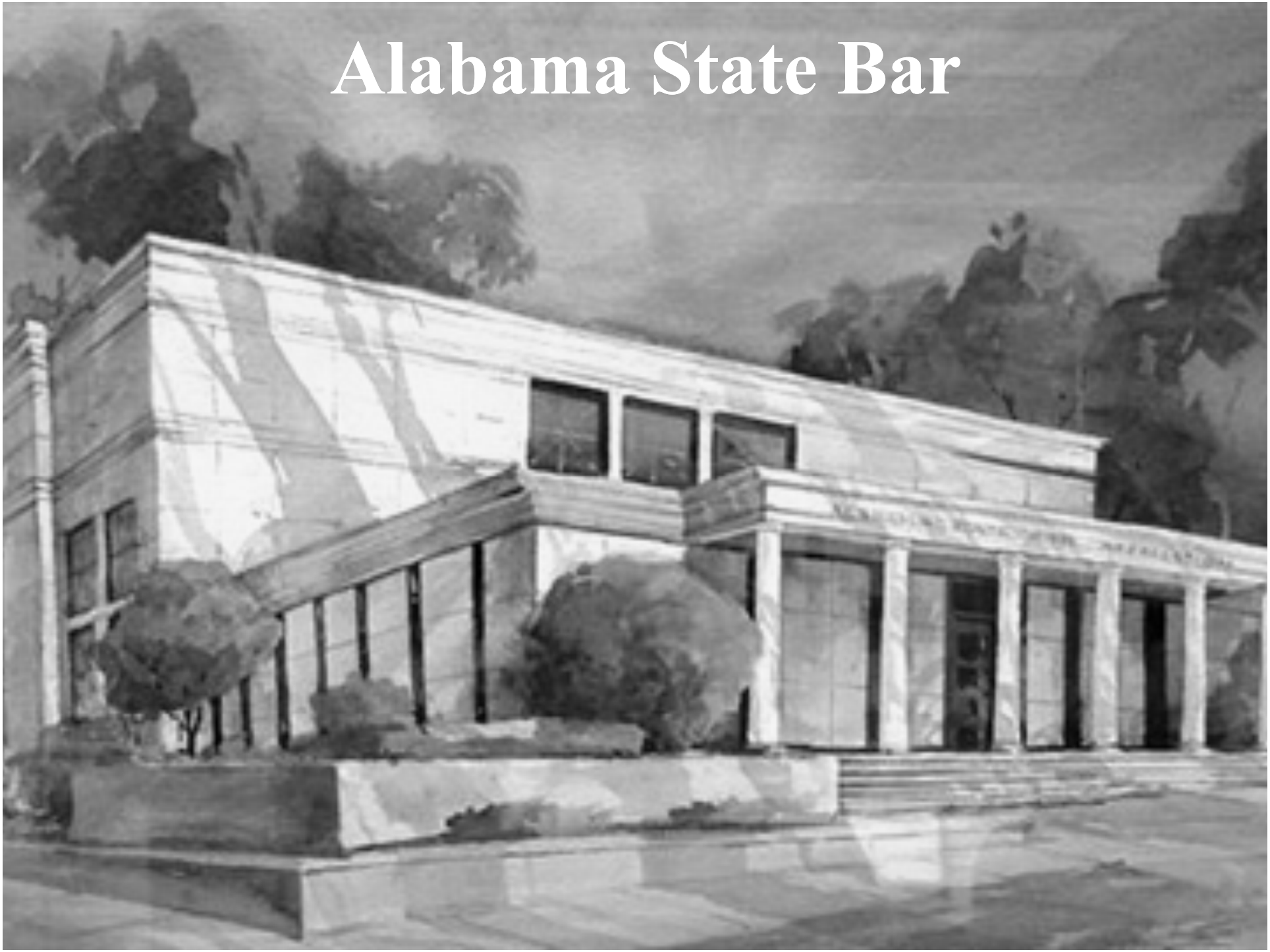
