Disciplinary Rules & Procedures Committee

AGENDA

January 13, 2023

Atlanta, GA

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VI. Adjourn
This standing committee shall advise the Executive Committee and Board of Governors with respect to all procedural and substantive disciplinary rules, policies, and procedures.

**Chairperson**
Harold Michael Bagley 2025

**Vice Chairperson**
R. Gary Spencer 2023

**Members**
- Hon. J. Antonio DelCampo 2023
- Erin H. Gerstenzang 2023
- Mazie Lynn Guertin 2023
- John G. Haubenreich 2023
- Patrick H. Head 2023
- R. Javoyne Hicks 2023
- William Dixon James 2023
- Seth David Kirschenbaum 2023
- Catherine Koura 2024
- Edward B. Krugman 2023
- David Neal Lefkowitz 2023
- Patrick E. Longan 2023
- David O’Neal 2023
- Jabu Mariette Sengova 2023
- H. Craig Stafford 2023
- William Hickerson Thomas, Jr. 2023
- Julayaun Maria Waters 2025
- Peter Werdesheim 2024
- Patrick John Wheale 2024
- Hon. Paige Reese Whitaker 2023

**Executive Committee Liaison**
David S. Lipscomb 2023

**Staff Liaison**
Paula J. Frederick 2023
Chair Michael Bagley called the meeting to order at 12:35 p.m.

**Attendance:**

**Committee members:** Michael Bagley, John G. Haubenreich (virtual), Patrick H. Head (virtual), R. Javoyne Hicks (virtual), Catherin Koura, Edward B. Krugman (virtual), David N. Lefkowitz (virtual), Patrick E. Longan (virtual), David O’Neal, William Thomas, Jr. (virtual), J. Maria Waters (virtual), Peter Werdesheim (virtual), Patrick Wheale (virtual), and Judge Paige Whitaker.

**Executive Committee Liaison:** David S. Lipscomb

**Staff:** Paula J. Frederick, Damon Elmore, Jenny K. Mittelman, Andreea Morrison, Billy Hearnburg, Kathya S. Jackson, and Carolyn Williams (virtual).

**Guests:** ITILS Committee members: Glenn Hendrix, Amanda Clark-Palmer (virtual), and Bernard Greer (virtual); Nall & Miller LLP attorneys: Patrick Arndt (virtual) and Ronald Goldstucker (virtual).

**Approval of Minutes:**

The Committee approved the Minutes from the August 16, 2022.

**Action Items:**

**Rule 1.0**

By unanimous vote, the Committee voted to add subsection (dd) defining “willful blindness” to support the changes to Rule 1.2. A copy of the Rule as amended appears at the end of these minutes.

**Rule 1.2**

By unanimous vote, the Committee voted to amend Rule 1.2(d) to address ITILS concerns regarding anti-money laundering. A copy of the Rule as amended appears at the end of these minutes.

**Part VII**

By unanimous vote, the Committee voted to amend Rules 7.1, 7.2, and 7.3, and reserved Rules 7.4 and 7.5. A copy of the Rule as amended appears at the end of these minutes.
**Discussion Item:**

A subcommittee will review the Fagan decision and the associated rules, and provide the Committee with an update at the next meeting. The members of the subcommittee are David Lipscomb, Patrick Head, Patrick Longan, Pete Werdesheim and Catherine Koura.

**Informational Item:**

Patrick Longan advised the committee of a new ABA Opinion regarding pro se lawyers contacting opposing party. The FAOB is currently looking into this matter and Bar Counsel will provide an update at the next meeting.

The meeting adjourned at 1:40 p.m.
RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not either knowingly or with willful blindness counsel a client to engage in criminal or fraudulent conduct that the lawyer knows is criminal or fraudulent, nor knowingly or with willful blindness assist a client in such conduct. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

The maximum penalty for a violation of this rule is disbarment.
Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4 (a) (1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4 (a) (2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a) (3).
[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might State Bar Handbook 58/298 otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and the client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If,
for example, a client's objective is limited to securing general information about
the law the client needs in order to handle a common and typically uncomplicated
legal problem, the lawyer and client may agree that the lawyer's services will be
limited to a brief telephone consultation. Such a limitation, however, would not be
reasonable if the time allotted was not sufficient to yield advice upon which the
client could rely. Although an agreement for a limited representation does not
exempt a lawyer from the duty to provide competent representation, the limitation
is a factor to be considered when determining the legal knowledge, skill,
 thoroughness and preparation reasonably necessary for the representation. See
Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord
with the Georgia Rules of Professional Conduct and other law. See, e.g., Rules 1.1,
1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a
client to commit a crime or fraud. This prohibition, however, does not preclude the
lawyer from giving an honest opinion about the actual consequences that appear
likely to result from a client's conduct. Nor does the fact that a client uses advice in
a course of action that is criminal or fraudulent of itself make a lawyer a party to
the course of action. There is a critical distinction between presenting an analysis
of legal aspects of questionable conduct and recommending the means by which a
crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the
lawyer's responsibility is especially delicate. The lawyer is required to avoid
assisting the client, for example, by drafting or delivering documents that the
lawyer knows are fraudulent or by suggesting how the wrongdoing might be
concealed. A lawyer may not continue assisting a client in conduct that the lawyer
originally supposed was legally proper but then discovers is criminal or fraudulent.
The lawyer must, therefore, withdraw from the representation of the client in the
matter. See Rule 1.16 (a). In some cases, withdrawal alone might be insufficient. It
may be necessary for the lawyer to give notice of the fact of withdrawal and to
disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special
obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the
transaction. Hence, a lawyer must not participate in a transaction to effectuate
criminal or fraudulent voidance of tax liability. Paragraph (d) does not preclude
undertaking a criminal defense incident to a general retainer for legal services to a
lawful enterprise. The last clause of paragraph (d) recognizes that determining the
validity or interpretation of a statute or regulation may require a course of action
involving disobedience of the statute or regulation or of the interpretation placed
upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects
assistance not permitted by the Georgia Rules of Professional Conduct or other law
or if the lawyer intends to act contrary to the client's instructions, the lawyer must
consult with the client regarding the limitations on the lawyer's conduct. See Rule
1.4 (a) (5).
RULE 1.0. TERMINOLOGY AND DEFINITIONS.

(a) “Belief” or “believes” denotes that the person involved actually thought the fact in question to be true. A person’s belief may be inferred from the circumstances.

(b) “Confidential Proceedings” denotes any proceeding under these rules which occurs prior to a filing in the Supreme Court of Georgia.

(c) “Confirmed in writing” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (l) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(e) “Conviction” or “convicted” denotes any of the following accepted by a court, whether or not a sentence has been imposed:

1. a guilty plea;
2. a plea of nolo contendere;
3. a verdict of guilty;
4. a verdict of guilty but mentally ill; or
5. A plea entered under the Georgia First Offender Act, OCGA § 42-8-60 et seq., or a substantially similar statute in Georgia or another jurisdiction.
(f) “Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any state or territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.

(g) “Firm” or “law firm” denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Bar Rule 1-203 (d); or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(h) “Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.

(i) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive; not merely negligent misrepresentation or failure to apprise another of relevant information.

(j) “Grievance” denotes an allegation of unethical conduct filed against a lawyer.

(k) “He,” “Him” or “His” denotes generic pronouns including both male and female.

(l) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(m) “Knowingly,” “known,” or “knows” denotes actual knowledge of the
fact in question. A person's knowledge may be inferred from the circumstances.

(n) “Lawyer” denotes a person authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia including persons admitted to practice in this state pro hac vice.

(o) “Memorandum of Grievance” denotes an allegation of unethical conduct against a lawyer filed in writing with the Office of the General Counsel and containing the name and signature of the complainant or initiated pursuant to Rule 4-203 (2).

(p) “Nonlawyer” denotes a person not authorized to practice law by either the:

(1) Supreme Court of Georgia or its rules (including pro hac vice admission), or

(2) duly constituted and authorized governmental body of any other state or territory of the United States, or the District of Columbia, or

(3) duly constituted and authorized governmental body of any foreign nation.

(q) “Notice of Discipline” denotes a notice by the State Disciplinary Board that the respondent will be subject to a disciplinary sanction for violation of one or more Georgia Rules of Professional Conduct unless the respondent affirmatively rejects the notice.

(r) “Partner” denotes a member of a partnership, a shareholder in a law firm organized pursuant to Bar Rule 1-203 (d), or a member of an association authorized to practice law.

(s) “Petition for Voluntary Surrender of License” denotes a Petition for Voluntary Discipline in which the respondent voluntarily surrenders his license to practice law in this state. A voluntary surrender of license is
tantamount to disbarment.

(t) “Probable Cause” denotes a finding by the State Disciplinary Board that there is sufficient evidence to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of the rules.

(u) "Prospective Client" denotes a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.

(v) “Public Proceedings” denotes any proceeding under these rules that has been filed with the Supreme Court of Georgia.

(w) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(x) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(y) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(z) “Respondent” denotes a person whose conduct is the subject of any disciplinary investigation or proceeding.

(aa) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(bb) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.
(cc) “Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(dd) “Willful blindness” denotes awareness of a high probability that a fact exists and deliberate action to avoid learning of the fact.

(ee) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including but not limited to handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

[1] Bar Rule 4-110 includes additional definitions for terminology used in the procedural section of these rules.

Confirmed in Writing

[1A] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.
Whether two or more lawyers constitute a firm within paragraph (e) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Georgia Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid
and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

[5] When used in these rules, the terms "fraud" or "fraudulent" refers to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Georgia Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2 (c), 1.6 (a) and 1.7 (b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a
discussion of the client's or other person's options and alternatives. In some
circumstances it may be appropriate for a lawyer to advise a client or other
person to seek the advice of other counsel. A lawyer need not inform a client or
other person of facts or implications already known to the client or other person;
nevertheless, a lawyer who does not personally inform the client or other person
assumes the risk that the client or other person is inadequately informed and the
consent is invalid. In determining whether the information and explanation
provided are reasonably adequate, relevant factors include whether the client or
other person is experienced in legal matters generally and in making decisions of
the type involved, and whether the client or other person is independently
represented by other counsel in giving the consent. Normally, such persons need
less information and explanation than others, and generally a client or other
person who is independently represented by other counsel in giving the consent
should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by
the client or other person. In general, a lawyer may not assume consent from a
client's or other person's silence. Consent may be inferred, however, from the
conduct of a client or other person who has reasonably adequate information
about the matter. A number of Rules require that a person's consent be
confirmed in writing. See Rules 1.7 (b) and 1.9 (a). For a definition of "writing"
and "confirmed in writing," see paragraphs (s) and (b). Other Rules require that a
client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8
(a) (3) and (g). For a definition of "signed," see paragraph (s).

Screened

[8] This definition applies to situations where screening of a personally
disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 and 1.12.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Writing
[11] The purpose of this definition is to permit a lawyer to use developing technologies that maintain an objective record of a communication that does not rely upon the memory of the lawyer or any other person. See OCGA § 10-12-2(8).
RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. By way of illustration, but not limitation, a communication is false or misleading if it: contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

1. contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
2. is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;
3. compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;
4. fails to include the name of at least one lawyer responsible for its content; or
5. contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:

"Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client."

6. contains the language "no fee unless you win or collect" or any similar phrase and fails to conspicuously present the following disclaimer:

"No fee unless you win or collect" [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.

b. A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication.

c. A lawyer retains ultimate responsibility to insure that all communications concerning the lawyer or the lawyer's services comply with the Georgia Rules of Professional Conduct.

The maximum penalty for a violation of this rule is disbarment.

Comment
This rule governs the content of all communications about a lawyer's services, including the various types of advertising permitted by Rules 7.3 through 7.5. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

The prohibition in sub-paragraph (a)(2) of this Rule: Communications Concerning a Lawyer's Services of Misleading truthful statements that may create "unjustified expectations" are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would ordinarily preclude advertisements about results obtained believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

A communication that truthfully reports a lawyer’s achievements on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar results can be obtained for others matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.
Affirmative Disclosure

[3] In general, the intrusion on the First Amendment right of commercial speech resulting from rationally-based affirmative disclosure requirements is minimal, and is therefore a preferable form of regulation to absolute bans or other similar restrictions. For example, there is no significant interest in failing to include the name of at least one accountable attorney in all communications promoting the services of a lawyer or law firm as required by sub-paragraph (a)(4) of Rule 7.1: Communications Concerning a Lawyer’s Services. Nor is there any substantial burden imposed as a result of the affirmative disclaimer requirement of sub-paragraph (a)(6) upon a lawyer who wishes to make a claim in the nature of "no fee unless you win." Indeed, the United States Supreme Court has specifically recognized that affirmative disclosure of a client’s liability for costs and expenses of litigation may be required to prevent consumer confusion over the technical distinction between the meaning and effect of the use of such terms as "fees" and "costs" in an advertisement.

