

IN THE SUPREME COURT OF THE
STATE OF ALABAMA

PETITION TO CONSIDER ABA ETHICS 2000 REPORT AND TO
AMEND THE ALABAMA RULES OF PROFESSIONAL CONDUCT

Comes now the Board of Bar Commissioners of the Alabama State Bar, by and through the Office of General, and petitions this Honorable Court to adopt the proposed rules changes to the Alabama Rules of Professional Conduct, as submitted herewith and attached hereto as Appendix "C".

The Board of Bar Commissioners, by and through the Committee on Disciplinary Rules and Enforcement, was called upon to address the Report of the American Bar Association, Ethics 2000 Report. A subcommittee of the Alabama State Bar Committee on Disciplinary Rules and Enforcement reviewed the Ethics 2000 Report, and compared the provisions of the Alabama Rules of Professional Conduct to that report.

The attached Appendix "C" reflects an executive summary as compiled by that subcommittee, and the specific changes which were suggested by the subcommittee, adopted by the committee as a whole, and which were subsequently approved for submission to this Honorable Court by the Board of Bar Commissioners.

WHEREFORE, the Alabama State Bar would respectfully request that this Honorable Court adopt the proposed changes to the Alabama Rules of Professional Conduct as contained in attached Appendix "C".

Respectfully submitted on this _____ day of October, 2007.

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From: Harlan Prater [hprater@lflaw.com]
Sent: Thursday, January 25, 2007 6:24 PM
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Cc: Ian D. Rosenthal; Reeves, Lee; Langford Floyd; Laura G. Chain; Judge Brian Huff
Subject: #705153 v1 - RULE 1.8 - Ethics Committee Proposal

Attachments: f43101!.DOC

Attached is the final version of the report regarding proposed changes to the Rules of Professional Conduct. This version incorporates the revisions adopted by the full Committee on Disciplinary Rules and Enforcement at today's meeting. Best regards.

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ALABAMA STATE BAR
COMMITTEE ON DISCIPLINARY RULES AND
ENFORCEMENT

*REPORT OF SUBCOMMITTEE ON RULES OF
PROFESSIONAL CONDUCT*

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JANUARY 25, 2007

EXECUTIVE SUMMARY

During the October 4, 2006, meeting of the Alabama State Bar Committee on Disciplinary Rules and Enforcement, Chairman R. Blake Lazenby appointed a subcommittee to evaluate the Alabama Rules of Professional Conduct. The subcommittee was to look at the rules in light of the American Bar Association's proposed revisions to the Model Rules of Professional Conduct, which were the product of the ABA's Ethics 2000 Commission. Prior to this appointment, almost every state and the District of Columbia had indicated that they had committees reviewing their professional conduct rules in light of the Ethics 2000 Commission recommendations. As of November 13, 2006, 27 state supreme courts had adopted new rules in response to review committee reports, and an additional 14 state review committees had published revised rules for consideration. The ASB had not failed to look at the Ethics 2000 Commission recommendations in a timely manner. Rather, unlike many other state bar associations, the ASB had regularly evaluated its Rules of Professional Conduct in its ongoing enforcement activities and monitoring of the rules adopted by other enforcement entities around the country. Nevertheless, the Committee on Disciplinary Rules and Enforcement felt that a intentional review of the Ethics 2000 Commission recommendations would be beneficial.

The subcommittee has taken an extensive look at the Ethics 2000 Commission recommendations. Using the ABA's proposed rules themselves, the explanation of the changes to the rules by the official reporter for the Ethics 2000 Commission, and a review of how other states have adopted, modified or rejected certain of the ABA's proposed rules, the subcommittee compared and contrasted the ABA's proposed rules with the existing Alabama rules. The subcommittee's ultimate conclusion was that the Alabama rules, particularly when combined with the Opinions of the General Counsel interpreting the rules, provide an excellent framework for the self-policing of attorney conduct so vital to our profession in this state. The subcommittee did identify a few instances, however, where our rules could be improved.

Specifically, the subcommittee recommends changes to the following rules:

Rule 1.8: Conflict of Interest: Prohibited Transactions. The proposed changes expressly prohibit lawyer-client sexual relations, except in specific circumstances.

Rule 1.10: Imputed Disqualification: General Rule. The subcommittee expanded the definition of the term “firm” to include various legal entities and legal services organizations.

Rule 1.12: Former Judge or Arbitrator. The proposed changes extend the rule’s restrictions to mediators and other third-party neutrals.