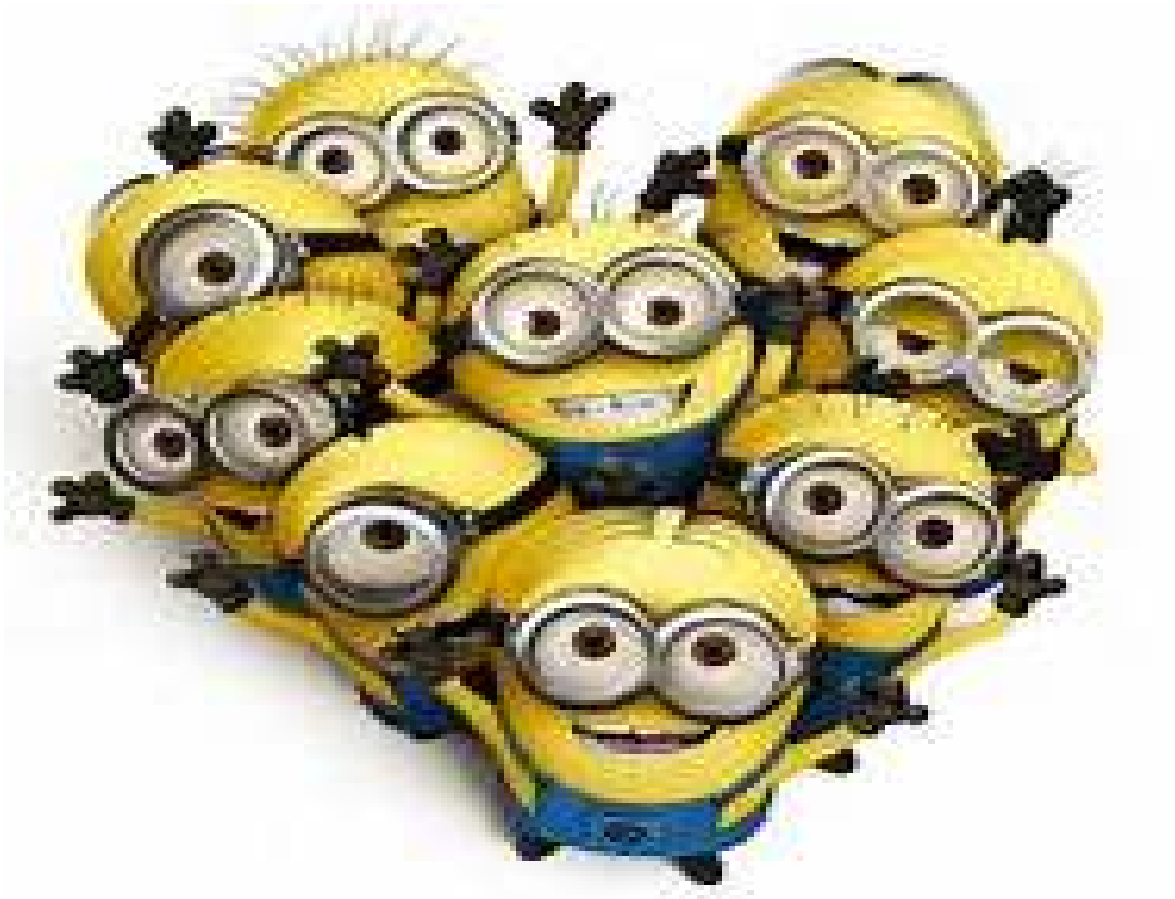