Certain promotional communications of a lawyer may, as a result of content or circumstance, tend to mislead a consumer to mistakenly believe that the communication is something other than a form of promotional communication for which the lawyer has paid. Examples of such a communication might include advertisements for seminars on legal topics directed to the lay public when such seminars are sponsored by the lawyer, or a newsletter or newspaper column which appears to inform or to educate about the law. Paragraph (b) of this Rule 7.1: Communications Concerning a Lawyer’s Services would require affirmative disclosure that a lawyer has given value in order to generate these types of public communications if such is in fact the case.

Accountability

[5] Paragraph (c) makes explicit an advertising attorney’s ultimate responsibility for all the lawyer’s promotional communications and would suggest that review by the lawyer prior to dissemination is advisable if any doubts exist concerning conformity of the end product with these Rules. Although prior review by disciplinary authorities is not required by these Rules, lawyers are certainly encouraged to contact disciplinary authorities prior to authorizing a promotional communication if there are any doubts concerning either an interpretation of these Rules or their application to the communication.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(a)(4). See also Rule 8.4(a)(6) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer’s services. A firm may be designated by the names of all or some of its current members, by the names of retired or deceased members where there has been a succession in the firm’s identity or
by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a
distinctive website address, social media username or comparable professional designation
that is not misleading. A law firm name or designation is misleading if it implies a connection
with a government agency, with a deceased lawyer who was not a former member of the firm,
with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a
public or charitable legal services organization. If a firm uses a trade name that includes a
geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is
not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other
professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they
are not a firm, as defined in Rule 1.0(g), because to do so would be false and misleading.
RULE 7.2: ADVERTISING COMMUNICATIONS CONCERNING A LAWYER’S SERVICES: SPECIFIC

RULES

a. Subject to the requirements of Rules 7.1 and 7.3, [a] A lawyer may advertise communicate information regarding the lawyer’s services through any media.

1. public media, such as a telephone directory, legal directory, newspaper or other periodical;
2. outdoor advertising;
3. radio or television;
4. written, electronic or recorded communication.

b. A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

c. Prominent disclosures. Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:

1. Disclosure of identity and physical location of attorney. Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer’s bona fide office, or the registered bar address, when a referral is made.

2. Disclosure of referral practice. If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3(c) regarding referral services.

3. Disclosure of spokespersons and portrayals. Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, or of a client by a non-client.
4. Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.

5. Appearance of legal notices or pleadings. Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2](b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service does not engage in conduct that would violate the Rules if engaged in by a lawyer;

(3) pay the usual and reasonable fees or dues charged by a bar-operated non-profit referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:
i. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the Office of the General Counsel a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

ii. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

iii. the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and

iv. a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than $100,000 per occurrence and $300,000 in the aggregate.

(4) pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer’s services, the lawyer’s partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(5) pay for a law practice in accordance with Rule 1.17;

(6) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and
(ii) the client is informed of the existence and nature of the agreement; and

(7) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

(c) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer’s name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.
Neither this Rule nor Rule 7.3: Direct Contact with Prospective Clients prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

Paying Others to Recommend a Lawyer

Except as permitted under paragraphs (b)(1)-(b)(7), lawyers are not permitted to pay others for recommending the lawyer’s services. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”

Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

Paragraph (b)(7) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer’s services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.
[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a)(1) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except
as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

Required Contact Information

[11] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.
RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

a. A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer’s firm, lawyer’s partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

Rule 7.3: Solicitation of Clients

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has been a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

1. the target of the solicitation has made known to the lawyer that a person does not a desire not to receive communications from the lawyer; or

2. the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; or
3. The written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or

4. The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

b. Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

e. A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

1. A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:
   i. Does not engage in conduct that would violate the Rules if engaged in by a lawyer;
   ii. Provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and
   iii. Discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.

2. A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:
   i. The lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;
   ii. The sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain
an office within the geographical area served, and who meet reasonable
objectively determinable experience requirements established by the bar
association;

iii. the combined fees charged by a lawyer and the lawyer referral service to a
client referred by such service shall not exceed the total charges which the
client would have paid had no service been involved; and

iv. a lawyer who is a member of the qualified lawyer referral service must
maintain in force a policy of errors and omissions insurance in an amount
no less than $100,000 per occurrence and $300,000 in the aggregate.

3. A lawyer may pay the usual and reasonable fees to a qualified legal services plan
or insurer providing legal services insurance as authorized by law to promote the
use of the lawyer's services, the lawyer's partner or associates services so long as
the communications of the organization are not false, fraudulent, deceptive or
misleading;

4. A lawyer may pay for a law practice in accordance with Rule 1.17.

d. A lawyer shall not solicit professional employment as a private practitioner for the
lawyer, a partner or associate through direct personal contact or through live telephone
contact, with a nonlawyer who has not sought advice regarding employment of a lawyer.
e. A lawyer shall not accept employment when the lawyer knows or reasonably should
know that the person who seeks to employ the lawyer does so as a result of conduct by
any person or organization that would violate these Rules if engage in by a lawyer.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or
other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or
group legal service plan operated by an organization not owned or directed by the lawyer that
uses live person-to-person contact to enroll members or sell subscriptions for the plan from
persons who are not known to need legal services in a particular matter covered by the plan.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in Paragraph (b) prohibits a lawyer from soliciting
professional employment by live person-to-person contact when a significant motive for the
lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. A lawyer’s communication is
not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal contact by a lawyer of prospective clients encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects the lay a person to the private importuning of the trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation circumstances giving rise to the need for legal services, and may have an impaired capacity for reason, may find it difficult to fully evaluate all available alternatives with reasoned judgment and protective appropriate self-interest. Furthermore, in the face of the lawyer’s presence and insistence upon an immediate response. The situation is fraught with a conflict stemming from the lawyer’s own interest, which may color the advice and representation offered the vulnerable prospect possibility of undue influence, intimidation, and overreaching.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation and overreaching. [3] The potential for abuse overreaching inherent in solicitation of prospective clients through personal live person-to-person contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating conveying necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct, personal contact through an intermediary and live contact by telephone.

**Direct Written Solicitation**

[3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule, promotional communication by a lawyer through direct written contact is generally permissible. The public’s need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.
Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public's intelligent selection of counsel, including the restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

Communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

This Rule does not prohibit communications. The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.

Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political,
social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law, such as or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices.
Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The maximum penalty for a violation of this rule is disbarment.

Comment

[1] This Rule governs all communications about a lawyer’s services, including advertising. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with those of other
lawyers or law firms, may be misleading if presented with such specificity as would lead a
reasonable person to conclude that the comparison or claim can be substantiated. The
inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a
statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud,
deceit or misrepresentation. Rule 8.4(a)(4). See also Rule 8.4(a)(6) for the prohibition against
stating or implying an ability to improperly influence a government agency or official or to
achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a
lawyer’s services. A firm may be designated by the names of all or some of its current members,
by the names of retired or deceased members where there has been a succession in the firm’s
identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be
designated by a distinctive website address, social media username or comparable professional
designation that is not misleading. A law firm name or designation is misleading if it implies a
connection with a government agency, with a deceased lawyer who was not a former member of
the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or
with a public or charitable legal services organization. If a firm uses a trade name that includes a
geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is
not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other
professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they
are not a firm, as defined in Rule 1.0(g), because to do so would be false and misleading.
RULE 7.2: COMMUNICATIONS CONCERNING A LAWYER’S SERVICES: SPECIFIC RULES

(a) A lawyer may communicate information regarding the lawyer’s services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:

1. pay the reasonable costs of advertisements or communications permitted by this Rule;

2. pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service does not engage in conduct that would violate the Rules if engaged in by a lawyer;

3. pay the usual and reasonable fees or dues charged by a bar-operated non-profit referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

i. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the Office of the General Counsel a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

ii. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

iii. the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and
iv. a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than $100,000 per occurrence and $300,000 in the aggregate.

(4) pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer’s services, the lawyer’s partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(5) pay for a law practice in accordance with Rule 1.17;

(6) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(7) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

(c) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

The maximum penalty for a violation of this Rule is disbarment.
Comment

[1] This Rule permits public dissemination of information concerning a lawyer’s or law firm’s name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(7), lawyers are not permitted to pay others for recommending the lawyer’s services. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(7) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer’s services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.
A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a)(1) (duty to avoid violating the Rules through the acts of another).

A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service.

A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c).
as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

Required Contact Information

[11] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.
Rule 7.3: Solicitation of Clients

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; or

(3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the communication; or
(4) the lawyer knows or reasonably should know that the physical, emotional or mental state of
the person is such that the person could not exercise reasonable judgment in employing a
lawyer.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or
other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or
group legal service plan operated by an organization not owned or directed by the lawyer that
uses live person-to-person contact to enroll members or sell subscriptions for the plan from
persons who are not known to need legal services in a particular matter covered by the plan.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-
person contact when a significant motive for the lawyer's doing so is the lawyer's or the law
firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the
general public, such as through a billboard, an Internet banner advertisement, a website or a
television commercial, or if it is in response to a request for information or is automatically
generated in response to electronic searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other
real-time visual or auditory person-to-person communications where the person is subject to a
direct personal encounter without time for reflection. Such person-to-person contact does not
include chat rooms, text messages or other written communications that recipients may easily
disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a
person known to be in need of legal services. This form of contact subjects a person to the
private importuning of the trained advocate in a direct interpersonal encounter. The person,
who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person’s judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.

Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political,
social, civic, fraternal, employee or trade organizations whose purposes include providing or
recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1,
that involves coercion, duress, fraud, overreaching, harassment, intimidation or undue
influence within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has
made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule
7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially
vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those
whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or
groups that may be interested in establishing a group or prepaid legal plan for their members,
insureds, beneficiaries or other third parties for the purpose of informing such entities of the
availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm
is willing to offer. This form of communication is not directed to people who are seeking legal
services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary
capacity seeking a supplier of legal services for others who may, if they choose, become
prospective clients of the lawyer. Under these circumstances, the activity which the lawyer
undertakes in communicating with such representatives and the type of information
transmitted to the individual are functionally similar to and serve the same purpose as
advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to
potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses
personal contact to enroll members for its group or prepaid legal service plan, provided that the
personal contact is not undertaken by any lawyer who would be a provider of legal services
through the plan. The organization must not be owned by or directed (whether as manager or
otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e)
would not permit a lawyer to create an organization controlled directly or indirectly by the
lawyer and use the organization for the person-to-person solicitation of legal employment of
the lawyer through memberships in the plan or otherwise. The communication permitted by
these organizations must not be directed to a person known to need legal services in a
particular matter, but must be designed to inform potential plan members generally of another
means of affordable legal services. Lawyers who participate in a legal service plan must
reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).
Dear Paula,

I hope this email finds you well since we saw each other last at the ABA Bench and Bar Academy. I’m writing to you on behalf of my colleagues and fellow members of the Georgia State Bar Cannabis and Hemp Section. The Section has been reflecting on the Georgia Supreme Court’s opinion from June 2021, which addressed the ethics of advising and assisting cannabis industry clients that are licensed to manufacture and distribute cannabis products that fall under the federal definition of “marijuana.” Naturally, the Section is concerned about the constraints the opinion places on Georgia attorneys and the potential professional consequences of advising or assisting clients whose operations are legal under Georgia law but remain illegal under federal law.

After extensive discussion among our Section members, there is a desire to reapproach this issue based on several developments since the motion made by the State Bar to the Supreme Court. First, there has been a distinct shift in federal policy with the recent Executive action to expunge federal marijuana possession convictions. Second, Georgia granted six licenses for the manufacture and distribution of low-THC cannabis products, and those companies deserve competent Georgia attorneys to advise and assist them. Georgia-licensed attorneys are in the best position to advise and assist these licensees on Georgia law. Third, it has come to section members’ attention that pro hac vice attorneys are being relied on for such advice and assistance, which is not ideal. Such arrangements put Georgia attorneys in a vulnerable position as local counsel given the attendant responsibilities they have under the Uniform Superior Court Rules and other rules.

Our section would like to ask if you support and would assist with another request of the Georgia Supreme Court to modify the Georgia Rules of Professional Conduct to permit Georgia attorneys to advise and assist cannabis industry clients who wish to comply with Georgia law? We stand ready to assist with research, strategy, and drafting for another motion to the Supreme Court.

Looking forward,

Amy E. McDougal, JD, CCEP, CA
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Check out our March 2022 article in CEP Magazine on the compliance challenges posed by legal cannabis! https://bit.ly/3swGiQQ
RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

a. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

b. A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

c. A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

d. **Except as provided in paragraph (e),** a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

e. **A lawyer may counsel or assist a client regarding conduct expressly permitted by Georgia or other applicable law, even if such conduct would be criminal under other law, provided that the lawyer counsels the client about the legal consequences of the client’s proposed course of conduct.**

The maximum penalty for a violation of this rule is disbarment.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter,

Proposed draft of Rule 1.2
As approved by DRPC in September 2019
must also be made by the client. See Rule 1.4 (a) (1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4 (a) (2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a) (3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services,

Proposed draft of Rule 1.2
As approved by DRPC in September 2019
or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and the client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.


Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest

Proposed draft of Rule 1.2
As approved by DRPC in September 2019
opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16 (a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent voidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Georgia Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4 (a) (5).

Proposed draft of Rule 1.2
As approved by DRPC in September 2019
IN THE SUPREME COURT
STATE OF GEORGIA

IN RE: STATE BAR OF GEORGIA
Rules and Regulations for its
Organization and Government

MOTION TO AMEND 2021-3

MOTION TO AMEND THE RULES AND REGULATIONS OF THE
STATE BAR OF GEORGIA AND BRIEF IN SUPPORT

SUBMITTED this 7th day of May, 2021.

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IN THE SUPREME COURT
STATE OF GEORGIA

IN RE: STATE BAR OF GEORGIA
Rules and Regulations for its
Organization and Government

MOTION TO AMEND 2021-4

MOTION TO AMEND THE RULES AND REGULATIONS OF THE
STATE BAR OF GEORGIA AND BRIEF IN SUPPORT

Pursuant to Rule 5-101ff. of the Rules and Regulations for the Organization
and Government of the State Bar of Georgia (“Bar Rules”), the State Bar of
Georgia moves this Court to amend Rule 1.2 of the Georgia Rules of Professional
Conduct by deleting the struck through language and inserting the underlined
language in subparts (d) and (e), as follows:

(d) Except as provided in paragraph (e), a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Georgia or other applicable law, even if such conduct would be criminal under other law, provided that the lawyer counsels the client about the legal consequences of the client’s proposed course of conduct.

Redline and clean copies of the entire rule along with the comments are attached as Exhibits A and B. Note that in Motion 2020-4, currently pending with this Court, the Bar moved adoption of revisions to Comment 9 of Rule 1.2. Those revisions are not related to the proposed change to Rule 1.2 (e) and they are indicated by a double underline in the redline version of the rule. In the clean version (Exhibit B) the proposed changes to Comment 9 appear as though they were already approved.

**Procedural History**

The State Bar of Georgia Board of Governors approved this proposed amendment along with several others at its Spring 2020 meeting. Pursuant to Bar Rule 5-101 it was published on June 30, 2020, with a notice saying that it would be filed in the Supreme Court no earlier than 30 days from the publication date. The publication period allows any Bar member who has concerns about a proposed
amendment to file written objections to the proposal. No one filed objections to the proposed amendment.

Although the publication notice designated the Spring 2020 batch of changes as Motion 2020-3, the other changes were actually filed as Motion 2020-4 because a pandemic-related rule change became 2020-3\(^1\). Motion 2020-4 was filed November 3, 2020, but the Office of the General Counsel made the decision not to file this proposal with the other Spring 2020 amendments in order to provide the Court with a more detailed brief about the issues presented and the need for the amendment.

**Background**

The impetus for the proposed amendment is the ethical dilemma presented by the conflict between federal law, which classifies marijuana as a Schedule 1 drug with associated criminal penalties\(^2\), and Georgia’s Hope Act\(^3\), which creates a regulatory framework for the growth, manufacture and sale of low-THC oil in Georgia\(^4\).

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\(^3\) O.C.G.A. §16-12-200ff.

\(^4\) THC is the psychotropic ingredient in marijuana. OCGA §16-12-190 defines “low THC oil” as “an oil that contains an amount of cannabidiol and not more than 5 percent by weight of tetrahydrocannabinol, tetrahydrocannabinolic acid, or a combination of tetrahydrocannabinol and tetrahydrocannabinolic acid which does not contain plant material exhibiting the external morphological features of the plant of the genus Cannabis.” For
Since Bar Rule 1.2 prohibits a lawyer from counseling a client regarding conduct that is criminal, a Georgia lawyer violates the Georgia Rules of Professional Conduct when she provides assistance to a client regarding the Hope Act—even though the Act was passed by the Georgia legislature and signed into law by the Governor.

The proposed amendment to Bar Rule 1.2 will allow lawyers to provide necessary services and guidance to clients as they navigate the complicated regulatory system that the new law creates, without fear of disciplinary penalties. But the proposed amendment does not just create an exception to the rules to allow lawyer involvement in Georgia’s fledgling cannabis industry. If adopted this amendment would give lawyers the ability to serve clients in other situations where the law of one jurisdiction defines certain conduct as criminal, but the law of another does not.5

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more information about low-THC, marijuana and cannabis, see the Department of Public Health website at https://dph.georgia.gov/low-thc-oil-registry-faq/low-thc-oil-faq-general-public.

5See, e.g., Ethical Issues in Representing Clients in the Cannabis Business: “One toke over the line?” by Dennis A. Rendleman, July 2, 2019. The author provides the following examples as “areas of the law in which state law and federal law are either in direct conflict, or, at least, inconsistent”:

…treatment of drones under federal aviation law versus privacy law at the state and local level;
issues of voting rights versus voting suppression. There also are significant disputes as to the authority of state law versus municipal and home rule authority. For example, state legislatures restricting home rule authority of municipalities in areas of immigration/sanctuary/welcoming cities, minimum wage, and civil rights protections for various minorities. More recently, twenty-six Illinois counties have passed “gun sanctuary” resolutions purporting to direct county employees not to enforce various proposed state laws that the municipalities believe unconstitutionally restrict the Second Amendment. (footnotes omitted).

https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/1/ethical-issues-representing-clients-the-cannabis-business-one-toke-over-line/
A brief discussion of the Hope Act illustrates the need for the proposed amendment to Rule 1.2:

a) The Hope Act

On April 17, 2019, Governor Brian Kemp signed Georgia’s Hope Act into law. The Act legalizes production, distribution, and sale of low-THC CBD oil in Georgia under limited and specified circumstances. A new state commission, the Georgia Access to Medical Cannabis Commission, will license and regulate a limited number of private companies and state universities that will grow cannabis, then manufacture medical cannabis oil to be sold to patients on a state registry. This statement from the 2021 Annual Report of the Commission describes its purpose:

The Commission is charged (O.C.G.A § 16-12-203) with regulatory oversight of medical cannabis growth, harvesting, refinement, production, tracking, quality assurance, distribution,

The pandemic has spawned other possibilities, such as municipal mask mandates that carry criminal penalties but which could conflict with state law, and vaccine requirements that could run afoul of other law.

6 O.C.G.A. §16-12-200ff.

7 From the website of the Georgia Access to Medical Cannabis Commission:

Georgia’s law is much more limited than some other states. For example, it does not legalize the growing, sale, or possession of marijuana in plant or leaf form. It does not authorize the production, sale, or ingestion of food products infused with low THC oil, or the inhalation of low THC oil through smoking, electronic vaping, or vapor. It does not authorize physicians to prescribe marijuana for medical use. It is intended solely to protect persons with an active Low-THC Oil Registry Card from criminal prosecution for possessing less than 20 ounces of low THC oil for medicinal purposes.

https://www.gmcc.ga.gov/faqs,
transportation, and dispensing. The Commission regulates companies applying for and licensed to operate within the medical cannabis industry to grow approximately 3 acres of medical cannabis in indoor secure facilities only for the purpose of producing low-THC oil, as well as a statewide network of dispensaries for registered patients to obtain access through lawful sale and purchase of low-THC oil.

At the time of this writing the Commission’s work is well underway. It received state funding in 2019 and in May 2020 the Commissioners selected an Executive Director. The Commission has received applications from 70 entities that wish to be licensed to produce low-THC CBD oil. The governing statute requires Commission involvement “from seed to sale,” so the group is in the process of developing regulations and tracking systems for all aspects of the new industry.

This is a highly regulated industry that touches on dozens of areas of the law. It is certainly in the public interest for lawyers to be involved as the State

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10 See OCGA §16-12-203 for the powers, duties and responsibilities of the Commission.
creates a framework for implementing the statute. Aside from the benefit to Georgia businesses that hope to engage in the cannabis business, lawyers can ensure that the industry is regulated as the Legislature intended; they can also ensure that the statute is not abused by those who would misuse it for criminal enterprise.

b) **Other Jurisdictions**

As of December 31, 2020, thirty-six states and four U.S. territories have legalized the use of marijuana for medical and/or recreational purposes. An additional eleven states have, like Georgia, approved the use of low-THC oil for medical purposes. In twenty U.S. jurisdictions the lawyer regulatory authority has amended Rule 1.2 or added a comment to the Rule to allow lawyers to ethically counsel or assist clients with legal matters related to the cannabis industry. At least six jurisdictions have left Rule 1.2 as-is, but issued advisory opinions authorizing a specific exception to the Rule. Three jurisdictions have

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12 Id.

13 American Bar Association Center for Professional Responsibility, [https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.pdf). Additional information came from the Ethics Overview page of the National Cannabis Bar Association, [https://www.canbar.org/ethics-overview](https://www.canbar.org/ethics-overview), and the National Organization of Bar Counsel (nobc.org; material only available to members).

14 Id.
not amended their rules or issued advisory opinions, but created policy and publicly stated that they will not prosecute lawyers solely for providing advice to cannabis-related clients\textsuperscript{15}. In Oklahoma, South Dakota and Mississippi, proposals to amend Rule 1.2 have failed despite the fact that each state has a (recently-enacted) statute legalizing medical marijuana\textsuperscript{16}.

Some of the discrepancy in how jurisdictions have handled this issue can be explained by the fact that many based their guidance on the Cole Memorandum,\textsuperscript{17} a 2013 statement from the Department of Justice that suggested that federal prosecutors should not devote scarce resources to prosecuting cannabis activity that was legal under state law. Attorney General Jeff Sessions rescinded the Cole Memorandum in 2018, and jurisdictions that had not already revised Rule 1.2 may have become less inclined to do so.

\textsuperscript{15} Id. (Florida, Massachusetts and Louisiana).

\textsuperscript{16} Id.

\textsuperscript{17} \url{https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf}. For example, Maryland added the following language to Comment 12 of Rule 1.2:

\begin{quote}
Notwithstanding Maryland law, the Federal Controlled Substances Act, 21 U.S.C. §§ 801–904, continues to criminalize the production, use, and distribution of marijuana, even in the context of medical use. As of 2014, the federal government has taken the position, however, that it generally does not wish to interfere with retail sales of medical marijuana permitted under State law.

In this narrow context, an attorney may counsel a client about compliance with the State's medical marijuana law without violating Rule 19-301.2 (d) and provide legal services in connection with business activities permitted by the State statute, provided that the attorney also advises the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

See also NY State Bar Association Ethics Opinions 1024 (2014) and 1177 (2019), citing the Cole memorandum when authorizing lawyers to assist in conduct designed to comply with state law notwithstanding federal law prohibiting the conduct. The 2019 opinion reaffirms that conclusion notwithstanding recission of the Cole memorandum.
There are ongoing efforts at the federal level to have cannabis de-classified or re-classified so that it is no longer a Schedule 1 drug. Thus far those efforts have not resulted in a solution to this issue.\(^{18}\)

The Office of the General Counsel has not found any public disciplinary cases based solely on a violation of Rule 1.2(e) in any jurisdiction where state law authorizes the underlying conduct.

**Discussion**

The public policy concern that underlies Rule 1.2(d) has its origins in the earliest version of the Rules of Professional Conduct. Canon 15 of the 1908 Canons of Professional Ethics provided that “it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.”

The 1969 Model Code of Professional Responsibility included DR 7-102(A)(7), which was substantially the same as the current Model Rule.

Clearly lawyers should not be allowed to help their clients become better criminals. But Rule 1.2 was not intended to address lawyer conduct in the context of a conflict such as the one presented by federal law and the provisions of the

\(^{18}\) Senate Majority Leader Chuck Schumer has spoken publicly about his plans to support legislation to end the criminalization of marijuana. [https://www.politico.com/news/2021/04/03/schumer-senate-marijuana-legalization-478963](https://www.politico.com/news/2021/04/03/schumer-senate-marijuana-legalization-478963).
Hope Act. The proposed amendment will only apply where one jurisdiction

*expressly permits* the conduct--it is more a conflict of laws issue than a justification for aiding a client in criminal conduct. As a 2015 advisory opinion from the Los Angeles County Bar put it:

> A member may advise and assist a client regarding compliance with California’s marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California’s marijuana laws, a member must limit the scope of the member’s representation of the client to exclude any advice or assistance to violate federal law with impunity.\(^{19}\)

Although Rule 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is criminal, it does allow a lawyer to “discuss the legal consequences of any proposed course of conduct with a client” and to

“counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” These exceptions recognize the public benefit of allowing lawyers to give advice regarding any course of action that a client hopes to undertake.

The proposed amendment to Rule 1.2 will allow Georgia clients to get the legal help that they need when navigating the new landscape created by the Hope Act. The involvement of lawyers will help ensure that the new regulatory system works to effectively detect criminal conduct. Requiring that the Georgia lawyer “counsels the client about the legal consequences of the proposed course of conduct” will ensure that clients get information about the conflict of laws that currently surrounds this issue, and will allow the client to make an informed decision about how to act.

