

Alabama Rules of Professional Conduct

Client-Lawyer Relationship

Rule 1.8.

Conflict of Interest: Prohibited Transactions.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

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

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of

the lawyer; and

(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, from his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to the representation of a client is protected as required by Rule 1.6.

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

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(k) In no event shall a lawyer represent both parties in a divorce or domestic

relations proceeding, or in matters involving custody of children, alimony, or child support, whether or not contested. In an uncontested proceeding of this nature a lawyer may have contact with the nonrepresented party and shall be deemed to have complied with this prohibition if the nonrepresented party knowingly executes a document that is filed in such proceeding acknowledging:

(1) that the lawyer does not and cannot appear to serve as the lawyer for the nonrepresented party;

(2) that the lawyer represents only the client and will use the lawyer's best efforts to protect the client's best interests;

(3) that the nonrepresented party has the right to employ counsel of the party's own choosing and has been advised that it may be in the party's best interest to do so; and

(4) that having been advised of the foregoing, the nonrepresented party has requested the lawyer to prepare an answer and waiver under which the cause may be submitted without notice and as may be appropriate.

(l) A lawyer shall not engage in sexual conduct with a client or representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship, including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of legal representation;

(2) continuing to represent a client if the lawyer's sexual relations with the client or the representative of the client cause the lawyer to render incompetent representation.

(m) Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.

(n) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (h) and in paragraphs (j) and (k) that applies to one of them shall apply to all of them.

[Amended eff. 1-9-95; Amended eff. 6-23-2008.]

Comment
(As Amended Effective June 23, 2008)

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Emergency Financial Assistance

On occasion, a client of a lawyer may suffer a financial emergency. The client may be totally unable to turn to traditional sources of emergency financial assistance such as banks, families, or neighbors to obtain necessary assistance in meeting such a financial emergency. While the client may have an expectation that a recovery in a pending lawsuit would provide ample funds from which to repay a loan, the collateralization of a loan with the anticipated proceeds of litigation is not generally accepted as a good business practice. In these circumstances, the only alternative to whom the client may realistically be able to turn is the lawyer handling the lawsuit. For true financial emergencies, arising from circumstances beyond the control of the client, the Rule permits the lawyer either to advance a loan to the client or to guarantee the repayment of a loan by a third party to the client.

A lawyer departs from the role of advocate when the lawyer becomes a lender to the client. The lawyer as lender is placed in a position adverse to the client, particularly if the client refuses to repay. Since the repayment by the client may not be contingent on the outcome of a matter, the client is always responsible for repayment of any loan, whether the client wins or loses the pending lawsuit.

Rule 1.8(e)(3) permits the lawyer to act as both advocate for and lender to the client under only the narrowest and most compelling of circumstances. The lawyer must not, prior to employment, directly or indirectly, have assured the client of the

availability of emergency financial assistance. The assistance must meet a true emergency. Emergency financial assistance does not include the regular provision of income and support to a client. Rather, the Rule is intended to permit the lawyer to help in those few cases which rise to the level of an emergency. The lawyer is never obligated to provide such assistance, and he is obligated to attempt collection from the client regardless of the outcome of the matter.

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for Lawyer's Services

Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Subsection (1) in this paragraph expressly recognizes that in the insurance defense practice, attorneys are appointed by insurers to represent insureds as clients. The insurer's authority to appoint counsel springs from its contract with the insured. In the normal insurance defense relationship where, for example, there are no coverage issues, appointed counsel has two clients, the insured and the insurer. Hence, the insurer is not a third party. Additionally, all arrangements pursuant to paragraph (f) must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Family Relationships Between Lawyers

Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Representation of Both Parties in Domestic Cases

In domestic relations cases, the lawyer is prohibited from representing both of the opposing parties, who generally are spouses or former spouses. This prohibition is applicable in a broad range of domestic relations cases, including divorce, child custody, child support, alimony, or other proceedings which generally fall under this category. The prohibition applies even in uncontested matters; thus, representation of both parties is not allowed even if the lawyer concludes that he could conduct the representation in a manner consistent with Rule 1.7, concerning conflicts of interest generally, or Rule 2.2, concerning intermediation between clients. This Rule is grounded in the view that, in domestic relations matters, the appropriate policy is a broad-based proscription not subject to waiver by the parties or the lawyer.