Alabama State Bar

Bankruptcy at the Beach

June 2018

Jeremy McIntire
Assistant General Counsel
Alabama State Bar Association

Don’t Rely on Your Friends for Ethics Advice



Informal Opinions

Call	334.269.1515 / 800.354.6154
Email	tripp.vickers@alabar.org
Write	Alabama State Bar Center for Professional Responsibility P.O. Box 671 Montgomery, Alabama 36104

The Four C's of Bankruptcy Ethics

1. Competency
2. Compensation
3. Conflicts of Interest
4. Candor

Competency

Rule 1.1.

Competence.

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

Compensation

Rule 1.5.

Fees.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Put Fee Agreements in Writing

Scenario #1

What are the ethical obligations of a debtor's attorney to file an adversary proceeding (for example, to discharge taxes or for a stay violation), if the debtor has not retained the attorney for this specific purpose and the contract states that attorney must be retained in order for him to represent the debtor in a separate adversary proceeding?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.4 [Communication]
- Rule 1.5 [Fees]

- The lawyer should let the debtor know that the debtor may have a possible cause of action or may be able to get an otherwise non-dischargeable debt discharged (or whatever the circumstances), and either renegotiate the terms of the original agreement to include the additional services or refer the debtor to other counsel.

Current Client Conflicts

Rule 1.7
Conflict of Interest: General Rule

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

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

(2) Each client consents after consultation.

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

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

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

Know the dangers and consequences of joint representation

Scenario #2

Husband and wife file bankruptcy (most likely a chapter 13), and some years into the plan they get divorced. They are now fighting about the bankruptcy: Who is to make the plan payments? How will the assets be divided? They come to their lawyer for advice and to get action. Can that lawyer now represent both debtors, or does he have a conflict of interest? What should the lawyer do in this situation?

Applicable Rules

- Rule 1.7 [Conflict of Interest: General Rule]
- Rule 1.4 [Communication]
- Rule 1.16 [Declining or Terminating Represenation]

Scenario #2

What are the ethical considerations a creditor's attorney should consider when representing multiple creditors against the same debtor?

Applicable Rules

- Rule 1.7 [Conflict of Interest: General Rule]

- Is there a limited pool of assests?

Former Client Conflicts

RULE 1.9
CONFLICT OF INTEREST: FORMER CLIENT

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

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

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

There is a rebuttable presumption that every time a lawyer represents a client, the lawyer obtains confidential information.

Scenario #3

Lawyer has represented husband and wife in a prior joint bankruptcy. Now they both want to file for bankruptcy again, however, they are now divorced. Can the lawyer ethically represent both of them in two separate cases?

Applicable Rules

- Rule 1.9 [Conflict of Interest: Former Client]

- Rule 1.6 [Confidentiality]

Candor

Rule 3.3.
Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or

(3) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take
reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Scenario #4

Lawyer is told by a client at initial interview that he does not want to disclose a certain asset or a certain debt to the bankruptcy court. What is the lawyer's position? What should the lawyer do?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.6 [Confidentiality]
- Rule 3.3 [Candor Toward the Tribunal]
- Rule 8.4 [Misconduct]

Scenario #5

Same scenario as above, but the debtor decides not to file with the original lawyer. The debtor files with a different lawyer, but does not disclose the asset to the new lawyer. What should the original lawyer do?

Applicable Rule

- Rule 1.6 [Confidentiality]

Scenario #6

After the bankruptcy filing, the lawyer discovers that the debtor failed to disclose assets to the bankruptcy court. What is the lawyer's position? What should the lawyer do?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.6 [Confidentiality]
- Rule 1.6 [Declining or Terminating Represenation]
- Rule 3.3 [Candor Toward the Tribunal]
- Rule 8.4 [Misconduct]

Scenario #7

Debtor wins big at the casino. Then, before the debtor discloses the winnings to his bankruptcy attorney, he spends the money. Is the debtor's attorney bound by the duty of confidentiality from disclosing this information to the court? Is this true even if the debtor's attorney finds out about the windfall after the debtor has already spent the money?

Applicable Rules

- Rule 1.2 [Scope of Representation]
- Rule 1.6 [Confidentiality]
- Rule 1.6 [Declining or Terminating Represenation]
- Rule 3.3 [Candor Toward the Tribunal]
- Rule 8.4 [Misconduct]

Chapter 7

- If the case was filed under *Chapter 7* of the Bankruptcy Code, and the cause of action arose *after* the petition was filed (i.e., the cause of action arose post-petition), the lawyer may not have a duty to disclose. The cause of action would not be considered property of the estate.

Chapter 13

- Section 1306(a) defines "property of the estate" in chapter 13 cases expansively to also include "all property acquired by the debtor after the case commences and until it ends or is converted."

- The Eleventh Circuit holds that post-petition acquired assets are property of the estate under § 1306(a). *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008).

- Therefore, if the asset is either pre- or post-petition in a case filed under Chapter 13, or if it is a pre-petition asset in a Chapter 7 case, the lawyer has a duty to disclose the asset.

Scenario #8

Debtor had a bankruptcy case. Unknown to attorney, the debtor committed bankruptcy fraud and is now being prosecuted by the U.S. Attorney. The debtor comes to the attorney to tell him about the fraud and the prosecution. Is the attorney ethically obligated to represent the debtor when the trustee moves to reopen the case to collect restitution on behalf of the creditors?

