I. Welcome (Bagley) 4

II. Approval of Minutes from 1/13/23 meeting (Bagley) 5-6

III. Action Items (Frederick/Mittelman)
   A. Rule 1.8 (e)  
      (the committee has previously approved the proposed revision to 1.8(e), which would allow a lawyer to provide “modest gifts” to an indigent client who the lawyer represents pro bono. The Executive Committee expressed concerns about the proposed amendment and asked Bar Counsel to publish it for comment before taking it to the Board. The proposal is back so that the Committee can consider the comments received.)
      i. Proposed draft of Rule 1.8 (e) 7-10
      ii. Comments regarding proposed changes to subsection (e) 11-17

   B. (consider amending the rule to address consensual sexual lawyer-client relationships)
      i. Proposed Rule 1.8 (j) and comments 11-13 18-25
C. Rule 4.2 and 4.3  *(consider amendment regarding communication with a represented party by a pro se lawyer)* (Longan)
   i.  Proposed Rule 4.2-redline (version 1)  26-28
   ii. Proposed Rule 4.2-redline (version 2)  29-31
   iii. Proposed Rule 4.3-redline  32-33

D. Rule 4-209.1(b)  *(consider removing language that limits the terms of the special masters)* (Longan)
   i.  Proposed Rule 4-209.1(b)-redline  34

E. Bar Rule 4-402-FAOB request *(consider amending rule to clearly address when a Board member’s term expires, remove language that is no longer applicable, and accurately describe the appointment process followed by the Bar)*
   i.  Proposed Bar Rule 4-402  35-37
   ii. Proposed Bar Rule 4-402- redline with comments  38-39
   iii. Proposed Bar Rule 4-402- clean  40-41

F. Rule 1.2—Cannabis subcommittee
   i.  Proposed Rule 1.2  42-47
   ii. Article on increasing the number of medical cannabis production licenses.  48
   iii. Memo with examples from other states  49-50

G. Bar Rule 4-203.1-Uniform Service Rule subcommittee
   i.  Default Memo  51-55
   ii. Current Bar Rule 4-203.1  56-57
   iii. Proposed Rule 4-203.1—Subcommittee proposal  58-61
   iv. Proposed Rule 4-203.1—OGC proposal  62-65

H. Rule 4-214 *(consider amendment to allow Coordinating Special Master to grant extensions of filing deadlines)*
   i.  Proposed Rule 4-214  66
I. Use of term ‘counsel’
(The Committee asked Bar staff to identify every time the word “counsel” is used in the rules, so that it could decide whether to substitute the word “lawyer” instead. More than 20 rules refer to “counsel.” One alternative is to define it so that it is synonymous with “lawyer” when used as a noun.)
   i. List of rules 67-76

IV. Informational Items (Frederick/Mittelman)
   A. Report on status of previously amended rules
   B. Draft of pending ABA Rule 1.1 77-88
   C. Next meeting is June 9, 2023 in conjunction with Annual BOG Meeting in Savannah, GA

V. Adjourn
Disciplinary Rules & Procedures

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
Disciplinary Rules and Procedures Committee
Meeting of January 13, 2023
Atlanta, Georgia

MINUTES

Chair Michael Bagley called the meeting to order at 2:05 p.m.

Attendance:

Committee members: Michael Bagley, Judge J. Antonio Del Campo, Erin Gerstenzang, Mazie Lynn Guertin, John G. Haubenreich (virtual), Patrick H. Head, R. Javoyne Hicks, Seth D. Kirschbaum (virtual), Edward B. Krugman (virtual), David N. Lefkowitz (virtual), Patrick E. Longan, J. Maria Waters (virtual), and Judge Paige Whitaker.

Executive Committee Liaison: David S. Lipscomb


Guests: Supreme Court Justices Bethel, Colvin, Peterson and Warren. Cannabis and Hemp Law Section Secretary, Olia Wall. State Disciplinary Review Board Chair John Long and State Disciplinary Review Board member Joshua Bell. Attorneys Patricia Harris, Keyunna Harris (virtual) and Amy Fouts (virtual).

Approval of Minutes:

The Committee approved the Minutes from the September 29, 2022 meeting.