**Conclusion**

The Office of the General Counsel does not have the authority to declare that the State Disciplinary Board or this Court will not prosecute Georgia lawyers for advice they give regarding the Hope Act. Through the Ethics Helpline the Office of the General Counsel has heard from dozens of lawyers who are concerned about their own or their law firm’s involvement with representation of clients in cannabis-related matters. Lawyers in the Office of the General Counsel point out the requirements of Rule 1.2, but we are not able to give callers any reassurance
that their conduct will not become the subject of a disciplinary investigation. It is in that context that we ask the Court to approve the proposed amendment to Rule 1.2.

SO MOVED, this 7th day of May, 2021.

Counsel for the State Bar of Georgia

[Signature]
Paula J. Frederick
Georgia Bar No. 275999
General Counsel

[Signature]
William D. NeSmith, III
Georgia Bar No. 535792
Deputy General Counsel

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EXHIBIT A

RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER (REDLINE VERSION)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) Except as provided in paragraph (e), a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of
any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d)(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Georgia or other applicable law, even if such conduct would be criminal under other law, provided that the lawyer counsels the client about the legal consequences of the client’s proposed course of conduct.

The maximum penalty for a violation of this rule is disbarment.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4 (a) (1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4 (a) (2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special
knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a) (3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.
Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and the client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited
to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.


Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. A lawyer’s knowledge may be inferred from the circumstances. See Rule 1.0 (m). Knowledge of the fact in question may be shown by actual knowledge or deliberate ignorance. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16 (a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.
[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Georgia Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4 (a) (5).
EXHIBIT B

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer (clean version)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) Except as provided in paragraph (e), a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal
consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Georgia or other applicable law, even if such conduct would be criminal under other law, provided that the lawyer counsels the client about the legal consequences of the client’s proposed course of conduct.

The maximum penalty for a violation of this rule is disbarment.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4 (a) (1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4 (a) (2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special
knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a) (3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.
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[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and the client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal
problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.


Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. A lawyer’s knowledge may be inferred from the circumstances. See Rule 1.0 (m). Knowledge of the fact in question may be shown by actual knowledge or deliberate ignorance. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between
presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16 (a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action
involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Georgia Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4 (a) (5).
The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

IN RE: MOTION TO AMEND 2021-3.

The State Bar of Georgia has moved to amend Rule 1.2 of the Georgia Rules of Professional Conduct to permit Georgia lawyers to counsel clients to engage in conduct that the lawyer knows is criminal or fraudulent, and to assist clients in such conduct, so long as the conduct is not a crime under Georgia law. The motion explains the proposed amendment arises from the desire of some Georgia lawyers to counsel clients to engage in conduct regarding the growth, manufacture, and sale of low-THC oil purportedly permitted under Georgia law although still constituting a crime under federal law. The motion also acknowledges that the proposed amendment is not limited to conduct related to low-THC oil; indeed, the proposed amendment is quite broad and might well apply to a wide range of conduct constituting a crime under federal law that simply has no corollary state criminal sanctions.

The Court understands the desire of some Georgia lawyers to assist Georgia’s fledgling cannabis industry. But this Court has long prohibited Georgia lawyers from counseling and assisting clients in
the commission of criminal acts. The passage of a Georgia statute purporting to permit and regulate conduct that constitutes federal crimes does not change that long-standing principle. The motion is DENIED.
FOR THE EXCLUSIVE USE OF PAULAF@GABAR.ORG

From the Atlanta Business Chronicle:

Marijuana in Georgia remains illegal, but medicinal production is moving forward

Jan 5, 2023, 2:58pm EST

The state commission that oversees medical marijuana has proposed rules regarding the production and distribution of low-THC oil, a major step forward to allow patients to legally buy the product.

Georgia passed Haleigh's Hope Act in 2015, which allows patients to possess up to 20 fluid ounces of low-THC oil, if approved by their doctor and issued a registration card by the state Department of Public Health. Georgia still does not allow the growing, sale or possession of marijuana in plant form, for medical uses or otherwise. THC oil cannot be produced or sold in food or electronic vapes.

Although the state has allowed low-THC oil for more than six years, there is still no way to legally purchase or produce that oil in the state.
That's what the Georgia Access to Medical Cannabis Commission was tasked with changing in 2019. The commission aimed to regulate the production and distribution of low-THC oil and had plans to choose six companies to grow and distribute it. But those regulations were stalled because of protests and lawsuits from the companies that lost the bids.

Almost four years later, it seems the commission is on the home stretch to allowing legal medical marijuana sales and production.

In September 2022, it awarded two companies, Botanical Sciences LLC and Trulieve GA Inc., with Class 1 production licenses. The commission has posted its proposed rules for production and distribution on its website and plan to host a public hearing at 4 p.m. on Jan. 18.

Erin Schilling
Digital Editor
Atlanta Business Chronicle
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

a. A lawyer shall neither enter into a business transaction with a client if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, nor shall the lawyer 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 advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

b. A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

c. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, 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; or

2. a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client; or

3. a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization pro bono or a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses. The lawyer:

   i. may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

   ii. may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

   iii. may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee shifting statute.
f. A lawyer shall not accept compensation for representing a client from one other than the client unless:
   1. the client gives informed consent;
   2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
   3. information relating to representation of a client is protected as required by Rule 1.6.

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyers disclosure shall include 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 by counsel 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. To the extent that agreements to arbitrate disputes over a lawyer’s liability for malpractice are enforceable, a lawyer may enter into such an agreement with a client or a prospective client if the client or prospective client gives informed consent in a writing signed by the client or prospective client. The agreement to arbitrate and the attorney’s disclosures regarding
arbitration must be set out in a separate paragraph, written in a font size at least as large as the rest of the contract, and separately initialed by the client and the lawyer.

i. A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.

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 the lawyer may:

1. acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and

2. contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

The maximum penalty for a violation of Rule 1.8 (b) is disbarment. The maximum penalty for a violation of Rule 1.8 (a) and 1.8 (c)-(j) is a public reprimand.

Comment

Transactions Between Client and Lawyer

[1A] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. The client should be fully informed of the true nature of the lawyer's interest or lack of interest in all aspects of the transaction. In such transactions a review by

Proposed draft Rule 1.8
As approved by DRPC in June 2022
independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not
exploit information relating to the representation to the client's disadvantage. For example, a
lawyer who has learned that the client is investing in specific real estate may not, without the
client's informed consent, seek to acquire nearby property where doing so would adversely affect
the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial
transactions between the lawyer and the client for products or services that the client generally
markets to others, for example, banking or brokerage services, medical services, products
manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer
has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary
and impracticable.

Use of Information to the Disadvantage of the Client

[1B] It is a general rule that an attorney will not be permitted to make use of knowledge, or
information, acquired by the attorney through the professional relationship with the client, or in
the conduct of the client's business, to the disadvantage of the client. Paragraph (b) follows this
general rule and provides that the client may waive this prohibition. However, if the waiver is
conditional, the duty is on the attorney to comply with the condition.

Gifts from Clients

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

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

Financial Assistance to Clients

[4] Paragraph (e) eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer. It further limits permitted assistance to court costs and expenses directly related to litigation. Accordingly, permitted expenses would include expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses other than those listed above.

[5] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the

Proposed draft Rule 1.8
As approved by DRPC in June 2022
courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[6] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[7] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[8] Financial assistance, including modest gifts pursuant to paragraph (e) (3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e) (3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or

Proposed draft Rule 1.8
As approved by DRPC in June 2022
cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Payment for a Lawyer's Services from One Other Than The Client

§ 9 Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Settlement of Aggregated Claims

Paragraph (g) requires informed consent. This requirement is not met by a blanket consent prior to settlement that the majority decision will rule.

Agreements to Limit Liability

A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.

A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a

Proposed draft Rule 1.8
As approved by DRPC in June 2022
client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.

Family Relationships Between Lawyers

Arbitration

[12A] Paragraph (h) requires informed consent to an agreement to arbitrate malpractice claims. See Rule 1.0(l). In obtaining such informed consent, the lawyer should reveal to the client or prospective client the following: (1) in an arbitration the client or prospective client waives the right to a jury because the dispute will be resolved by an individual arbitrator or a panel of arbitrators; (2) generally, there is no right to an appeal from an arbitration decision; (3) arbitration may not permit the broad discovery that would be available in civil litigation; (4) how the costs of arbitration compare to the costs of litigation in a public court, including the requirement that the arbitrator or arbitrators be compensated; and (5) who will bear the costs of arbitration. The lawyer should also inform the client or prospective client that an agreement to arbitrate a dispute over fees and expenses is not a waiver of the right to make a disciplinary complaint regarding the lawyer.

[913] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

Acquisition of Interest in Litigation

[1014] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in the common law prohibition of champertory and maintenance, is subject to specific exceptions developed in

Proposed draft Rule 1.8
As approved by DRPC in June 2022
decisional law and continued in these rules, such as the exception for reasonable contingent fees
set forth in Rule 1.5 and the exception for lawyer's fees and for certain advances of costs of
litigation set forth in paragraph (e).
Rule 4-214. Report of the Special Master

a. Unless the Coordinating Special Master extends the deadline for good cause, the Special Master shall prepare a report within 45 days from receipt of the transcript of the evidentiary hearing. Failure of the Special Master to issue the report within 45 days shall not be grounds for dismissal. The report shall contain the following:

1. findings of fact on the issues raised by the formal complaint;
2. conclusions of law on the issues raised by the pleadings of the parties;

and

3. a recommendation of discipline.

b. The Special Master shall file his or her original report and recommendation with the Clerk of the State Disciplinary Boards and shall serve a copy on the respondent and counsel for the State Bar of Georgia pursuant to Rule 4-203.1.

c. The Clerk of the State Disciplinary Boards shall file the original record in the case directly with the Supreme Court of Georgia, unless any party files with the Clerk a request for review by the State Disciplinary Review Board and exceptions to the report within 30 days of the date the report is filed as provided in Rule 4-216 et seq. The Clerk shall inform the State Disciplinary Review Board when a request for review and exceptions are filed.
d. In the event any party requests review, the responding party shall file a response to the exceptions within 30 days of the filing. Within 10 days after the receipt of a response or the expiration of the time for responding, the Clerk shall transmit the record in the case to the State Disciplinary Review Board.
Rule 4-206. Confidential Discipline; Contents

(a) Formal Letters of Admonition and Confidential Reprimands shall contain a statement of the specific conduct of the respondent that violates Part IV, Chapter 1 of these Rules, shall state the name of the complainant, if any, and shall state the reasons for issuance of such confidential discipline.

(b) A Formal Letter of Admonition shall also contain the following information:
   (1) the right of the respondent to reject the Formal Letter of Admonition under Rule 4-207;
   (2) the procedure for rejecting the Formal Letter of Admonition under Rule 4-207; and
   (3) the effect of an accepted Formal Letter of Admonition in the event of a third or subsequent imposition of discipline.

(c) A Confidential Reprimand shall also contain information concerning the effect of the acceptance of such reprimand in the event of a third or subsequent imposition of discipline.

Rule 4-207. Letters of Formal Admonition and Confidential Reprimands; Notification and Right of Rejection

In any case where the State Disciplinary Board votes to impose discipline in the form of a Formal Letter of Admonition or a Confidential Reprimand, such vote shall constitute the State Disciplinary Board’s finding of Probable Cause. The respondent shall have the right to reject, in writing, the imposition of such discipline.

(a) Notification to respondent shall be as follows:
   (1) in the case of a Formal Letter of Admonition, the letter of admonition;
   (2) in the case of a Confidential Reprimand, the letter notifying the respondent to appear for the administration of the reprimand; sent to the respondent at his or her address as reflected in the membership records of the State Bar of Georgia, via certified mail, return receipt requested.

(b) Rejection by respondent shall be as follows:
   (1) in writing, within 30 days of notification; and
   (2) sent to the State Disciplinary Board via any of the methods authorized under Rule 4-203.1 (c) and directed to the Clerk of the State Disciplinary Boards at the current headquarters address of the State Bar of Georgia.

(c) If the respondent rejects the imposition of a Formal Letter of Admonition or Confidential Reprimand, the Office of the General Counsel may file a formal complaint with the Clerk of the Supreme Court of Georgia unless the State Disciplinary Board reconsiders its decision.

(d) Confidential Reprimands shall be administered before the State Disciplinary Board by the Chair or his designee.

Rule 4-208. Confidential Discipline; Effect in Event of Subsequent Discipline

In the event of a subsequent disciplinary proceeding, the confidentiality of the imposition of confidential discipline shall be waived and the Office of the General Counsel may use such information as aggravation of discipline.

Rule 4-208.1. Notice of Discipline

(a) In any case where the State Disciplinary Board finds Probable Cause, the State Disciplinary Board may issue a Notice of Discipline requesting that the Supreme Court of Georgia impose any level of public discipline authorized by these Rules.

