



**STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL**

**STEVE MARSHALL  
ATTORNEY GENERAL**

**OFFICE OF THE ATTORNEY GENERAL  
CONTINUING LEGAL EDUCATION SEMINAR**

**Office of the Attorney General  
Multipurpose Room  
Thursday, December 14, 2017**

**AFTERNOON SESSION  
2:30 PM – 3:30 PM**

**Ethical Quicksands**

**Jeremy McIntire, Esq., Assistant General Counsel  
Alabama State Bar Association**



# Alabama State Bar

## ETHICAL QUICKSANDS

December 14, 2017  
Alabama Attorney General's Office

Jeremy McIntire  
Assistant General Counsel  
Alabama State Bar Association

Don't Rely on Your Friends for Ethics Advice



## Ethics Opinions

Alabama Rules of Disciplinary Procedure  
Rule 18.

Conduct not subject to disciplinary action.

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, to the Office of General Counsel, said inquiry shall be considered confidential. Additionally, if said lawyer receives a formal or informal opinion from the Office of General Counsel that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action.

## Informal Opinions

What Our Office Can Do:

Give you a confidential opinion regarding the ethical propriety of your own prospective conduct based upon a verifiable set of facts.

## Informal Opinions

### What Our Office Cannot Do:

- Provide legal advice or conclusions
- Comment or opine on your past conduct
- Comment or opine on the conduct of another lawyer
- Answer hypothetical questions

## Rules to Live By

- Don't file frivolous motions or motions designed to harass or delay – Rule 3.1 and 3.2
- Don't fail to cite opposing authority – Rule 3.3
- Don't misstate the law or the facts of the case – Rule 3.3

## Rules to Live By

- Don't conceal or fail to disclose exculpatory evidence – Rule 3.4 and 3.8
- Don't counsel a witness to testify falsely or offer an inducement to a witness prohibited by law – Rule 3.4

## Rules to Live By

- Don't allude to a matter or evidence not admissible as evidence or assert personal knowledge – Rule 3.4(c) and 8.4(d)
- Don't engage in ex parte communication with the Court – Rule 3.5

## Rule 3.6

### Trial Publicity

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

(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.

(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.

## Other Rules to Live By

- Do not engage in a relationship with a witness
- Do not engage in a relationship with opposing counsel without informing your supervisor
- If engaged in a relationship with a member of law enforcement, disclose such to your supervisor

## Conflicts of Interest

A Chinese wall or screening is allowed for governmental agencies, including the Attorney General's Office

## Rule 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a 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 government agency to enable it to ascertain compliance with the provisions of this rule.

## Rule 1.11. Successive Government and Private Employment

(b) Except as may otherwise be permitted by law, a lawyer, having information concerning a person, which was acquired when the lawyer was a public officer or employee and which the lawyer knows to be confidential government information, may not represent a private client whose interests are adverse to that person in a matter in which such information could be used to that person's material disadvantage. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is precluded from any participation in the matter and is apportioned no part of the fee therefrom.

## Rule 1.11. Successive Government and Private Employment

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private 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, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

## Rule 1.11. Successive Government and Private Employment

(d) As used in this rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

## Rule 3.8

### Special Responsibilities of a Prosecutor

(1) The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Not willfully fail to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) Exercise reasonable care to prevent anyone under the control or direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, and shall not cause or influence anyone to make a statement that the prosecutor would be prohibited from making under Rule 3.6; and

(2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:

(a) Notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and

(b) To the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

## 10 Biggest Ethical Pitfalls

1. Suppression of Exculpatory Evidence
2. Improper Statements to the Press
3. Ex Parte Communications with the Court
4. Drug and Alcohol Issues

## 10 Biggest Ethical Pitfalls

5. Knowingly using False Evidence or Testimony
6. Communicating with Parties Represented by Counsel
7. False Statements of Material Fact

## 10 Biggest Ethical Pitfalls

8. Taking Bribes (Yes, it has happened in Alabama)
9. Improper Contact with Jurors
10. Believing the Ends Justifies the Means