Action Items:

**Cannabis and Hemp Law Section request**

By unanimous vote, the Committee voted to reintroduce an amendment to Rule 1.2 regarding advising clients on cannabis production in Georgia. The Committee would like examples from other states regarding this issue. The Committee commissioned a subcommittee to draft an amendment to Rule 1.2. The subcommittee members are David Lipscomb, Pat Longan, Erin Gerstenzang, Paula Frederick, and Cannabis and Hemp Law Section Secretary, Olia Wall.

**Rule 1.8(h)**

The Committee discussed Jeffrey Smith’s request and agreed to change “by counsel” to “by a lawyer.” On January 14, 2023, Bar Counsel will provide the BOG, during its meeting, with a verbal update regarding the Committee’s decision.

The Committee would like a comprehensive list of the rules that include “counsel” to decide if they need to be changed to “lawyer” at its next meeting.
Rule 4-214/Jack Long’s request

By unanimous vote, the Committee voted to create a mechanism allowing the State Disciplinary Review Board, Special Master, or other designee to grant extensions of filing deadlines. A draft of the proposed rule will be provided at the next meeting.

Discussion Items:

Fagan subcommittee:

David Lipscomb withdrew his request for the committee to address this issue.

ABA Opinion 502

The Formal Advisory Opinion Board has a subcommittee drafting an Opinion regarding communication with a represented party by a pro se lawyer.

The Committee discussed the possibility of amending Rule 4.2 to address the ABA Opinion. Patrick Longan agreed to draft 2 versions of proposed Rule 4.2 for the Committee to discuss at its next meeting.

Uniform Service Rule

The Committee discussed the possibility of updating Rule 4-203.1. The Committee commissioned a subcommittee to update the rule and address how to perfect service for an attorney living out of the country. The subcommittee members are Patrick Head, Judge Whitaker, and David Lipscomb. Jack Long volunteered to be of service if needed.

The meeting adjourned at 3:51 p.m.
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

... 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;
Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee shifting statute.

. . .

COMMENTS

. . .

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 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 cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

...
Hi Paula, it has been a long time since our paths crossing back in the day of the Executive Committee of the Real Estate Section. But, I have followed all of your achievements since then and you are to be commended for all you have done personally and for the profession.

I read your column in a recent edition of the Georgia Bar Journal regarding the ABA model rule. The last sentence of your column asked for comments. My opinion is the Model Rule opens the door to a very slippery slope. There has always been a line between advocacy and finances, and for good reason. Our firm does dispossessory work so I understand well the jams that tenants can find themselves, especially over the last few years. Our role is better suited to trying to find community resources to help a client than solving the problem with a gift.

Thanks Paula. Best wishes to you.

Steve
From: Konny Li <klight777@msn.com>
Sent: Thursday, March 9, 2023 5:40 PM
To: Betty Derrickson <BettyD@gabar.org>
Subject: Comment on Rule 1.8 amendments.

Hi Betty,

I was out of the country from the end of December though your cut off date for comments. I understand that you may not be able to use them, but I provide them anyway as I believe that the input of those of us who have practiced for many years is vital.

I believe that you open a can of worms when you allow gifts and incentives. Yet, I think buying a meal or providing basic food items is acceptable. There should be a dollar limit in addition to the other parameters that you have included. Not having a dollar limit invites litigation, abuse and problems that a dollar limit make clear and clean.

Thanks for listening,
Konny

Sent from Mail for Windows
I applaud, but disagree with the proposed section (e)(3). The Bar is largely unable to police or prevent the use of runners by attorneys, which is also an ethical violation. I’ve interviewed potential clients who tell me that a prior attorney offered them money to retain the attorney. Unfortunately, so far none of the potential clients have been able to remember the attorney’s name, and some were contacted by a non-attorney on behalf of the attorney. I’ve been hired by clients who tell me that attorneys approached them while the clients were still in the hospital. I even reported an attorney whose estranged wife (also an attorney) made representations to a judge that the attorney was mentally unfit to practice law and the Bar just took the allegedly unfit attorney’s word that he was fine and dismissed the report. I sincerely doubt that it will be able to police or prevent violations of (e)(3)(i) or (iii).