(b) Unless the Notice of Discipline is rejected by the respondent as provided in Rule 4-208.3, (1) the respondent shall be in default; (2) the respondent shall have no right to any evidentiary hearing; and (3) the respondent shall be subject to such discipline and further proceedings as may be determined by the Supreme Court of Georgia. The Supreme Court of Georgia is not bound by the State Disciplinary Board’s recommendation and may impose any level of discipline it deems appropriate.

Rule 4-208.2. Notice of Discipline; Contents; Service

(a) The Notice of Discipline shall include:
   (1) the Rules that the State Disciplinary Board found the respondent violated;
   (2) the allegations of facts that, if unrebutted, support the finding that such Rules have been violated;
   (3) the level of public discipline recommended to be imposed;
   (4) the reasons why such level of discipline is recommended, including matters considered in mitigation and matters considered in aggravation, and such other considerations deemed by the State Disciplinary Board to be relevant to such recommendation;
   (5) the entire provisions of Rule 4-208.3 relating to rejection of a Notice of Discipline. This may be satisfied by attaching a copy of the Rule to the Notice of Discipline and referencing the same in the notice;
   (6) a copy of the Memorandum of Grievance or written description pursuant to Bar Rule 4-202 (a); and
   (7) a statement of any prior discipline imposed upon the respondent, including confidential discipline under Rules 4-205 to 4-208.

(b) The Notice of Discipline shall be filed with the Clerk of the Supreme Court of Georgia, and a copy of the Notice of Discipline shall be served upon the respondent pursuant to Rule 4-203.1.

(c) The Office of the General Counsel shall file documents evidencing service with the Clerk of the Supreme Court of Georgia.

(d) The level of disciplinary sanction in any Notice of Discipline rejected by the respondent or the Office of the General Counsel shall not be binding on the Special Master, the State Disciplinary Board or the Supreme Court of Georgia in subsequent proceedings in the same matter.
Rule 4-208.3. Rejection of Notice of Discipline

(a) In order to reject the Notice of Discipline, the respondent or the Office of the General Counsel must file a Notice of Rejection of the Notice of Discipline with the Clerk of the Supreme Court of Georgia within 30 days following service of the Notice of Discipline.
(b) Any Notice of Rejection by the respondent shall be served upon the opposing party. In accordance with Rule 4-204.3 if the respondent has not previously filed a sworn response to the Notice of Investigation the rejection must include a sworn response in order to be considered valid. The respondent must also file a copy of such written response with the Clerk of the Supreme Court of Georgia at the time of filing the Notice of Rejection.
(c) The timely filing of a Notice of Rejection shall constitute an election for the matter to proceed pursuant to Rule 4-208.4 et seq.

Rule 4-208.4. Formal Complaint Following Notice of Rejection of Discipline

(a) The Office of the General Counsel shall file with the Clerk of the Supreme Court of Georgia a formal complaint and a Petition for Appointment of Special Master within 30 days following the filing of a Notice of Rejection. The Notice of Discipline shall operate as the notice of finding of Probable Cause by the State Disciplinary Board.
(b) The Office of the General Counsel may obtain extensions of time for the filing of the formal complaint from the Chair of the State Disciplinary Board or his designee.
(c) After the rejection of a Notice of Discipline and prior to the time of the filing of the formal complaint, the State Disciplinary Board may reconsider the grievance and take appropriate action.

Rule 4-209. Docketing by Supreme Court; Appointment of Special Master; Challenges to Special Master

(a) Upon receipt of a notice of finding of Probable Cause, a petition for appointment of a Special Master and a formal complaint, the Clerk of the Supreme Court of Georgia shall file the matter in the records of the Court, give the matter a Supreme Court of Georgia docket number, and notify the Coordinating Special Master that appointment of a Special Master is appropriate. In those proceedings where a Notice of Discipline has been filed, the notice of finding of Probable Cause need not be filed.
(b) Within a reasonable time after receipt of a petition for appointment of a Special Master or notification that a Special Master previously appointed has been disqualified, withdrawn, or is otherwise unable to serve, the Coordinating Special Master shall appoint a Special Master to conduct formal disciplinary proceedings in such complaint. The Coordinating Special Master shall select a Special Master from the list approved by the Supreme Court of Georgia.
(c) The Clerk of the Supreme Court shall serve the signed Order Appointing Special Master on the Office of the General Counsel of the State Bar of Georgia. Upon notification of the appointment of a Special Master, the State Bar of Georgia shall immediately serve the respondent with the order of appointment of a Special Master and with its formal complaint as hereinafter provided.
(d) Within 10 days of service of the notice of appointment of a Special Master, the respondent and the State Bar of Georgia may file any and all objections or challenges either of them may have to the competency, qualifications or impartiality of the Special Master with the Coordinating Special Master. The party filing such objections or challenges must also serve a copy of the objections or challenges upon the opposing party and the Special Master, who may respond to such objections or challenges. Within a reasonable time, the Coordinating Special Master shall consider the challenges and the responses of the respondent, the State Bar of Georgia, and the Special Master, if any, determine whether the Special Master is disqualified and notify the parties, the Clerk of the Supreme Court of Georgia and the Special Master of the decision. Exceptions to the Coordinating Special Master’s denial of disqualification are subject to review by the Supreme Court of Georgia at the time the record in the matter is filed with the Court pursuant to Rule 4-216 (e). If a Special Master is disqualified, appointment of a successor Special Master shall proceed as provided in this Rule.

Rule 4-209.1. Coordinating Special Master

(a) The Supreme Court of Georgia shall appoint a lawyer to serve as the Coordinating Special Master for disciplinary cases.
(b) The Supreme Court of Georgia annually shall appoint up to 20 lawyers to serve as Special Masters in disciplinary cases. The Court may reappoint lawyers appointed in prior years, although it generally is preferable for a lawyer to serve as a Special Master for no more than five consecutive years. When a case is assigned to a lawyer appointed as Special Master, such lawyer shall continue to serve as Special Master in that case until final disposition, unless the Coordinating Special Master or the Court directs otherwise, irrespective of whether such lawyer is reappointed to serve as Special Master for another year.
(c) The Coordinating Special Master and Special Masters shall serve at the pleasure of the Supreme Court of Georgia.
(d) No member of the State Disciplinary Board, State Disciplinary Review Board, Special Master Compensation Commission, or Executive Committee of the State Bar of Georgia shall be appointed to serve as Coordinating Special Master or as a Special Master.
(e) A list of the lawyers appointed by the Supreme Court of Georgia as Special Masters shall be published on the website of the State Bar of Georgia and annually in a regular publication of the State Bar of Georgia.
(f) Training for Special Masters is expected, and the Coordinating Special Master shall be responsible for the planning and conduct of training sessions, which the State Bar of Georgia shall make available without cost to Special Masters. At a minimum, a lawyer appointed for the first time as a Special Master should attend a training session within six months of his appointment. The failure of a Special Master to complete the minimum required training session shall not be a basis for a motion to disqualify a Special Master.
(g) A Special Master (including the Coordinating Special Master) shall be disqualified to serve in a disciplinary case when circumstances exist, which, if the Special Master were a judge, would require the recusal of the Special Master under the Code of Judicial Conduct. In the event that the Coordinating Special Master is disqualified in any case, the Supreme Court of Georgia shall assign the case to a Special Master, and the Court shall designate another Special Master to act as Coordinating Special Master for purposes of that case only.

Rule 4-209.2. Special Masters
At any time after the State Disciplinary Board finds Probable Cause, the Office of the General Counsel may dismiss the proceeding with the consent of the Chair or Vice-Chair of the State Disciplinary Board or with the consent of any three members of the State Disciplinary Board.

**Rule 4-212. Answer of Respondent; Discovery**

(a) The respondent shall file and serve his answer to the formal complaint of the State Bar of Georgia pursuant to Rule 4-221 (b) within 30 days after service of the formal complaint. If the respondent fails to answer or to obtain an extension of time for his answer, the facts alleged and violations charged in the formal complaint shall be deemed admitted. In the event the respondent’s answer fails to address specifically the issues raised in the formal complaint, the facts alleged and violations charged in the formal complaint and not specifically addressed in the answer shall be deemed admitted. A respondent may obtain an extension of time not to exceed 15 days to file the answer from the Special Master. Extensions of time for the filing of an answer shall not be routinely granted.

(b) The pendency of objections or challenges to one or more Special Masters shall provide no justification for a respondent’s failure to file his answer or for failure of the State Bar of Georgia or the respondent to engage in discovery.

(c) Both parties to the disciplinary proceeding may engage in discovery under the rules of practice and procedure then applicable to civil cases in the State of Georgia.

(d) In lieu of filing an answer to the formal complaint of the State Bar of Georgia, the respondent may submit to the Special Master a Petition for Voluntary Discipline as provided in Rule 4-227 (c). Each such petition shall contain admissions of fact and admissions of conduct in violation of Part IV, Chapter I of these Rules sufficient to authorize the imposition of discipline. As provided in Rule 4-227 (c) (1), the Special Master shall allow Bar counsel 30 days within which to respond.

**Rule 4-213. Evidentiary Hearing**

(a) Within 90 days after the filing of respondent’s answer to the formal complaint or the expiration of the time for filing of the answer, whichever is later, the Special Master shall proceed to hear the case. The evidentiary hearing shall be reported and transcribed at the expense of the State Bar of Georgia. When the hearing is complete, the Special Master shall proceed to make findings of fact, conclusions of law and a recommendation of discipline and file a report with the Clerk of the State Disciplinary Boards as hereinafter provided. Alleged errors in the hearing may be reviewed by the Supreme Court of Georgia when the findings and recommendations of discipline are filed with the Court. There shall be no interlocutory appeal of alleged errors in the hearing.

(b) Upon respondent’s showing of necessity and financial inability to pay for a copy of the transcript, the Special Master shall order the State Bar of Georgia to purchase a copy of the transcript for respondent.

**Rule 4-214. Report of the Special Master**

(a) Unless the Coordinating Special Master extends the deadline for good cause, the Special Master shall prepare a report within 45 days from receipt of the transcript of the evidentiary hearing. Failure of the Special Master to issue the report within 45 days shall not be grounds for dismissal. The report shall contain the following:

1. findings of fact on the issues raised by the formal complaint;
2. conclusions of law on the issues raised by the pleadings of the parties; and
3. a recommendation of discipline.

(b) The Special Master shall file his or her original report and recommendation with the Clerk of the State Disciplinary Boards and shall serve a copy on the respondent and counsel for the State Bar of Georgia pursuant to Rule 4-203.1.

(c) The Clerk of the State Disciplinary Boards shall file the original record in the case directly with the Supreme Court of Georgia, unless any party files with the Clerk a request for review by the State Disciplinary Review Board and exceptions to the report within 30 days of the date the report is filed as provided in Rule 4-216 et seq. The Clerk shall inform the State Disciplinary Review Board when a request for review and exceptions are filed.

(d) In the event any party requests review, the responding party shall file a response to the exceptions within 30 days of the filing. Within 10 days after the receipt of a response or the expiration of the time for responding, the Clerk shall transmit the record in the case to the State Disciplinary Review Board.

**Rule 4-215. Powers and Duties of the State Disciplinary Review Board**

In accordance with these Rules, the State Disciplinary Review Board shall have the following powers and duties:

(a) to review reports of Special Masters, and to recommend to the Supreme Court of Georgia the imposition of punishment and discipline or dismissal of the complaint;

(b) to adopt forms for notices and any other written instruments necessary or desirable under these Rules;

(c) to prescribe its own rules of conduct and procedure;

(d) to receive Notice of Reciprocal Discipline and to recommend to the Supreme Court of Georgia the imposition of punishment and discipline pursuant to Bar Rule 9.4 (b) (3); and

(e) to administer State Disciplinary Review Board reprimands.

**Rule 4-216. Proceedings Before the State Disciplinary Review Board**

(a) Upon receipt of the record and exceptions to the report of the Special Master pursuant to Rule 4-214, the State Disciplinary Review Board shall consider the record, review findings of fact and conclusions of law, and determine whether a recommendation of disciplinary action will be made to the Supreme Court of Georgia and the nature of such recommended discipline. The findings of fact made by a
Rule 4-209.3 Powers and Duties of the Coordinating Special Master

The Coordinating Special Master shall have the following powers and duties:

(a) to establish requirements for, conduct, and supervise Special Master training;
(b) to assign cases to Special Masters from the list provided in Rule 4-209 (b);
(c) to exercise all of the powers and duties provided in Rule 4-210 when acting as a Special Master under paragraph (h) below;
(d) to monitor and evaluate the performance of Special Masters and to submit a report to the Supreme Court of Georgia regarding such performance annually;
(e) to remove Special Masters for such cause as may be deemed proper by the Coordinating Special Master;
(f) to fill all vacancies occasioned by incapacity, disqualification, recusal, or removal;
(g) to administer Special Master compensation, as provided in Rule 4-209.2 (b);
(h) to hear pretrial motions when no Special Master is serving;
(i) to perform all other administrative duties necessary for an efficient and effective hearing system;
(j) to allow a late filing of the respondent’s answer where there has been no final selection of a Special Master within 30 days of service of the formal complaint upon the respondent;
(k) to receive and pass upon challenges and objections to the appointment of Special Masters; and
(l) to extend the time for a Special Master to file a report, in accordance with Rule 4-214 (a).