Rule 1.14: Client Under a Disability. The proposed changes reflect current terminology and provide additional guidance to lawyers representing individuals who suffer from some diminished capacity.

Rule 3.2: Expediting Litigation. The subcommittee feels that the existing prohibition against seeking a postponement for personal reasons was too broad and inflexible.

Rule 3.6: Trial Publicity. The proposed changes allow an attorney to respond, within reason, to publicity initiated by others.

Rule 3.7: Lawyer as Witness. The subcommittee believes that the tribunal’s interest in a lawyer not acting as both an advocate and a witness in the same proceeding needs to be acknowledged.

Rule 3.9: Advocate in Nonadjudicative Proceedings. The proposed changes more clearly reflect the different types of forums in which a lawyer may appear.

Rule 4.4: Respect for Rights of Third Persons. The subcommittee believes that the obligations of a lawyer who inadvertently receives a privileged or confidential document should be expressly stated.

Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs. The subcommittee thinks that conflict rules should be tailored to accommodate short-term representation arrangements.

The subcommittee is deeply indebted to the ASB General Counsel, J. Anthony McLain, for his invaluable support and insight throughout our project.

RULE 1.8: CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

CURRENT RULE

(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 which 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 non-represented party and shall be deemed to have complied with this prohibition if the non-represented party knowingly executes a document that is filed in such proceeding acknowledging:

(1) that the lawyer does not and cannot appear or serve as the lawyer for the non-represented 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 non-represented 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 non-represented 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.

PROPOSED RULE

(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 which 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 non-represented party and shall be deemed to have complied with this

prohibition if the non-represented party knowingly executes a document that is filed in such proceeding acknowledging:

(1) that the lawyer does not and cannot appear or serve as the lawyer for the non-represented 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 non-represented 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 non-represented 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 a legal representation;

(2) continuing to represent a client if the lawyer's sexual relations with the client or 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 (k) that applies to one of them shall apply to all of them.

PROPOSED COMMENT

Add at the end of the existing Comments to Rule 1.8:

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 lawyer and 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 impairment of the exercise of independent professional judgment. 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, since 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 client's interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule is intended to restrict the lawyer from having sexual relations with a client under most circumstances, 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 are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to 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 (m), a prohibition on conduct by an individual lawyer in paragraphs (a) through (k) also applies to all lawyers associated in a firm with the personally prohibited lawyer. 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 for in paragraphs (l) and (m) are personal and are not applied to associated lawyers.

REASONS FOR PROPOSED CHANGES

Regarding (l) and (m): The Subcommittee believes that Rule 1.8 should be amended to expressly propound a prohibition against lawyer-client sexual relations, except in specific circumstances. The fundamental relationship between lawyer and client is compromised when the relationship changes from a professional relationship to sexual relationship. The above proposed rule is a combination of the Florida Rule and the Utah Rule regarding attorney-client sexual relations.

Regarding (n): The Subcommittee believes that Rule 1.8 should be amended to expressly address the imputation of the prohibitions set out in paragraphs (a) through (k) to apply to all the attorneys of a firm.

RULE 1.10: IMPUTED DISQUALIFICATION: GENERAL RULE

CURRENT RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which the lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9 (b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

PROPOSED RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (a) through 1.8 (k), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which the lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9 (b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

PROPOSED COMMENT

Definition of “Firm”

The following sentence replaces the first sentence in first paragraph of the existing Comment to section 1.10. The remaining paragraphs remain the same.

For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

REASONS FOR PROPOSED CHANGES

Regarding section (a): The change is necessary to bring Rule 1.10 into conformity with Rule 1.8(n).

Regarding the Comment: The Subcommittee expanded the meaning of the term “firm” to encompass various business entities and legal services organizations.

RULE 1.12: FORMER JUDGE OR ARBITRATOR

CURRENT RULE

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provision of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

PROPOSED RULE

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD PARTY NEUTRAL

a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, other third party neutral, or law clerk to such a person, unless all parties to the proceeding consent after consultation.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, other third party neutral. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator, mediator, other third party neutral may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, arbitrator, mediator, other third party neutral.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provision of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

REASON FOR THE PROPOSED CHANGES:

By inclusion in Rule 1.12, the Subcommittee recognizes the obligations imposed upon mediators and other third party neutrals.

RULE 1.14: CLIENT UNDER A DISABILITY

CURRENT RULE

(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 believes that the client cannot adequately act in the client's own interest.

PROPOSED RULE

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest.