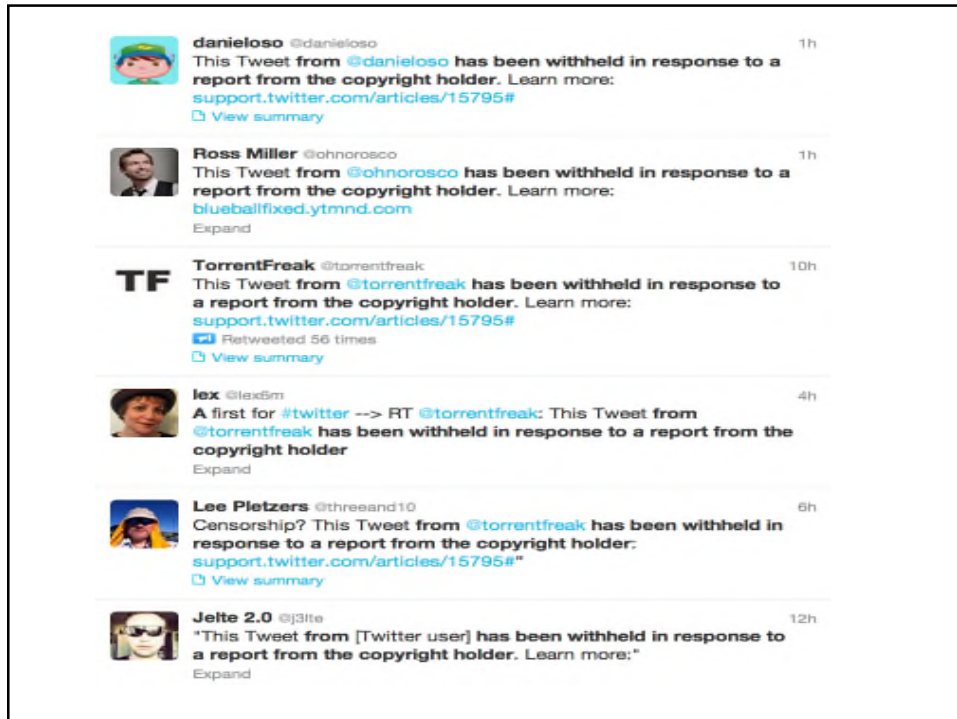
Social Media and Ethics

What you follow,  
follows you

TWITTER

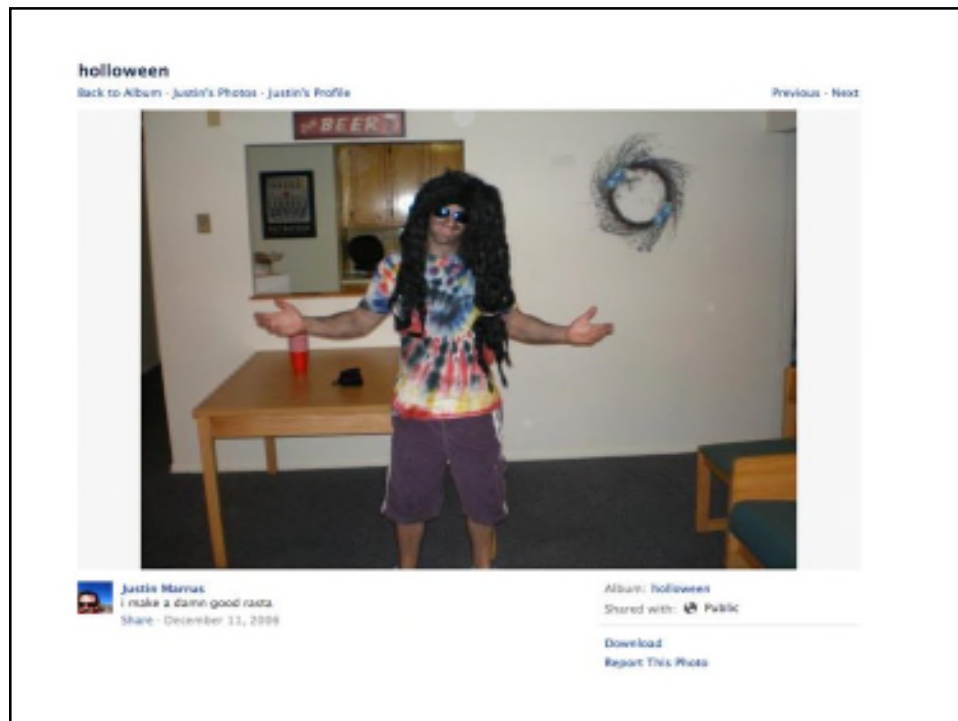
- What you follow is visible to the public
- What you “like” is searchable on google by your twitter handle