Rule 4-210. Powers and Duties of Special Masters

In accordance with these Rules a duly appointed Special Master shall have the following powers and duties:

(a) to exercise general supervision over assigned disciplinary proceedings, including emergency suspension cases as provided in Rule 4-108, and to perform all duties specifically enumerated in these Rules;
(b) to rule on all questions concerning the sufficiency of the formal complaint;
(c) to encourage negotiations between the State Bar of Georgia and the respondent, whether at a pretrial meeting set by the Special Master or at any other time;
(d) to receive and evaluate any Petition for Voluntary Discipline filed after the filing of a formal complaint;
(e) to grant continuances and to extend any time limit provided for herein as to any pending matter subject to Rule 4-214 (a);
(f) to apply to the Coordinating Special Master for leave to withdraw and for the appointment of a successor in the event that he becomes incapacitated or otherwise unable to perform his duties;
(g) to hear, determine and consolidate action on the complaints, where there are multiple complaints against a respondent growing out of different transactions, whether they involve one or more complainants, and to make recommendations on each complaint as constituting a separate offense;
(h) to sign subpoenas and to exercise the powers described in Rule 4-221 (c);
(i) to preside over evidentiary hearings and to decide questions of law and fact raised during such hearings;
(j) to make findings of fact and conclusions of law and a recommendation of discipline as hereinafter provided and to submit his findings for consideration by the Supreme Court of Georgia in accordance with Rule 4-214;
(k) to exercise general supervision over discovery by parties to disciplinary proceedings and to conduct such hearings and sign all appropriate pleadings and orders pertaining to such discovery as are provided for by the law of Georgia applicable to discovery in civil cases; and
(l) in disciplinary cases, to make a recommendation of discipline, and in emergency suspension cases a recommendation as to whether the respondent should be suspended pending further disciplinary proceedings.

Rule 4-211. Formal Complaint; Service

1. Within 30 days after a finding of Probable Cause, the Office of the General Counsel shall file a formal complaint that specifies with reasonable particularity the acts complained of and the grounds for disciplinary action. A copy of the formal complaint shall be served upon the respondent after appointment of a Special Master. In those cases where a Notice of Discipline has been filed and rejected, the filing of the formal complaint shall be governed by the time period set forth in Rule 4-208.4. The formal complaint shall be served pursuant to Rule 4-203.1.
2. Reserved.
3. At all stages of the proceeding, both the respondent and the State Bar of Georgia may be represented by counsel. Counsel representing the State Bar of Georgia shall be authorized to prepare and sign notices, pleadings, motions, complaints, and certificates for and in behalf of the State Bar of Georgia and the State Disciplinary Board.

Rule 4-211.1 Dismissal after Formal Complaint
In the Supreme Court of Georgia

Decided: July 6, 2022

S22Y0802. IN THE MATTER OF GLEN ROY FAGAN.

PER CURIAM.

This disciplinary matter is before the Court on the report and recommendation of Special Master Adam M. Hames, who recommends that respondent Glen Roy Fagan (State Bar No. 253944) be disbarred based on his violations of Rules 1.7, 1.8 (b), 1.15 (l), 8.4 (a) (4), and 9.3 of the Georgia Rules of Professional Conduct found in Bar Rule 4-102 (d). Because Fagan did not answer or otherwise respond to the formal complaint, which was properly served by publication, the Special Master granted the State Bar’s motion for default pursuant to Bar Rule 4-212 (a), and the facts as set out in the formal complaint were deemed admitted. See In the Matter of Wadsworth, 312 Ga. 159, 159 (861 SE2d 104) (2021). In addition, the Special Master determined, as an initial matter, that
while Fagan, who became a member of the State Bar in 2000, resigned his membership in the State Bar before the complaint giving rise to this matter was filed with the Office of General Counsel, he was still subject to these disciplinary proceedings. See Bar Rule 9.4 (a) (providing that “[a]ny lawyer admitted to practice law in this jurisdiction, including any formerly admitted lawyer with respect to acts committed prior to resignation . . . is subject to the disciplinary jurisdiction of the State Bar of Georgia”); In the Matter of Fry, 300 Ga. 862, 865 (800 SE2d 514) (2017) (concluding that allowing a resignation, in the absence of disbarment, “would leave [a lawyer’s] disciplinary record completely clean, and if he chose to apply for admission in other jurisdictions in future years, he would be able to truthfully report that he has no disciplinary record in Georgia”). See also Bar Rule 1-108 (e) (“Resignation shall not be a bar to institution of subsequent disciplinary proceedings for any conduct of the resigned person occurring prior to the resignation. If the penalty imposed on the resigned member is disbarment or suspension, the status of the member shall be changed from
'resigned member' to that of a person so disciplined.")

The facts as set forth in the Special Master's report are as follows. Fagan was employed as an associate general counsel by U.S. Xpress, Inc. ("USX") in Tennessee from August 2015 until February 2019, and at all relevant times, he was also registered as in-house counsel to practice law in Tennessee. As part of his employment with USX, Fagan oversaw employment-related lawsuits, administrative charges, and complaints and allegations of employee misconduct. On April 30, 2018, Fagan falsified in its entirety an Equal Employment Opportunity Commission ("EEOC") complaint allegedly filed by an individual named Karen Sawyer; on May 2, 2018, he incorporated the law firm of Kirk James and Associates, LLC ("Kirk James"); and on August 27, 2018, he communicated to his supervisor that he attended a mediation in the Sawyer matter and also created a confidential settlement agreement and general release in the matter. Fagan then signed the settlement agreement and general release on behalf of himself and Sawyer, whose signature he forged, and on August 28, 2018, he instructed
USX to issue payment for $27,000 to Kirk James for the Sawyer settlement and provided USX with a W-9 form for Kirk James. Fagan then deposited the $27,000 settlement check into the account of Kirk James and converted the money to his own use.

In addition, on January 29, 2019, Fagan signed a confidential settlement agreement and general release purporting to be initialed and signed by Virginia Ladd to settle her claim against USX for $14,000, and then forged Ladd’s initials and signature on the settlement agreement. On the same day, Fagan emailed an employee with USX to authorize the disbursement of funds to Kirk James, the purported firm representing Ladd; USX then issued a check in the amount of $14,000 payable to Kirk James; and Fagan deposited the check into Kirk James’s account and converted the money to his own use.

On February 1, 2019, Fagan announced that he was resigning from his position with USX to accept a position with another company in Atlanta, Georgia. On February 12, 2019, he signed and filed a position statement with the EEOC on the Ladd case, even
though the case was allegedly settled; on February 14, 2019, Fagan met with employees at USX regarding his cases and listed the Ladd case as pending with a note that he submitted the position statement to the EEOC; and on February 15, 2019, he stopped working for USX. On August 20, 2019, the EEOC contacted USX regarding settling the Ladd case, and upon review, USX became aware of Fagan's misconduct in that case, as well as in the Sawyer case. USX filed a complaint with the Tennessee Board of Responsibility in October 2019, and after USX filed its complaint, Fagan entered into a promissory note with USX, paying USX $45,243.29, which included full repayment of the $41,000 from the Ladd and Sawyer settlements, plus interest. Fagan resigned his membership with the Georgia Bar before it received USX's complaint in this matter, and thereafter, he failed to respond to disciplinary authorities' requests for information in this disciplinary proceeding.

The Special Master determined that Fagan admitted through his default to the State Bar's allegations that he violated Rule 1.7
(a), because his own interests materially and adversely affected his representation of USX; Rule 1.8 (b), by using information gained in his professional relationship with USX to the disadvantage of USX; and Rule 1.15 (I), when he retained and misappropriated settlement funds paid out by USX and failed to disburse to the proper parties the settlement funds paid out by USX. The Special Master stated that Fagan also admitted violating Rule 8.4 (a) (4) when he (1) falsified a complaint allegedly filed by an employee of USX; (2) entered into fraudulent settlements on behalf of USX; (3) falsified documents, including but not limited to settlement documents in matters he was overseeing; (4) misled USX regarding the status of matters he was overseeing; (5) forged signatures of the complaints on settlement agreements and settlement checks; (6) incorporated a law firm, Kirk James, and instructed USX to disburse settlement funds for falsified settlements to this law firm; (7) misled USX into disbursing settlement funds in the amount of $41,000 to Kirk James; and (8) retained settlement funds paid out by USX. The Special Master also stated that Fagan admitted violating Rule 9.3 when he
failed to respond to disciplinary authorities.

Finally, the Special Master stated that Fagan admitted violating Rule 4.1 (a), by falsely representing to USX that he had settled claims and falsely representing to USX the status of matters he was overseeing. However, the Special Master determined that USX was not a "third person," as contemplated in Rule 4.1 (a), but rather Fagan's client, and although Fagan made false statements to other third parties, the State Bar's allegation was specifically that he had falsely stated to USX (i.e., his client) that he settled claims and provided false status reports on his cases. Accordingly, based upon the plain language of Rule 4.1 (a) and the specific allegation in the State Bar's complaint, the Special Master concluded that this admission provided no basis for a sanction. The Special Master noted that the maximum sanction for a single violation of Rules 1.7, 1.8 (b), 1.15 (I) and 8.4 (a) (4) is disbarment, while the maximum sanction for a violation of Rule 9.3 is a public reprimand.

In considering the appropriate sanction, the Special Master considered the ABA Standards for Imposing Lawyer Sanctions, see
In the Matter of Morse, 266 Ga. 652, 653 (470 SE2d 232) (1996), and the primary purposes of disciplinary matters, including “to protect the public from attorneys who are not qualified to practice law due to incompetence or unprofessional conduct,” In the Matter of Skandalakis, 279 Ga. 865, 866 (621 SE2d 750) (2005), and the protection of the public’s confidence in the legal system, see In the Matter of Blitch, 288 Ga. 690, 692 (706 SE2d 461) (2011). The Special Master determined that Fagan violated a duty to his client and to the legal profession; that he acted knowingly; and that while he had repaid the misappropriated money, with interest, to his client, the potential injury could have been significant. See ABA Standard 3.0. Moreover, the Special Master noted that pursuant to ABA Standard 4.11, “[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client,” and that disbarment is also appropriate when a “lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.” ABA Standard
5.11 (b).

As for aggravating factors, the Special Master concluded that the State Bar had established that Fagan acted with a dishonest and selfish motive, ABA Standard 9.22 (b); engaged in a pattern of misconduct resulting in multiple offenses, ABA Standard 9.22 (c); and had substantial experience in the practice of law, ABA Standard 9.22 (i). In addition, the Special Master concluded that Fagan engaged in illegal conduct, including “theft, forgery, and wire fraud at a minimum.” ABA Standard 9.22 (k). See In the Matter of Hunt, 304 Ga. 635, 643 (820 SE2d 716) (2018) (reciting that the Special Master had concluded that ABA Standard 9.22 (k) applied where “[b]ased on the admitted facts, a case of theft by fiduciary would not be difficult to prove”). Indeed, as the Special Master noted, based on the admitted facts, “the potential laundry list of criminal charges [Fagan] could have, and may still face, is substantial,” and it is not clear to this Court why Fagan apparently has not been criminally prosecuted.

