resources, or the unavailability of computer hardware or

software necessary to access the documents would create an burden on the client to access the file in electronic format, the lawyer must produce a copy of the file in traditional paper format. Likewise, if the client requests the lawyer to produce the file in electronic format, but the lawyer maintains portions of the file in traditional paper format, the lawyer is not required to produce the file in electronic format, but may simply produce the file in the format in which it is maintained.

Can the lawyer charge the client for the cost of copying the file?

A lawyer may not charge the client for the cost of providing an initial copy of the file to the client. We note that many lawyers furnish courtesy copies of documents to their clients during the representation. Again, unless the lawyer includes a provision providing otherwise in his written file retention policy, acknowledged by the client at the outset of the representation, providing contemporaneous courtesy copies does not change the lawyer's obligation to tender the *entire* file to the client at the termination of the representation. And, the lawyer may not charge the client for copying the *entire* file, even though courtesy copies of some documents have been previously provided to the client. Although some of the documents being provided to the client may be duplicates, tendering the entire file protects the interests of the client and the lawyer with the assurance that nothing has been overlooked. If the lawyer includes a contrary provision in the client contract or engagement letter which provides that contemporaneous courtesy copies of documents during the representation satisfies his obligation to

produce the client's file, such provision must describe with specificity what documents will be contemporaneously produced, what documents will not be contemporaneously produced, and what procedure and safeguards will be in place to ensure that the contemporaneous courtesy copy policy will be consistently followed. In any case, the client has a right to inspect the lawyer's file to ensure that the client's contemporaneous courtesy copy corresponds to the lawyer's copy of the file. Lawyers may not charge the client for any costs incurred in producing and tendering the file to the client. However, the lawyer may charge reasonable copying costs if a client requests additional copies of his file.

As a general rule, the client is responsible to make arrangements to pick up a copy of his file at the lawyer's place of business. The lawyer may insist on a written acknowledgement of receipt from the client as a condition of surrender of the file. In the event the client refuses to acknowledge receipt of the file, the lawyer may refuse to tender the file. If the client requests that the file be produced to his authorized agent, then the lawyer should insist on written authorization to do so and should expressly warn the client that production of the file to a third party may defeat confidentiality and attorney-client privilege. Finally, if the client requests that the file be produced by mail, common carrier, or at a location other than the lawyer's office, the client is responsible for the costs associated with such production and the lawyer may withhold production

until the client pre-pays the estimated costs or makes arrangements agreeable to the lawyer.