Applicable Rules

- Rule 1.2 [Scope of Representation
- Rule 1.6 [Confidentiality]
- Rule 3.7 [Lawyer as Witness Rule]

Top Ethical Pitfalls in Bankruptcy

- Failure to Communicate – Rules 1.4(a) and (b)
- Failure to Provide Competent Representation – Rule 1.1
- Failure to Disclose Fraud by the Client –Rule 3.3
- Trust account Mismanagement – Rule 1.15

Top Ethical Pitfalls in Bankruptcy

- Corporate or Spousal Conflicts – Rules 1.7, 1.9, and 1.13
- Improper Notarization/Signature – Rule 8.4(c)
- Failure to diligently represent the client – Rule 1.3

Retention and Destruction of Client Files 2010-02

- Lawyer's should adopt a file retention policy and disclose such to clients at the outset of representation
- Generally, the file is the property of the client
- Segregate file from property of attorney and other clients
- Promptly produce to client upon request, except, if the attorney has a valid attorney's lien. (Ala. Code § 34-3-61 (1975))
- Providing contemporaneous copies during representation does not terminate lawyer's obligation to provide client full copy of file at the end of representation unless provided for in employment agreement

2010-02

- Initial copy must be provided at no charge
- Must retain client's file for a minimum of six years
- May store client files electronically
- May use a cloud server for storage
- Must reproduce file in the format requested by the client

2010-02

- Disciplinary Commission has adopted the entire file approach in determining what must be given to the client. Exceptions do exists, such as, client has a mental health disorder or where information in the file could endanger the safety and welfare of the client or others.

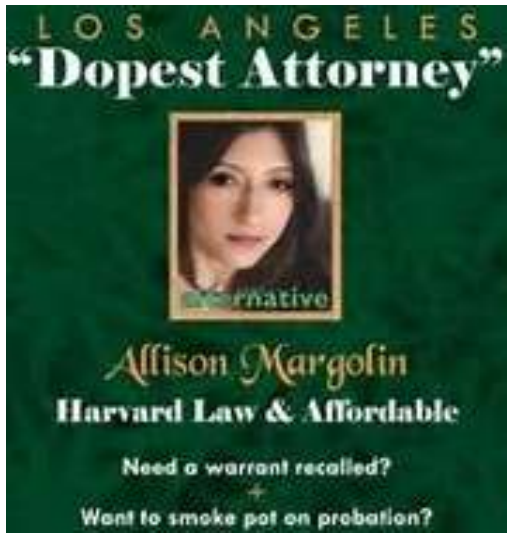
3 Categories of property

- Category 1 is intrinsically valuable property such as original wills and deeds. Such property may not be destroyed.
- Category 2 is valuable property of the client. Such property may be destroyed with the actual consent of the client or upon implied consent or within 60 days of a date established by the lawyer's file retention policy or as provided by notice to the client by the lawyer of the item's impending destruction. (Ex. Notifying client of such by written notice to client's last known address)
- Category 3 is property with no value. It may be destroyed after six years without notice to the client.
- Lawyer must maintain an index of all destroyed files and should identify the following: identity of client, nature or subject matter of the representation, date the file was opened and closed, court case number, general description of property destroyed, and the date of destruction.

Advertising and Solicitation

A Brave New World

If you are going to advertise, know the rules.



Rule 7.1.
Communications Concerning a Lawyer's Services.

- This rule applies to any form of marketing

- Focus is on the content of the information, rather than the means of dissemination (RO-96-07)

- Generally, any information communicated about a lawyer's services is subject to the following regulations or limitations:

  - False or misleading information about the lawyer or the lawyer's services
  - Information that would create unjustified expectations
  - Endorsements or testimonials
  - Damage awards, past results and testimonials are permitted if "extended disclaimer" is used (RO-03-01)
  - Self-laudatory statements
  - Comparative language

Rule 7.2.
Advertising

- Applies to advertising (i.e., communications concerning a lawyer's services)

- Copy or recording be mailed or delivered to the Office of General Counsel within three days after the first date of dissemination

- The duration, the publisher, or broadcaster of shall be identified within the advertisement or in a communication accompanying

- The responsible lawyer must keep a copy for six years

- Lawyer may not give anything of value to a person for recommending the lawyer's service
- May not establish a separate firm and pay for advertising and other expenses (RO-93-23)
- Lawyer may not pay for advertising of another attorney in exchange for referrals (RO-99-01)
- Lawyer may pay reasonable cost of advertising
- Lawyer may pay usual charges of a not-for-profit referral service

- Advertisement must include the name of a responsible lawyer

- Advertisement must contain disclaimer, “No representation is made that the quality of the legal service to be performed is greater than the quality of legal services performed by other lawyers.”