As to mitigation, the Special Master concluded that Fagan
admitted the facts and rule violations as alleged, but "since the potential sanction . . . depend[ed] on matters not required to be pled in the complaint," Fagan nonetheless should have the opportunity to submit evidence in mitigation, even though he had defaulted by failing to timely answer the formal complaint. The Special Master stated that in his view, "a default under the Bar Rules is similar to a default judgment" where the defendant has "admit[ted] each and every material allegation of the complaint, except as to the amount of damages suffered." The Special Master thus "reached out" on his own to Fagan by emailing him and asked Fagan if he wanted to submit evidence of mitigating circumstances in this case. Fagan responded by email, stated that he "sincerely appreciate[d] the offer," mentioned some mitigating factors, and said that he was "not requesting a hearing with respect to mitigation" and did "not plan on ever returning to the practice of law." Based on Fagan's emailed response, the Special Master determined that although Fagan could have presented evidence of mitigating factors, he waived his right to do so. The Special Master also concluded that, in any event, Fagan's
actions in this matter warranted a severe punishment.¹

In sum, the Special Master concluded that Fagan used his position as in-house counsel to defraud and swindle his client out of a substantial amount of money, and that in doing so he violated his duties to his client and to the legal profession. Thus, the Special Master recommended that Fagan be disbarred. See In Matter of Cheatham, 304 Ga. 645, 646 (820 SE2d 668) (2018) (disbarring lawyer who converted client funds to his own use and failed to respond to disciplinary authorities); In the Matter of Snipes, 303 Ga. 800, 801 (815 SE2d 54) (2018) (disbarring lawyer who settled client’s

¹ We note that it is possible for a Special Master to open default in certain circumstances. See OCGA § 9-11-55 (b) (provision for opening default); Bar Rule 4-221.2 (b) (“In all proceedings under this Chapter occurring after a finding of Probable Cause as described in Rule 204.4, the procedures and rules of evidence applicable in civil cases under the laws of Georgia shall apply . . . .”); In the Matter of Turk, 267 Ga. 30, 30 (471 SE2d 842) (1996) (citing former Rule 4-221 (e) (2), which has since been moved to Rule 4-221.2 (b), for the proposition that “OCGA § 9-11-55 (b) applies in disciplinary proceedings”). But the Bar Rules do not give the Special Master authority to sua sponte invite and receive any evidence, including mitigation, when a party is currently in default. See Bar Rule 4-208.1 (b) (unless Notice of Discipline is rejected, respondent shall be in default and “shall have no right to any evidentiary hearing”). We therefore conclude that the Special Master should not have solicited such evidence by email, but agree with the Special Master’s ultimate conclusion that Fagan waived his right to present mitigating evidence in this matter by virtue of his default.
case without client’s knowledge and converted funds to his own personal use and failed to respond to disciplinary authorities); In the Matter of Mathis, 297 Ga. 867, 868 (778 SE2d 793) (2015) (disbarring lawyer who misappropriated client funds that had been wired to him in advance of real estate closing and failed to respond to disciplinary authorities); In the Matter of Jones, 296 Ga. 151, 152 (765 SE2d 360) (2014) (disbarring lawyer who absconded with client funds and failed to respond to disciplinary authorities); In the Matter of Utley, 270 Ga. 88, 88 (765 SE2d 360) (1998) (disbarring lawyer who deliberately misappropriated estate funds and failed to respond to disciplinary authorities).

Based on our review of the record, we agree with the Special Master that Fagan has violated Rules 1.7, 1.8 (b), 1.15 (I), 8.4 (a) (4), and 9.3, and that disbarment is the appropriate sanction in this disciplinary matter. Accordingly, Glen Roy Fagan is disbarred. Fagan is reminded of his duties pursuant to Bar Rule 4-219 (b).

Disbarred. All the Justices concur.
Communication with a Represented Person by a Pro Se Lawyer

Under Model Rule 4.2, if a person is represented in a matter, lawyers for others in the matter may not communicate with that represented person about the subject of the representation but instead must communicate about the matter through the person’s lawyer, unless the communication is authorized by law or court order or consented to by the person’s lawyer.

When a lawyer is self-representing, i.e., pro se, that lawyer may wish to communicate directly with another represented person about the subject of the representation and may believe that, because they are not representing another in the matter, the prohibition of Model Rule 4.2 does not apply. In fact, both the language of the Rule and its established purposes support the conclusion that the Rule applies to a pro se lawyer because pro se individuals represent themselves and lawyers are no exception to this principle.

Accordingly, unless the pro se lawyer has the consent of the represented person’s lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited. In this context, if direct pro se lawyer-to-represented person communication about the subject of the representation is desired, the pro se lawyer and counsel for the represented person should reach advance agreement on the permissibility and scope of any direct communications.

I. Introduction

Model Rule 4.2, Communication with Person Represented by Counsel, is commonly known as the “no-contact” or “anticontact” rule. It has been part of the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

1 ELLEN J. BENNETT & HELEN W. GUNNARSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 454 (9th ed. 2019).
Conduct since their 1983 inception in largely its present form. The rule is “universally followed” in American jurisdictions. It provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

Viewed broadly, the rule requires that a lawyer’s communications about a legal matter be routed through a represented person’s lawyer; direct communication with the represented person about the subject of the representation is prohibited unless the lawyer has the consent of the represented person’s lawyer or is authorized to engage in the communication by law or a court order. The rule “contributes to the proper functioning of the legal system” by preventing lawyers from overreaching, from interfering in other lawyers’ relationships with their clients, and from eliciting protected information via “uncounselled disclosure.”

When a lawyer engages in self-representation in a legal matter in which that lawyer is personally involved, in other words, when a lawyer is acting pro se, application of Model Rule 4.2 is less straightforward. Such a lawyer might not appear to be “representing a client” in the matter because the lawyer is acting solely on the lawyer’s own behalf, i.e., “without a lawyer.” Moreover, the commentary to Rule 4.2 specifically states that “Parties to a matter may communicate directly with

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3 In 1995, an amendment proposed by the ABA Standing Committee on Ethics and Professional Responsibility changed the term “party” to “person” in the text of the rule and revised the Comment. In 2002, amendments proposed by the ABA Ethics 2000 Commission added a reference to “court order” in the text of the rule and revised the Comment. See Art Garwin, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013, 558-66 (2013). Model Rule 4.2 can be traced back to Canon 9 of the 1908 ABA Canons of Professional Ethics, which stated that “[a] lawyer should not in any way communicate upon the subject of controversy with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized to do so by law or court order. The concept carried forward into the 1969 ABA Model Code of Professional Responsibility, DR 7-104(A)(1), which provided that a lawyer should not “communicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.” See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-396, at 3-4 (1995) (recounting long history of anti-contact rule); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward A Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 799 (2009).


5 Model Rules of Prof’l Conduct R. 4.2 cmt. [1]: ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-396 (1995) (“the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests”). See also Restatement Third, supra note 4 (purpose is to “protect against overreaching and deception of nonclients,” “protect the relationship between the represented nonclient and that person’s lawyer” and “assure [] the confidentiality of the nonclient’s communications with the lawyer”).

6 Pro se is defined as “For oneself; on one’s own behalf; without a lawyer.” Black’s Law Dictionary (11th ed. 2019); see also definition of propria persona as “In his own person.” Id.

7 Carl A. Pierce, Variations on A Basic Theme: Revisiting the ABA’s Revision of Model Rule 4.2 (Part II), 70 Tenn. L. Rev. 321, 325 (2003) (“On its face, the reference in the Rule to a lawyer ‘representing a client’ can be read to suggest a negative inference that it does not apply to communication by a lawyer who is acting pro se, or is represented by another lawyer, in a matter in which she is interested.”).
each other . . . .”8 However, a pro se lawyer is representing a client. Pro se individuals represent themselves and lawyers are no exception to this principle.9

This opinion analyzes applicability of Model Rule 4.2 and the rationale for the anticontact rule in the context of a lawyer engaged in self-representation. The opinion also provides guidance on the advisability in these situations of reaching advance agreement on the permissibility and scope of any direct pro se lawyer-to-represented person communications.10

II. ANALYSIS

Although the general prohibition of Model Rule 4.2 is ubiquitous in U.S. jurisdictions, as applied to pro se lawyers the scope of the rule is less clear.11 Interpretation of the Rule in this circumstance involves consideration of both its plain language and policy purposes.

The language in the Rule that is primarily at issue in this analysis is its first clause: “In representing a client, a lawyer shall not . . . .”12 The key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounselled disclosures, including inappropriate acquisition of confidential lawyer-client communications.13 In the context of pro se lawyers, balanced against these policy goals is the principle that, as a general proposition, parties to a matter may communicate directly with each other.14

Yet, both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers. Pro se lawyers represent themselves as “a client,” and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person’s client-lawyer relationship, and acquisition of uncounselled disclosures. That risk outweighs the sometimes-salutary benefit of direct communication. That said, it is important to remember that Model Rule 4.2 applies only when a communication is “about the subject of the representation,” i.e., the Rule is matter specific, and a lawyer may speak with another represented person about matters that do not constitute the subject

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8 MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. [4].
9 See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) (“when a lawyer represents himself pro se, Rule 4.2 can be interpreted to prohibit the lawyer-party from communicating directly with an opposing represented party”); In re Haley, 156 Wash. 2d 324, 338, 126 P.3d 1262, 1269 (2006) (“we hold that a lawyer acting pro se is ‘representing a client’ for purposes of RPC 4.2(a)”).
10 This opinion does not address the related question of applicability of Rule 4.2 when a lawyer is represented by another lawyer and the represented lawyer wishes to communicate with another represented person about the matter.
11 Samuel J. Levine, The Law and the “Spirit of the Law,” 2015 Prof. Law. 1, 17 (2015) (noting the Model Rules do not expressly address a case in which a lawyer is proceeding as a pro se party to a matter) [hereinafter Spirit of the Law]; Margaret Raymond, Professional Responsibility for the Pro Se Attorney, 1 ST. MARY’S J. LEGAL MAL. & ETHICS 2, 37 (2011) (issue of whether a lawyer who is pro se is constrained by the no-contact rule when the opposing party is represented by counsel was not explicitly addressed in Model Rule 4.2).
12 MODEL RULES OF PROF’L CONDUCT R. 4.2 (emphasis added).
13 See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. [1]; RESTATEMENT THIRD, supra note 4.
14 MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. [4]. See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-362 (1992) (noting that Rule 4.2’s prohibition on the lawyer does not purport to govern communications by the lawyer’s client and observing that in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).
of the representation. See Model Rules R. 4.2, cmt. [4] (“This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.”). 15

A. Model Rule 4.2 and Pro Se Lawyers

Application of the Rule 4.2 anticontact principle to pro se lawyers is a well-documented ethical dilemma. There are decades worth of disciplinary cases, 16 civil cases, 17 and ethics opinions 18 concluding that a lawyer acting in a pro se capacity may not communicate directly with a represented adversary or other represented person about the subject of the representation without the consent of that person’s lawyer, unless the communication is authorized by law or court order. 19 These authorities reason that a pro se lawyer is “representing a client” for purposes of Model Rule 4.2, and that the policy underlying the prohibition makes it clear that such communications are “ripe with potential for overreaching and exploitation,” 20 and that “the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se.” 21

Viewed in this light, it is not possible for a pro se lawyer to “take off the lawyer hat” and navigate around Rule 4.2 by communicating solely as a client. Consequently, the proposition, set forth in Comment [4] to Model Rule 4.2, that “[p]arties to a matter may communicate directly with each

15 Note, however, that perspectives can differ in this context about whether a lawyer’s effort to communicate with a represented person is beyond the scope of the rule. See In re Steele, 181 N.E.3d 976 (Ind. 2022) (rejecting respondent’s contention that an email was not “about the subject of the representation” but rather “spoke only of matters involving friendship,” a contention that was belied both by the language of the email itself, which thrice explicitly requested that the adverse party bypass their lawyer, and by the context in which it was sent, after two weeks of unsuccessful discussions with opposing counsel and the filing of a lawsuit).


19 Oregon has adopted a modified version of Model Rule 4.2 to address this issue. Or. Rules of Prof’l Conduct R. 4.2 (“In representing a client or the lawyer’s own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject . . . .”).


21 In re Schaefer, 25 P.3d 191, 199 (Ne. 2001).
other” does not apply to pro se lawyers. This proposition recognizes that, in general, the rules of professional conduct establish limits on lawyer behavior, not that of their clients.23

The first clause of Model Rule 4.2—“In representing a client, a lawyer shall not . . . .”24—may be seen as creating an ambiguity as applied to lawyers representing themselves. The conclusion of many jurisdictions is more persuasive and consistent with the purposes of Model Rule 4.2.25 A pro se lawyer is self-representing, i.e., “representing a client” for purposes of Model Rule 4.2. The risk in this situation of overreaching, disruption of the represented person’s client-lawyer relationship, and acquisition of uncounselled disclosures, is acute, outweighing the potential benefit of direct client-to-client communication.26 Accordingly, unless a pro se lawyer has the consent of the other represented person’s lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited.27

22 Model Rules of Prof’l Conduct R. 4.2 cmt. [4]; ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-461 (2011) (“Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.”).

23 ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-362 (1992) (noting that Model Rule 4.2’s prohibition on the lawyer does not purport to govern communications by the lawyer’s client); Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics – The Lawyer’s Deskbook on Professional Responsibility § 4.2-5 (2021-2022 ed.) (“The rule governs lawyers, not their clients . . . .”). It is well established, however, that a lawyer cannot direct client-to-client communication as a way of evading Model Rule 4.2’s prohibition. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-461 (2011) (when advising a client about direct client-to-client communication, the line between permissible advice and impermissible assistance “must be drawn on the basis of whether the lawyer’s assistance is an attempt to circumvent the basic purpose of Rule 4.2”). In the pro se lawyer situation, it is not feasible to parse the distinction between a lawyer acting as a lawyer and a lawyer acting as a client.

