DOMESTIC RELATIONS HODGEPODGE CLE

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BIRMINGHAM BAR ASSOCIATION'S
PROFESSIONAL ETHICS COMMITTEE PRESENTATION

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I. Introduction.

II. Attorney As Advisor And Counselor.

Rule 2.1 Advisor: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

A. "Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." (Comment, Rule 2.1).

B. May need to involve others in family law issues, such a psychiatrist/psychologist, social workers, etc.

III. Conflicts Of Interest (Rules 1.7 and 1.8).

A. Estate planning and estate administrators within families.

1. Who is client? (Jurisdictional).

   a. Testator/Testatrix?
   b. Fiduciary?
   c. Estate/Trust?
   d. Beneficiaries?

2. Make clear the relationship.

3. Rule 1.8(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."

4. Probate - Executor's client is **estate**, not beneficiaries. §§ 43-3-682 and -683, Ala. Code (1975); Mills v. Neville, 443 So. 2d 935 (Ala. 1983) (Attorney Executor employed himself to represent estate in wrongful death claim; held appropriate).

B. Domestic Relations.

1. Rule 1.8(k).

   a. Attorney absolutely prohibited from representing both parties.

      (i) Divorce/Alimony.
      (ii) Child Custody/Support.

   b. Even where uncontested (regardless of whether lawyer concludes Rules 1.7 and

2.2 (intermediary) would otherwise allow).

2. Rule 1.8(k)(1)-(4) permits attorney to contact unrepresented party in domestic relations action for limited purpose of preparing answer and other appropriate pleadings where the parties are in agreement, and the unrepresented party consents in writing.

    a. Very specific procedure to follow.

    b. Even here, attorney still only represents one spouse.

IV. Client Under Disability (Rule 1.14)

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

A. Attorney has obligation to treat client with attention and respect.

1. De facto guardian (if no guardian or legal representative involved).

2. Attorney has obligation to seek appointment of legal representative if in client's best interest.

3. Even if legal representative is involved, attorney should still accord represented person the status of client.

4. Guardian ad litem must stand impartial among all contesting parties, directing representations solely to the benefit of the ward. See Ex parte Herrin, 257 Ala. 392, 60 So. 2d 56 (1952).

B. The Alabama State Bar Disciplinary Commission in a formal Ethics Opinion, has stated that Rule 1.14 "[R]ecognizes that a lawyer may, on occasion best serve a client by taking action that, on first blush, might appear to be adverse to the client." (Ethics Opinion RO-90-67; RO-95-06). The comment to Rule 1.14 directs that the lawyer may seek guidance from an appropriate diagnostician in furtherance of the client's best interest.

C. In RO-95-03, the Disciplinary Commission reasoned that a lawyer confronted with the dilemma of dealing with a client with a perceived emotional or mental instability must determine what is in the best interest of the client based on the lawyer's analysis of all aspects of the situation, including opinions of medical experts. The Commission further stated:

> Much of the burden of this decision is placed on the lawyer who must keep foremost in his mind the increased standard of responsibility when dealing with a disabled client. He must assess all aspects of the situation, including expert medical opinions, balancing the client's ability to communicate and to appreciate the serious decisions to be made. If the lawyer has doubts, he should resolve those doubts in a manner that best serves his client. The lawyer should also appreciate the Court's increased concern in matters involving lawyers and

> their representation of incompetent clients. "The normal limitations on a lawyer's self-enrichment at the expense of a client are applied with enhanced strictness when the client is a child or otherwise not capable of making fully informed and voluntary decisions."

Id., quoting Wolfram, Modern Legal Ethics, Student Ed., p. 159 (West, 1986).

D. Beware Rule 1.6 "Confidentiality of Information."

1. Subsection (b) of Rule 1.6 allows disclosure of information by a lawyer which is otherwise confidential if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act which the lawyer believes is likely to result in imminent death or substantial bodily harm.

2. If you determine that the best interest of your client would be served by making disclosure to the court of your client's condition, and the possibility that he might harm himself, and that protective measures should be taken to prevent such harm, Rule 1.6 would allow this. However, in conjunction with Rule 1.14, if you make this determination, then you could seek appointment of a legal representative for your client to further protect your client's interest. (See Disciplinary Commission Ethics Opinion RO-95-06).

E. Rule 1.14 was intended to address situations where communications between lawyer and client are difficult (subparagraph (a)) or where they are impossible (subparagraph (b)). Questions involved in such representations have been described as "among the most perplexing that a lawyer confronts." Wolfram, Modern Legal Ethics, Student Ed., p. 159 (West, 1986). Similarly, Professors Hazard and Hodes, in their handbook, The Law of Lawyering, §1.14:101, p. 439, point out that

> Difficult questions of law and morality continue to plague this troublesome area. In practice, situations involving disabled clients do not neatly present distinct "levels" of disability, so that it may not be clear whether Rule 1.14 has application, or which subsection. Furthermore, even when it is clear that Rule 1.14(a) applies, it is difficult to say how far a lawyer may deviate from a "normal" client-lawyer relationship in any given instance.