## Florida Public Defender

- A Florida public defender is reportedly out of a job after a judge declared a mistrial upon learning of a Facebook posting the lawyer made mocking her own client.
- Anya Cintron Stern posted the photo of leopard-print underwear that defendant Fermin Recalde's family had given him, according to the Miami Herald.
- The Hialeah, Fla., man, 40, was on trial for the 2010 death of his girlfriend of two years. Prosecutors say he stabbed his girlfriend twice, allegedly killing her after he saw a love bite on her cheek. His family had brought clean clothes for him to wear in court, including the underwear that Stern photographed, the Herald reported.
- Stern, 31, who could not be reached for comment by ABC News, reportedly posted a picture of the underwear on her Facebook page, saying that Recalde's family believed the underwear was "proper attire for a trial"





- A Brooklyn assistant district attorney is seen in blackface and holding a Confederate flag on his Facebook page and in another photo, simulating prison rape.
- An Indiana deputy assistant attorney general tweeted about using “live ammunition” on protesters.
- An assistant U.S. attorney in Beaumont, Tex., posted about the “Dalibama” and Trayvon Martin case.

- Multiple federal prosecutors in New Orleans admitted to posting pseudonymously about judges, pending investigations and cases.
- A Norfolk, Va., assistant prosecutor posted threats against his boss on Facebook.
- A Minnesota prosecutor commented on Facebook during an attempted murder trial about “keeping the streets safe from Somalis.”

- An Illinois defense attorney uploaded discovery video of an undercover drug buy involving his client on YouTube, and described it as evidence of police planting drugs. Later, after viewing it more closely, he admitted that it incriminated his client.
- An Illinois public defender posted sensitive and disparaging information on her blog about her cases and clients, even describing one jurist as “Judge Clueless.”
- A former chief lead counsel to the Missouri governor posted nude photos of his ex-girlfriend--a prosecutor in Virginia--on Twitter.

- *Judicial criticism*--A Florida lawyer agreed to a public reprimand in 2008 for harshly criticizing a judge in a blog post, using phrases such as “evil, unfair witch” and “seemingly mentally ill.” The Florida Supreme Court said the reprimand did not violate the lawyer's constitutional rights, Hyland said. (*Fla. Bar v. Conway*, 996 So. 2d 213 (Fla. Oct. 29, 2008) (order without published opinion).)

- *Lawyer-client confidentiality*--An Illinois criminal defense lawyer was suspended for 60 days and fired after 19 years with the public defender's office after she blogged about her cases. For example, she described one of her clients as stoned in court. (*In re Peshek*, [No. M.R. 23794](#) (Ill. May 18, 2010)).

- *Ex parte contacts*--A judge was publicly reprimanded for communicating ex parte with a lawyer who was in trial before the judge. The lawyer said on Facebook: "I hope I'm in my last day of trial"; the judge answered "You are in your last day of trial." (*In re Terry*, [No. 08-234](#) (N.C. Judicial Standards Comm. April 1, 2009)).