I’m sure there are ways attorneys will find to use a “non-profit” legal services organization or “public interest” organization to ethically circumvent the prohibitions on using runners and using monetary inducements to hire the attorney.

The last sentence of (e)(3) acts as an inducement to prioritize cases that have a likelihood of fee-shifting. The lawyer or organization will “profit” by retaining the fees as compensation.

What constitutes an “indigent” client is not defined. Is that a person who cannot afford to pay the attorney? Is it a person who lives at or below the income level the federal government defines as
the poverty line? Is it only clients who are homeless or jobless?

What constitutes a “public interest organization” is undefined. The Georgia Association of Defense Lawyers, the Georgia Chamber of Commerce, and the Georgia Association of Trial Lawyers all position themselves as public interest organizations.

What constitutes “modest” in the phrase “modest gifts” is undefined and is counter to the concept of paying rent. Is paying $800 per month for the two years it takes for a lawsuit to work its way through the system “modest”?

The next question is why is a “public interest” organization permitted to pay rent, medicine, and basic living expenses while an attorney working on a contingency fee is not. Every attorney working on a contingency basis can tell stories of clients calling desperate for money to pay rent for one more month. Or a client who can’t afford transportation costs to get to a doctor for needed treatment. I have an 18 year-old client whose mother is disabled and receives Social Security Disability payments. In short, the client and her family are indigent. My client was in a horrible car wreck that rendered her paraplegic. Unfortunately, the client lives several hours away from Atlanta and her family doesn’t have the ability to pay for transportation to Shepherd Center where she could receive further care, training on how to drive a car with hand controls, participate in activities with other people in her situation, and generally get the support that she can’t get at home. The Bar says I can’t pay for her transportation, but a “public interest” organization can?

In the Comment [5], the word “lending” in the second sentence should be changed to “advancing” to remain consistent with word choice throughout the rest of the comments and rule.

Comment [8] is internally inconsistent. It seems to be saying that an attorney can give financial assistance in a case eligible for fee-shifting by statute, but not in a case in which fees can be shifted by statute. For example, if OCGA § 13-6-11 applies in a personal injury case because of something like the defendant being DUI, then even if the attorney takes the case on a pro bono basis, the attorney cannot provide assistance? Also, the applicability of a fee-shifting statute is not always clear from the outset of a case. For example, during the course of litigation fees can be awarded for discovery violations (OCGA § 9-11-67) or for frivolous claims or defenses (OCGA § 9-15-14). Does an attorney who provided assistance prior to the point that a fee-shifting statute applies violate the rule if he or she moves for sanctions in a case?

In my opinion, leaving Rule 1.8 the way it is now is better than creating more confusion on what is allowed and what is not allowed, or creating a loophole for crafty attorneys to provide support to clients that other attorneys can’t while not violating the letter of the ethics rules.

James A. Neuberger
Neuberger Law, LLC
2100 RiverEdge Parkway
Suite 700
Atlanta, Georgia 30328
(678) 766-1700 (office)
(770) 637-2633 (fax)
jimi@neubergerlawllc.com
Dear Betty,

This email is in response to the request for comment from State Bar members on proposed changes to Ga. R. P. Conduct 1.8(e) as announced at https://www.gabar.org/newsandpublications/announcement/announcementdetail.cfm?id=31915713

I realize that this emailed submission is more than "a day late and a dollar short," as my beloved Mother was wont to say, and for that, I apologize.
I doubt that there is much originality in my chief concern about the proposed changes to Rule 1.8 (e) and to Comment [5], and to the addition of Comments [6], [7] and [8]. That chief concern is over how one is to determine whether "modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses" are indeed "modest."

Modesty and immodesty are contextual concepts. They are very much creatures of their time, place, and contemporary culture. They are unavoidably affected by relativism. I will simply observe in my experience, their meaning seems to have changed in many ways since I was admitted to practice in Georgia in 1989 and began my practice at Kilpatrick & Cody. I still blush, metaphorically speaking, at quite a few things today in which a younger generation of attorneys finds no cause to even bat an eye.

Specifically, my concerns here are that the amended and new Comments neither:

1. provide much insight into how to determine whether a gift for the listed purposes is "modest"; nor

2. provide a set of factors for assisting an attorney, or advisory or disciplinary authorities of the State Bar, in determining whether a particular contribution by the attorney to an eligible client is "modest."