F. Bottom line. In dealing with a client with a disability, attorneys have a heightened degree of professional responsibility to insure the best interest of their client is served. Any doubts should be resolved in favor of the client's "best interest."

V. Fees (Rule 1.5).

A. Rule 1.5(d)(1) states "A lawyer shall not enter into an arrangement for, charge, or collect: Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. . ."

VI. Responsibilities of a partner or supervisory lawyer (Rule 5.1).

> **(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to insure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A. There are no formal Ethics Opinions from the Alabama State Bar regarding this rule; however, this is a burgeoning area regarding professional responsibility issues in other jurisdictions.

1. Attorney-client relationship is highly personal as between the individual lawyer and his or her client.

2. Client relies on the individual attorney for advice, counsel, recommendations, evaluations and representation.

3. Malpractice liability can be that of a firm, but generally, ethical liability is not.

4. Fiduciary duties toward a client cannot be delegated or assigned.

B. Cases in other jurisdictions have held a supervising lawyer vicariously responsible under theories of negligence. See, e.g., Gendron v. State Bar of California, 35 Cal.3d 409, 673 P.2d 260 (1983); In re Kiley, 22 A.D.2d 527, 256 N.Y.S.2d 848 (N.Y.A.D. 1 Dept. 1965); In re Gladstone, 16 A.D.2d 512, 229 N.Y.S.2d 663 (N.Y.A.D. 1 Dept. 1962).

C. The law has traditionally opposed vicarious responsibility for the professional ethical problems of another based on the lawyer's lack of knowledge of the misconduct of another lawyer. See Idaho State Bar v. Jenkins, 120 Idaho 379, 816 P.2d 335 (1991).

D. Rule 5.1 covers lawyers who supervise other lawyers only, and is not applicable to paraprofessional help. Rule 5. 3 deals with paraprofessionals and non-lawyer staff.

E. The ABA legislative history of Model Rule 5.1 (which Alabama Rule 5.1 was patterned after) insists that this Rule is intended to establish a principle of supervisory responsibility **without** instituting vicarious professional responsibility.

1. Typically, at common law, no person undertook liability for another, with certain exceptions, such as principal and agent, master and servant and insurance.

1. The same is true with regard to lawyers and their responsibility for the actions of other lawyers and non-lawyers employed in their offices.

1. Model Rule 5.1 attempted to draw a distinction, and that distinction was based largely on the term "reasonable efforts." Reasonable efforts can include informal oversight, systems of regularly reporting, systems of confidential inter-firm reporting of ethical violations, in-house CLE and exceeding the jurisdiction's CLE ethics requirement.

F. The test at common law was and continues to be **knowledge.**

1. If a lawyer has no knowledge, then he or she should not be held accountable for the ethical problems of another lawyer in the office or a non-lawyer employee.

2. On the other hand, if the lawyer knows of a colleague's or employee's wrongful conduct, then the lawyer may be disciplined. See In re Craven, 267 S.C. 33, 225 S.E.2d 861 (1976); In re Bonafield, 75 N.J. 490, 383 A.2d 1143 (1978).

G. Balanced against the notion of **knowledge** is the notion of **accountability**, and the law appears headed in this direction.

1. A lawyer is ultimately responsible for the manner in which his or her practice operates, and thus, failure to supervise can constitute unethical behavior.

H. Conclusions.

1. The disciplinary offense of failing to supervise or its corollary of failing to take measures to mitigate after discovery of a wrong done by an employee is an issue of **accountability** for the acts of your associates and employees.

2. This is a real change in the common law notion of individual disciplinary liability.

3. Has a lawyer become a guarantor to his clients and to the public as far as the acts of others within his firm are concerned? If the rules of professional conduct are drafted, designed, interpreted and enforced to protect the public, then the answer is **yes**, we are becoming guarantors.

4. How do you protect yourself and reduce the chance of disciplinary liability?

a. Employment contracts with employees;

b. Standards and practices policies in writing, required to be read by all employees;

c. If it is necessary to restrict an associate's scope of duties, put it in writing, and disclose it to clients and potential clients (letterhead, professional cards) in a nonthreatening way;

d. Maintain professional errors and omissions insurance covering all employees as well as principals in the firm;

e. If you have any doubts, remove the doubt. Remember, ultimately the captain goes down with the ship (either figuratively or literally). Your professional well being and your continued practice may depend on following seemingly simple rules.

VII. Formal/Informal Opinions Of Alabama State Bar.

A. Formal - A written request is made to the General Counsel's office. An opinion is then prepared and sent to the state bar disciplinary commission, which votes on the opinion. If the disciplinary commission approves, the ethics opinion is binding and protects the attorney from actions taken consistently with the opinion.

B. Informal - A call or a request is made to a staff attorney at the General Counsel's office, and the staff attorney responds orally or in writing. With an informal opinion, there is no approval by the

disciplinary commission.

C. Binding Authority?

1. Formal opinions offer protection to an attorney as a defense to a disciplinary action brought against the attorney.

2. Informal opinions are advisory only.

3. These opinions typically apply only to the attorney requesting the opinion, although, where the facts are **identical**, formal opinions may be relied upon by others.