Often a lawyer is confronted with a situation in which the opposing parties in a divorce case have agreed, or can agree, on the terms of the divorce concerning such matters as alimony, child custody, and child support. In such a situation, paragraphs (k)(1)-(4) permit a lawyer representing one of the parties to provide an answer and waiver to the unrepresented party if the unrepresented party knowingly executes a specified form of document, which must be filed in the proceeding. The document contains disclosures and disclaimers directed towards the unrepresented party. Having complied with paragraphs (k)(1)-(4), the lawyer may have contact with the unrepresented party. Upon request of the unrepresented party, the lawyer may prepare an answer to a petition or complaint, as well as other appropriate pleadings and agreements, for the signature of the unrepresented party. This Rule thus permits a lawyer to facilitate his representation of one party by preparing documents for the unrepresented party to sign. If these activities are performed in accordance with the specified procedure, the lawyer is not in violation of the prohibition upon representation of opposing parties in domestic proceedings.

Sexual Relations Between Lawyer and Client

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between the lawyer and the client can involve unfair exploitation of the lawyer's fiduciary role in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without the exercise of independent professional judgment being impaired.

Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, because client confidences are protected by privilege only when they are imparted in the context of the lawyer-client relationship. Because of the significant danger of harm to the client's interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Spousal relationships and sexual relationships that predate the lawyer-client relationship, however, are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed before the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.

Imputation of Prohibitions

Under paragraph (n), a prohibition on conduct by an individual lawyer in paragraphs (a) through (h) and in paragraphs (j) and (k) also applies to all lawyers associated in a firm with the lawyer who is personally prohibited from representing the client. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraphs (l) and (m) are personal and are not imputed to associated lawyers.

Comparison with former Alabama Code of Professional Responsibility

With regard to paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 stated that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

With regard to paragraph (b), DR 4-101(B)(3) provided that a lawyer should not use "a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."

There was no counterpart to paragraph (c) in the Disciplinary Rules. EC 5-5 stated that a lawyer "should not suggest to his client that a gift be made to himself or

for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.”

Paragraph (d) is substantially similar to DR 5-104(B), but refers to “literary or media” rights, a more generally inclusive term than “publication” rights.

Paragraph (e)(1), permitting the lawyer to advance costs which are repayable contingent on the outcome of the litigation, is a change from the accepted interpretation of DR 5-103(B). See Morrow, “Opinions of the General Counsel,” 44 Ala. Law 168 (1983).

Paragraph (e)(2) has no counterpart in the former Code.

Paragraph (e)(3) is substantially identical to DR 5-103(B).

Paragraph (f) is substantially identical to DR 5-107(A).

Paragraph (g) is substantially identical to DR 5-106.

The first clause of paragraph (h) is similar to DR 6-102(A). There was no counterpart in the former Code to the second clause of paragraph (h).

Paragraph (i) has no counterpart in the former Code.

Paragraph (j) is substantially identical to DR 5-103(A).

Paragraph (k) is substantially identical to the last part of DR 5-105(C). This provision is unique to Alabama and is carried forward into the Rules.

Note from the reporter of decisions: The order amending Rule 1.8, the Comment to Rule 1.8, Rule 1.10(a), the Comment to Rule 1.10, Rule 1.12, Rule 1.14, the Comment to Rule 1.14, the Comment to Rule 3.2, Rule 3.6, the Comment to Rule 3.7, Rule 3.9, and Rule 4.4 is published in that volume of *Alabama Reporter* that contains Alabama cases from 983 So.2d.