PROPOSED COMMENT

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a

diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.

The fact that a client suffers a diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent the guardian's misconduct. See Rule 1.2(d)

Taking Protective Action

If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measure could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional

services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's best interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of Client's Condition

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the

risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.

Emergency Legal Assistance

In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer with respect to a client.

A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

REASONS FOR PROPOSED CHANGES

The Subcommittee believes that title and text of Rule 1.14 should be modified to more specifically provide guidance for lawyers who represent individuals who suffer from some diminished capacity and give the lawyer more clear direction with how to proceed in the client's best interest.

RULE 3.2 EXPEDITING LITIGATION

CURRENT RULE

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

PROPOSED RULE

NONE.

PROPOSED COMMENT

~~Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or~~
Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or response. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

REASONS FOR PROPOSED CHANGES

The Subcommittee believes that the reference in the second sentence of Comment [1] to indulge in delay "merely for the convenience of the advocates" is too restrictive. The Subcommittee recommends that Alabama adopt the modifications to the Comment because it also recognizes that there are circumstances where it is acceptable for a lawyer to request a postponement for personal reasons.

RULE 3.6 TRIAL PUBLICITY

CURRENT RULE

(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.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case:
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

PROPOSED RULE

The Subcommittee focused on the addition of to one subparagraph in Rule 3.6(c) as follows:

(8) Notwithstanding paragraphs (a) and (b) above, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

REASONS FOR PROPOSED CHANGES

The Subcommittee believes that subparagraph (c) recommended by the ABA was appropriate to add to the Alabama rule. The Alabama rule had

nothing in it that would allow what has been commonly known as “fair response” once the door had been opened by the other party, so the Subcommittee thought it very appropriate.

RULE 3.7 LAWYER AS WITNESS

CURRENT RULE

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

PROPOSED RULE

NONE.

PROPOSED COMMENT

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in these circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services ren-

dered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

REASONS FOR PROPOSED CHANGES

The Subcommittee believes the first sentence in each of the above two Comments should be adopted in the Alabama rules. The additions of the first sentence in each of the two comments above will clarify the rights of the tribunal and the reasons why the tribunal should not be confused or misled.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

CURRENT RULE

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

PROPOSED RULE

A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

REASONS FOR PROPOSED CHANGES

The Subcommittee recommends adding the word “body” after the word “legislative” and replacing the word “tribunal” with the word “agency.” The Subcommittee believes that the changes will make the rule clearer and will help avoid any confusion by attorneys, either in practice or in interpretation of the rule.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

CURRENT RULE

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

PROPOSED RULE

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document that on its face appears to be subject to the attorney-client privilege or otherwise confidential, and knows or reasonably should know that the document was inadvertently sent, should promptly notify the sender and abide by the instructions of the sender regarding the disposition of the document.

REASONS FOR PROPOSED CHANGES

The Subcommittee believes that Rule 4.4 should be amended to expressly address those situations in which a lawyer inadvertently receives a document that is subject to the attorney-client privilege or otherwise confidential. The concept of confidentiality is a fundamental aspect of the right to the effective assistance of counsel, and it is important that the mere inadvertent disclosure of a privileged or confidential document not result in a total waiver of the protection that may attach to that document. By the same token, the receiving lawyer may reasonably believe that he or she has an obligation to use the inadvertently produced document in order to zealously represent his or her client. Balancing these interests, and to foster professionalism, the Subcommittee concluded that the receiving lawyer's obligations should be clearly stated. As stated in ABA Formal Opinion 92-368, "This result not only fosters the important principle of confidentiality, avoids punishing the innocent client, and conforms to the law of bailment, but also achieves a level of professionalism which can only redound to the lawyer's benefit."

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

CURRENT RULE

NONE.

PROPOSED RULE

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

REASONS FOR PROPOSED CHANGES

The proposed rule is designed to facilitate participation in programs providing short-term legal services - such as advice or the completion of legal forms - that will assist persons with legal problems without further representation. In programs such as legal-advice hotlines, tax advice hotlines, disaster relief efforts, there is a client-lawyer relationship but it is not expected that the representation will continue after the limited consultation.

As a practical matter, the nature of these programs does not allow for a systematic screening of conflicts prior to undertaking the representation.

The Subcommittee believes that Rule 6.5 should be added. Known conflicts would still be prohibited. Unknown conflicts would not result in a rules violation and, due to the short-term and limited nature of the representation, there is no significant possibility that an unknown conflict would affect the attorney's performance for the client.