## Confidentiality and the Dangers of Technology

### Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

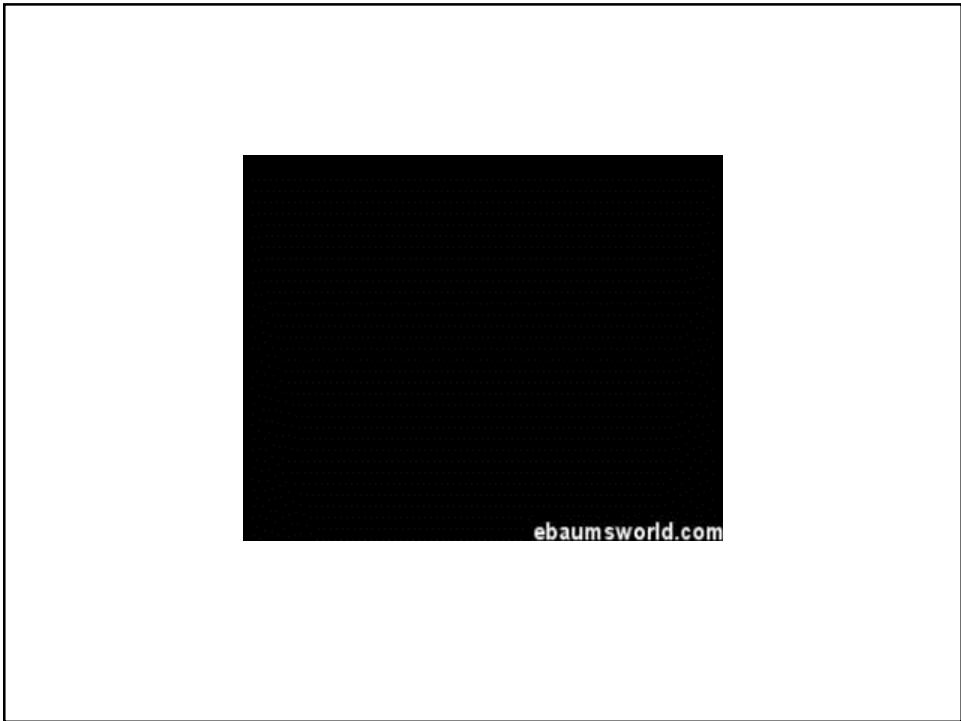
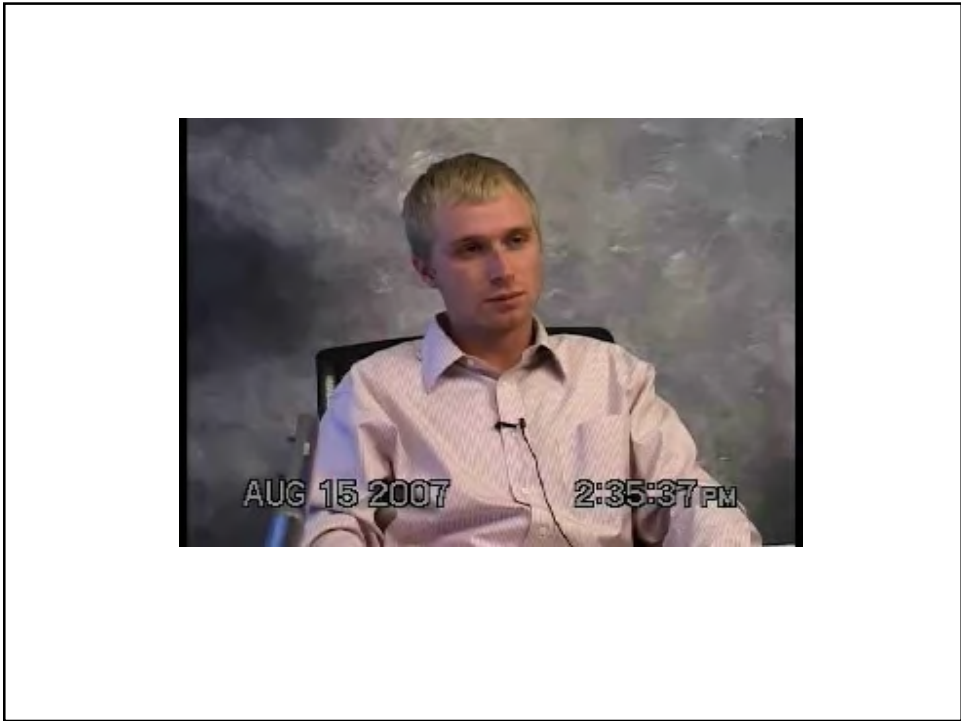
(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Professionalism

# Self-Awareness







## What to Do if You Do Get That Letter?



- Don't Panic. 75% of all complaints are screened out after the attorney's initial response.
- But do respond. Lawyer's are subject to a summary suspension of their law license for failing to respond to a bar complaint.
- Don't get angry at Bar staff. It doesn't help.



## Remember KISS



- Keep your response simple and to the point.
- Address all of the allegations of the complaint.
- Attach any supporting documents.
- Briefly address and explain any relevant portions of the law if necessary to address the complaint.

## And Most Importantly!

- Do Not Lie or Mislead in Your Response

**LIAR**  
**LIAR**



## Lawyer Assistance Program

- **Robert B. Thornhill, MS, LPC, MLAP**  
**Director**

(334) 517-2238 - Phone

(334) 517-2239 - Fax

(334) 224-6920 - 24 Hour Confidential Helpline

[robert.thornhill@alabar.org](mailto:robert.thornhill@alabar.org)

- <http://www.alabar.org/alap/>