If I have overlooked something in the Proposed Rule/Comments themselves, or elsewhere in our Rules, that would provide meaningful illumination, I apologize. I don't, however, think that I have.

The views expressed above are entirely my own. They constitute an individually held assessment. They are not intended, nor should they be constructed in any way, to reflect the views of my Law School or the State Bar Committee on which I have represented my Law School since 2005.

Sincerely,
Professor Van Detta
--
Jeffrey A. Van Detta
The John E. Ryan Professor of Int'l Business & Workplace Law
Faculty Advisor, *John Marshall Law Journal*
Atlanta's John Marshall Law School
245 Peachtree Center Avenue, NE
Suite 1900
Atlanta, Georgia 30303
Office telephone: 678-916-2633
Office facsimile: 404-872-7546
Institutional Website: [www.johnmarshall.edu](http://www.johnmarshall.edu)
Email: ivandetta@johnmarshall.edu
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.

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.

g. 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 a lawyer 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 changes in green are currently pending with the Court.
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 have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

k. 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 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

The changes in green are currently pending with the Court.
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.

The changes in green are currently pending with the Court.
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.

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

[5] 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

[6] 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

The changes in green are currently pending with the Court.
[7] 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.

[8] 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 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.

### Arbitration

[8A] 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.

### Family Relationships Between Lawyers

[9] 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.

The changes in green are currently pending with the Court.
Acquisition of Interest in Litigation

[10] 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 champerty and maintenance, is subject to specific exceptions developed in 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).

Client-Lawyer Sexual Relationships

[11] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[12] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the

The changes in green are currently pending with the Court.
lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[13] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.
RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

a. A lawyer who is representing a client or proceeding pro se in a matter 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.

b. Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.

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

Comment

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government entity and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government entity to speak with government officials about the matter.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This Rule applies to communications with any person, whether or not a party to a formal adjudicative
proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the
communication relates.

[4A] In the case of an organization, this Rule prohibits communications with an agent or employee of the
organization who supervises, directs or regularly consults with the organization's lawyer concerning the
matter or has authority to obligate the organization with respect to the matter, or whose act or omission
in connection with the matter may be imputed to the organization for purposes of civil or criminal
liability. If an agent or employee of the organization is represented in the matter by his or her own
counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.
Compare Rule 3.4 (f). Communication with a former employee of a represented organization is discussed
in Formal Advisory Opinion 20-1.

[4B] In administering this Rule it should be anticipated that in many instances, prior to the beginning of
the interview, the interviewing lawyer will not possess sufficient information to determine whether the
relationship of the interviewee to the entity is sufficiently close to place the person in the "represented"
category. In those situations the good faith of the lawyer in undertaking the interview should be
considered. Evidence of good faith includes an immediate and candid statement of the interest of the
person on whose behalf the interview is being taken, a full explanation of why that person's position is
adverse to the interests of the entity with which the interviewee is associated, the exploration of the
relationship issue at the outset of the interview and the cessation of the interview immediately upon
determination that the interview is improper.

[5] The prohibition on communications with a represented person only applies, however, in
circumstances where the lawyer knows that the person is in fact represented in the matter to be
discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such
actual knowledge may be inferred from the circumstances. See 1.0. Such an inference may arise in
circumstances where there is substantial reason to believe that the person with whom communication is
sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of
obtaining the consent of counsel by ignoring the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by
counsel in the matter, the lawyer's communications are subject to Rule 4.3.
A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

The anti-contact rule serves important public interests which preserve the proper functioning of the judicial system and the administration of justice by a) protecting against misuse of the imbalance of legal skill between a lawyer and layperson; b) safeguarding the client-lawyer relationship from interference by adverse counsel; c) ensuring that all valid claims and defenses are raised in response to inquiry from adverse counsel; d) reducing the likelihood that clients will disclose privileged or other information that might harm their interests; and e) maintaining the lawyers ability to monitor the case and effectively represent the client.