D. Birmingham Bar Association.

1. Professional Ethics Committee will provide written opinions in response to a request.

2. Any such written opinion should be considered advisory in nature only.

VIII. Case Studies.

A. Informal opinions.

1. Lawyer represented husband in a divorce. Husband and ex-wife want to file bankruptcy. It would be easier and cheaper for attorney for husband or attorney for wife to handle bankruptcy filing. Is this permissible?

Response: Pursuant to Rule 1.7, so long as the interest of the husband and wife were consistent in the bankruptcy, attorney could handle the matter for them. However, both clients must be informed of the possible conflicts of interest and the fact that if a conflict developed requiring disqualification, the attorney would have to withdraw from representation of both, which might end up costing the clients more in the long run. If clients agreed to joint or duel representation, it would be permissible.

2. Is there any ethical prohibition against an attorney drafting a will for a long time family friend who wants to name attorney as trustee of the estate of her minor children?

Response: Rule 1.8(c) prohibits an attorney from drafting a will for a non-family member in which the attorney is named as a beneficiary. However, the attorney is not prohibited from drafting a will in which the attorney is named as trustee and which further provides that the attorney may receive reasonable compensation for the attorney's services.

3. Attorney represents mother and two minor children in a child support modification proceeding. Attorney has reason to believe the children's father is intimidating or coercing the mother into withdrawing her petition for modification. Attorney has prepared a motion to withdraw the mother's petition and inquires as to the ethical obligation owed to the minor children.

Response: Alabama Courts have consistently held that child support is for the benefit of the children and not for the benefit of the custodial parent. See, e.g. State Ex Rel. Shellhouse v. Bentley, 666 So. 2d 517 (Ala.Civ.App. 1995). The custodial parent cannot agree to forgive the amount due under a child support arrearage, and the parent cannot waive child support due under a court order. In this situation, the children are the secondary or derivative clients, and an attorney owes them a duty to act in their best interests. This may involve an appointment of a guardian ad litem. In addition, Rule 1.14(d) requires an attorney to take "protective action" if the attorney reasonably believes that "the client cannot adequately act in the client's own interest."

4. Attorney advised that he was interviewing a client regarding bankruptcy. The client was extremely emotional and disturbed regarding the situation, and at one point during the interview, advised the attorney that he was going to kill himself. The client then jumped up and ran out of the office. Attorney asked what he can do.

   Response: Consistently with Rules 1.6 and 1.14, attorney could notify the appropriate authorities in an effort to prevent the client from committing harm to himself.

B. Formal Opinions.

1. Ethics Opinion RO-87-52 - Husband asked attorney to defend him in divorce suit filed by wife in 1982. Attorney did so for several months. The parties reconciled, attorney refunded a portion of husband's money and had no contact with either party since 1982. Subsequently, and unbeknownst to the attorney, the parties divorced in 1985, and remarried a few months thereafter. In 1987, wife came to see attorney about representing her in a new divorce action against husband. The only apparent issues are child custody and child support. Is the attorney's representation of the wife in this case unethical?

   Response: The Disciplinary Commission has consistently held that where an attorney represents a husband or wife in a domestic relations matter he cannot subsequently represent the opposite party in a domestic relations matter, even though there has been a divorce and remarriage of the parties since there is such a "substantial relationship" between the first matter and the second matter that the attorney could have, although he may not have, obtained a "confidence" or "secret" that he can now use favorably to the new client and adversely to the former client. Thus, the attorney could not ethically represent wife in the contemplated new divorce proceeding.

2. Ethics Opinion RO-91-25 - Can a lawyer represent the husband or wife in a divorce proceeding when the lawyer represented both parties in a bankruptcy proceeding that is still pending? Would the answer be different if a Chapter 13 Plan had been confirmed but not yet completed because payments were continuing?

   Response: The attorney may not represent the husband or wife in a divorce proceeding when the attorney is currently representing both parties in a bankruptcy matter. This disability continues even though the only activity in the matter is the making of payments pursuant to a confirmed plan. (See Rules 1.7 and 1.9. See also Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) (attorney's duty of undivided loyalty owed to clients prohibits attorney in taking part in litigation against **existing** client)).

3. Ethics Opinion RO-91-25 - Can a lawyer represent the husband or wife in a divorce proceeding when the lawyer represented both parties in a bankruptcy proceeding that has been completed?

   Response: The attorney may represent either the husband or wife in a divorce proceeding where the attorney formally represented both parties in a bankruptcy matter that is now complete subject to certain limitations. In the normal case, the bankruptcy matter and the current divorce proceedings would not be "substantially related" and there would be no disqualification. However, there may be circumstances such as personal financial matters that cause a "substantial relationship" to exist between the bankruptcy and the divorce.

4. Ethics Opinion RO-91-25 - In the above situations, can the attorney represent the husband or wife in an uncontested divorce with the consent of the unrepresented party?

   Response: The unrepresented client or former client in an uncontested divorce proceeding may consent to the attorney's representation. Both Rules 1.7 and 1.9 provide

that a current or former client could consent to the representation after consultation notwithstanding the conflict. Rule 1.7 requires **each** client to consent and Rule 1.9 requires the **former** client to consent.

IX. Conclusion.