- Display of the firm name, address and telephone number, along with the scales of justice displayed on the tire cover of a spare tire mounted on the back of a conversion van is advertising and requires the disclaimer. (RO-90-63)

- Advertised fees must be honored for a period of not less than 60 days following the date of the last publication or broadcast of the advertisement, if not prima facie evidence of misleading advertising and deceptive practices

Rule 7.3 Direct Contact with Prospective Clients

- No direct contact with prospective clients where there is no familial or current or prior professional relationship
- Lawyer may not contract with “Welcome Wagon” for Welcome Wagon to include the firm’s brochure and other advertising material to the people on whom they call (RO-91-17)
- Lawyer cannot print firm information on exterior of prescription bags to be disbursed by a pharmacy to its customers (RO-03-01)
- Offer to provide legal services on a pro bono basis is not subject to the rules governing advertising and solicitation (RO-03-01)

- The term “solicit” includes any direct contact in person, by telephone, telegraph, email, electronic message, or facsimile transmission, or by other communication directed to a specific recipient.

- Communications to former clients not covered by Rule 7.3, *A.R.P.C.* (RO-03-01)

- Lawyer's employees and agents prohibited from soliciting on lawyer's behalf

- Lawyer may not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule

- Prohibits contact:
  - In person
  - Telephone
  - Telegraph
  - Facsimile
  - Other communication directed to a specific recipient
- *Email*
- *Chat groups*
- *Discussion forums*

- Written communication not permitted when:
  - Concerns personal injury or wrongful death as a result of accident or natural disaster, unless 30 day waiting period is observed
  - Know or reasonably should person already represented
  - Person has made known to lawyer they do not want to receive
  - Communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence
  - Contains false, fraudulent, misleading, deceptive, or unfair statement or claim, or violates Rule 7.1
  - Knows or reasonably should know person is a minor, or incompetent or person's physical, emotional or mental state makes it unlikely the person would use reasonable judgment in employing a lawyer

- Written communication when permitted, must:
- Copy of communication, envelope and list of names and addresses of intended recipients filed with Office of General Counsel, before or concurrently with dissemination
- List cannot be on computer disk (RO-96-05)
- Lawyer must preserve a copy of the above for six years
- Only regular mail permitted
- No reference to approved by the Alabama State Bar

- Advertisement” in 14-point type, red ink, in lower left-hand corner of envelope and on each page of communication

- No extraneous terms (RO-96-05)

- Should not include contract, but if you do, “SAMPLE” must appear on each page and “DO NOT SIGN” must appear on signature line

- First sentence must say, “If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure, or written communication]”

- Must state how the lawyer obtained the information prompting the communication

- May not reveal nature of legal matter on envelope

- Lawyer must be able to prove truthfulness of all the information contained in the communication

Advertising

- May not participate in Groupon or other Deal of the Day Websites
- An attorney may advertise the ability of a nonlawyer employee to communicate in a foreign language if the advertisement makes it clear that the nonlawyer employee and not the attorney will be communicating with the client in the foreign language.
- Additionally, if the advertisement is placed using the foreign language being advertised, then the disclaimer required by Rule 7.2(e) must also be in that same foreign language. If the advertisement being placed uses both English and the foreign language, then the disclaimer must be communicated through both the foreign language and English.
- Finally, any attorney using a nonlawyer employee to communicate with a client in a foreign language assumes all responsibility for the accuracy of the information relayed between the nonlawyer employee and client.

Advertising

- The business cards of an attorney can constitute advertising if the cards are distributed to the public in such a way as to, or with the intent to, directly solicit prospective clients.
- An offer to provide legal services on a pro bono basis is not subject to the Rules governing advertising and solicitation.

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