24 Model Rules of Prof’l Conduct R. 4.2 (emphasis added).

25 See, e.g., Md. Bar Ass’n Ethics Comm., Can Pro Se Lawyer Speak with A Represented Party over the Objection of the Party’s Lawyer?, Md. B.J., Sept./Oct. 2006, at 57, 59 (“We believe the opinions that prohibit a lawyer from having contact with a represented party opponent to be the most persuasive.”). We recognize that a handful of authorities, including the Restatement of the Law Governing Lawyers, have come to a different conclusion. See Restatement Third, supra note 4, cmt. e, at 73 (“[a] lawyer representing his or her own interests pro se may communicate with an opposing represented client on the same basis as any other principals.”). The Reporter’s Note, however, recognizes that “the position of the ABA ethics committee is probably contrary to that in the Section and Comment . . . .” Id. Reporter’s Note on Illustration 3 (citing ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 982 (1967)). See also In re Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003); Texas Ethics Comm’n Advisory Op. 653 (Jan. 2016); Cal. Rules of Prof’l Conduct R. 4.2, cmt. 3 (“The rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.”). Cf. N.Y. Rules of Prof’l Conduct R. 4.2(c) (“A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.”).

26 See generally Spirit of the Law, supra note 11 (“The methodologies courts have employed to expand the scope of the no-contact rule to include pro se lawyers exemplify the potential relevance of a spirit of the law approach for the interpretation of ethics codes.”). Recognizing the significance of Rule 4.2’s underlying public policy, an Illinois appellate court upheld application of Rule 4.2 to a non-lawyer pro se plaintiff in a civil case. See Zemater v. Village of Waterman, 157 N.E.3d 1069, 1074 (Ill. App. 2020) (“Protecting defendant under these circumstances also furthered public policy regarding the confidential and fiduciary nature of the attorney-client relationship.”).

27 This conclusion is consistent with this Committee’s 1967 analysis of Canon 9 of the former Canons of Professional Ethics. See ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 982 (1967) (attorney who is a
B. Obtaining Consent for Client-to-Client Communication

In certain situations, otherwise prohibited client-to-client communications involving a pro se lawyer may be beneficial. If a pro se lawyer wishes in good faith to communicate with another represented person about the subject of the representation, that lawyer should contact the represented person’s counsel and seek to obtain consent, providing an opportunity for that lawyer to object, consent, or consent by agreement to conditions under which such communications are to take place. If a lawyer receives such a request from a pro se lawyer, it is prudent to discuss with the client in advance the advisability of such communication, along with the risks and benefits of such communication. In some circumstances it may be appropriate to advise the client not to communicate with the pro se lawyer.

Although a lawyer’s decision to consent to a pro se lawyer’s communication with the lawyer’s client is within the lawyer’s discretion and will depend on the circumstances, there are certain situations in which direct communication between a pro se lawyer and the represented person are likely necessary or appropriate such that consenting to the communication makes sense.

Conversely, consenting to a communication where the pro se lawyer appears to be overreaching for a strategic advantage—such as seeking the communication for a concession to an extension of time to produce documents, renegotiating terms of an agreed-upon contract, or calling to elicit disclosures—is not advisable.

Advance agreements between counsel for the represented person and the pro se lawyer are important to avoid disputes about compliance and ensure no disruption of Model Rule 4.2’s protections. Thus, the agreement should be clear about the scope of any direct pro se lawyer-to-represented person communications. It would be prudent to memorialize the agreement in writing.

III. CONCLUSION

Under Model Rule 4.2, in representing a client, a lawyer may not communicate with a person the lawyer knows is represented by counsel about the subject of the representation, unless that person’s counsel has consented to the communication, or the communication is authorized by law or court order. When a lawyer is participating in a matter pro se, that lawyer is engaged in self-representation and is therefore subject to Model Rule 4.2’s prohibition.

DISSENT

I must respectfully dissent from the conclusion of the well-written majority opinion because I cannot agree that “both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers.” While the purpose of the rule would clearly be

defendant in a case may not settle the case directly with the plaintiff who is represented by counsel without the knowledge of the plaintiff's counsel).

28 See Att’y Grievance Comm’n of Maryland v. Trye, 444 Md. 201, 221, 118 A.3d 980, 991 (2015) (noting that “direct communication between the principals—leaving the lawyers out of the room—is sometimes the path to settlement of a dispute”).

29 See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-362 (1992) (in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).
served by extending it to self-represented lawyers, its language clearly prohibits such application. Again, Model Rule 4.2 states:

*In representing a client*, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order. [Emphasis added.]

Our majority opinion thoughtfully and candidly discusses the split of authority interpreting the rule. It is not uncommon for ethics committees to weigh in when there is such a split. But it is, I hope, unusual for a committee to nullify plain language through interpretation, especially when the committee has jurisdiction to propose rule amendments.

The interpretation of our majority opinion and the ethics and discipline opinions cited therein depend upon the conclusion that, “A pro se lawyer is self-representing, i.e., ‘representing a client’ for purposes of Model Rule 4.2.” Majority Opinion, at p. 5. This logic provides the rationale for cases holding that the rule applies to pro se lawyers.1 The number of opinions following this approach is not convincing if the analysis is not persuasive; error compounded is still error.

Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not “representing a client,” nor will an average or even sophisticated reader of these words equate the two situations. See In re Haley, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an “ingenious bit of legal fiction.” Haley, at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule’s language renders the phrase “in representing a client” surplusage, contrary to a basic canon of construction.2

It is also simply wrong to perpetuate language that was clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase “in representing a client” will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, “Parties to a matter may communicate directly with each other.” Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it

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1 See, e.g., In re Haley, 126 P.3d 1262 (Wash. 2006) (forthrightly summarizing authorities and all of the reasons one might think the rule means what it says, but noting that jurisdictions considering the question “have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se”). See also Runsvold v. Idaho State Bar, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996) (“We thus construe the phrase of Rule 4.2, ‘in representing a client’ to include the situation in which an attorney is acting pro se because this interpretation better effectuates the purpose of Rule 4.2.”).

2 See “Surplusage canon,” BLACK’S LAW DICTIONARY (11th ed. 2019) (“if possible, every word and every provision in a legal instrument is to be given effect”), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) (“it is no more the court’s function to revise by subtraction than by addition”).
does in Connecticut, Kansas, and Texas? Or, does it mean what we wish it said, as several other states have declared?

Model Rule 4.2’s plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement, cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process, and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers.

Thoughtful commentators have identified the problems with Model Rule 4.2’s language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves. By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.

Mark Armitage
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3 See Pinsky v. Statewide Grievance Comm., 216 Conn. 228, 236, 578 A.2d 1075, 1079 (1990) (“plaintiff’s letter was a communication between litigants and that the plaintiff had a right to make such a communication because he was not representing a client”); In re Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003) (“violation of KRPC 4.2 was not shown to have occurred, as the rule applies only to acts done ‘[i]n representing a client.’”); and Texas Comm. on Prof'l Ethics Op. 653 (2016) (“Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer.”).

4 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99(1)(b), and cmt. (e) thereto (“A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals”).

5 See, e.g., In re Discipline of Shaeffer, 25 P.3d 191, 199-202 (Nev. 2001), and In re Disciplinary Proceeding Against Haley, 156 Wash. 2d 324, 1267-69; 126 P.3d 1262 (2006).

6 See, e.g., Or. Rules of Prof’l Conduct R. 4.2: “In representing a client or the lawyer's own interests, a lawyer shall not communicate . . .” (emphasis added).

7 See, e.g., Carl A. Pierce, Variations on A Basic Theme: Revisiting the ABA’s Revision of Model Rule 4.2 (Part II), 70 TENN. L. REV. 321, 324-329 (2003) (tracing the Ethics 2000 Commission’s failure to address the problem pointed out by the author and others and recommending that states adopt a rule with language clearly prohibiting contact by pro se lawyers); Margaret Raymond, Professional Responsibility for the Pro Se Attorney, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 38 (2011) (recognizing the split, asserting that the rule does not answer the question and consulting the purpose should be done, but stating: “It would, of course, be optimal for rule drafters to consider explicitly whether particular rules apply to pro se lawyers.”); and Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward A Revised 4.2 No-Contact Rule, 60 HASTINGS L.J. 797, 831 (2009) (also recognizing this mess and concluding: “We therefore propose changing the text of the Rule from ‘In representing a client, a lawyer shall not . . .’ to ‘A lawyer participating in a matter shall not . . .’”).
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Rule 4-203.1. Uniform Service Rule

a. Lawyers shall inform the Membership Department of the State Bar of Georgia, in writing, of their current name, official address and telephone number. The Supreme Court of Georgia and the State Bar of Georgia may rely on the official address on file with the Membership Department in all efforts to contact, communicate with, and perfect service upon a lawyer. The choice of a lawyer to provide only a post office box or commercial equivalent address to the Membership Department of the State Bar of Georgia shall constitute an election to waive personal service. Notification of a change of address given to any department of the State Bar of Georgia other than the Membership Department shall not satisfy the requirement herein.

b. In all matters requiring personal service under Part IV of the Bar Rules, service may be perfected in the following manner:

1. Acknowledgment of Service: An acknowledgment of service from the respondent shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.

2. Written Response from Respondent: A written response from the respondent or respondent’s counsel shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.

3. In the absence of an acknowledgment of service or a written response from the respondent or respondent’s counsel, and subject to the provisions of subparagraph (b) (4) below, the respondent shall be
served in the following manner:

i. Personal Service: Service may be accomplished by the Sheriff or any other person authorized to serve a summons under the provisions of the Georgia Civil Practice Act, as approved by the Chair of the State Disciplinary Board or the Chair’s designee. Receipt of a Return of Service Non Est Inventus shall constitute conclusive proof that service cannot be perfected by personal service.

ii. Service by Publication: If personal service cannot be perfected, or when the respondent has only provided a post office box or commercial equivalent address to the Membership Department and the respondent has not acknowledged service within 10 days of a mailing to respondent’s post office box or commercial equivalent address, service may be accomplished by publication once a week for two weeks in the legal organ of the county of respondent’s address, as shown on the records of the Membership Department of the State Bar of Georgia, and, contemporaneously with the publication, mailing a copy of the service documents by first class mail to respondent’s address as shown on the records of the Membership Department of the State Bar of Georgia.

4. When it appears from an affidavit made by the Office of the General Counsel that the respondent has departed from the State, or cannot, after due diligence, be found within the State, or seeks to avoid the service, the Chair of the State Disciplinary Board, or the Chair’s
designee, may authorize service by publication without the necessity of first attempting personal service. The affidavit made by the Office of the General Counsel must demonstrate recent unsuccessful attempts at personal service upon the respondent regarding other or related disciplinary matters and that such personal service was attempted at respondent’s address as shown on the records of the Membership Department of the State Bar of Georgia.

c. Whenever service of pleadings or other documents subsequent to the original complaint is required or permitted to be made upon a respondent represented by a lawyer, the service shall be made upon the respondent’s lawyer. Service upon the respondent’s lawyer or upon an unrepresented respondent shall be made by hand-delivery or by delivering a copy or mailing a copy to the respondent’s lawyer or to the respondent’s official address on file with the Membership Department, unless the respondent’s lawyer specifies a different address for the lawyer in a filed pleading. As used in this Rule, the term “delivering a copy” means handing it to the respondent’s lawyer or to the respondent, or leaving it at the lawyer’s or respondent’s office with a person of suitable age or, if the office is closed or the person to be served has no office, leaving it at the person’s dwelling house or usual place of abode with some person of suitable age and discretion. Service by mail is complete upon mailing and includes transmission by U.S. Mail, or by a third-party commercial carrier for delivery within three business days, shown by the official postmark or by the commercial carrier’s transmittal form. Proof of service may be made by certificate of a lawyer or of his employee, written admission, affidavit, or
other satisfactory proof. Failure to make proof of service shall not affect the validity of service.
Arizona Bar Seeks Input on Malpractice Insurance Rule (CORRECT)

By David McAfee

Oct. 31, 2022, 2:53 PM; Updated: Nov. 9, 2022, 1:36 PM

The State Bar of Arizona is seeking input on a proposal to require lawyers to inform clients within 30 days when their malpractice insurance has been terminated or has lapsed.

The State Bar on Oct. 28 asked stakeholders for input on proposed petition that would ask Arizona’s Supreme Court justices to amend Ethical Rule 1.4, Rule 42, of the Arizona Rules of Supreme Court to create an affirmative duty for attorneys to tell clients if they don’t have insurance. Arizona lawyers aren’t currently required to have liability insurance.

The petition cited a 2022 survey finding that the severity of legal malpractice claims has increased. Although most private practice attorneys in Arizona have professional liability coverage, the State Bar recommended disclosures for those who don’t.

“So that clients may make informed decisions about whether to continue to be represented by a lawyer who, at some time during the representation is no longer insured, the proposed amendment requires the lawyer to inform the client in writing within thirty (30) days of the date on which the lawyer knows their insurance has been terminated or has lapsed,” the petition says.

These requirements would be accompanied by an education campaign by the State Bar, which will further allow clients to make an informed decision, according to the petition.

(Corrects top two paragraphs of Oct. 31 story to say the petition was circulated for comment, not filed with the state’s Supreme Court.)

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