Parties to a matter generally may communicate directly with each other because this Rule is not intended to affect communications between parties to an action entered into independent of and not at the request or direction of counsel. However, a lawyer proceeding pro se in a matter may not communicate about that matter with a person that 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.
RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

a. A lawyer who is representing a client in a matter 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. A lawyer who is proceeding pro se in a matter and represents no other person in the matter is not subject to this prohibition.

b. Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.

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

Comment

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government entity and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government entity to speak with government officials about the matter.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.
This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[4A] In the case of an organization, this Rule prohibits communications with an agent or employee of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4 (f). Communication with a former employee of a represented organization is discussed in Formal Advisory Opinion 20-1.

[4B] In administering this Rule it should be anticipated that in many instances, prior to the beginning of the interview, the interviewing lawyer will not possess sufficient information to determine whether the relationship of the interviewee to the entity is sufficiently close to place the person in the "represented" category. In those situations the good faith of the lawyer in undertaking the interview should be considered. Evidence of good faith includes an immediate and candid statement of the interest of the person on whose behalf the interview is being taken, a full explanation of why that person’s position is adverse to the interests of the entity with which the interviewee is associated, the exploration of the relationship issue at the outset of the interview and the cessation of the interview immediately upon determination that the interview is improper.

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See 1.0. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.
[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[6A] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] The anti-contact rule serves important public interests which preserve the proper functioning of the judicial system and the administration of justice by a) protecting against misuse of the imbalance of legal skill between a lawyer and layperson; b) safeguarding the client-lawyer relationship from interference by adverse counsel; c) ensuring that all valid claims and defenses are raised in response to inquiry from adverse counsel; d) reducing the likelihood that clients will disclose privileged or other information that might harm their interests; and e) maintaining the lawyers ability to monitor the case and effectively represent the client.

[8] Parties to a matter may communicate directly with each other because this Rule is not intended to affect communications between parties to an action entered into independent of and not at the request or direction of counsel.
RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client or pro se with a person who is not represented by counsel, a lawyer shall not:

a. state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and

b. give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client or, if the lawyer is acting pro se, with the interests of the lawyer.

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

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client or is acting pro se. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client or that the lawyer is acting pro se and, where necessary, explain that the client or the pro se lawyer has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer’s client or the interests of the lawyer acting pro se and those in which the
person's interests are not in conflict with the client's or the interests of the pro se lawyer. In the former situation, the possibility that the lawyer will compromise the unrepresented persons interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party or is acting pro se and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.
(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.
Proposed Amendments to
Bar Rule 4-402. The Formal Advisory Opinion Board

Rule 4-402. The Formal Advisory Opinion Board

(a) The Formal Advisory Opinion Board shall consist only of active members of the State Bar of Georgia who are shall be initially appointed by the President of the State Bar of Georgia, with the approval of the Board of Governors of the State Bar of Georgia.

(b) The members of the Formal Advisory Opinion Board are shall be selected as follows:

(1) Five members of the State Bar of Georgia at-large;
(2) One member of the Georgia Trial Lawyers Association;
(3) One member of the Georgia Defense Lawyers Association;
(4) One member of the Georgia Association of Criminal Defense Lawyers;
(5) One member of the Young Lawyers Division of the State Bar of Georgia;
(6) One member of the Georgia District Attorneys Association;
(7) One member of the faculty of each American Bar Association Accredited Law School operating within the State of Georgia;
(8) One member of the State Disciplinary Board;
(9) One member of the State Disciplinary Review Board; and
(10) One member of the Executive Committee of the State Bar of Georgia.

(c) All appointments will maintain staggered terms. All members are shall be appointed for terms of two years, subject to the following exceptions:
(1) Any person appointed to fill a vacancy occasioned by resignation, death, disqualification, or disability shall serve only for the unexpired term of the member replaced unless reappointed;

(2) The members appointed from the State Disciplinary Board and State Disciplinary Review Board, and the Executive Committee shall serve for a term of one year;

(d) When a Formal Advisory Opinion Board member’s term expires, it does so at the conclusion of the Bar year. (3) The terms of the current members of the Formal Advisory Opinion Board will terminate at the Annual Meeting of the State Bar of Georgia following the amendment of this Rule regardless of the length of each member's current term; thereafter all appointments will be as follows to achieve staggered, two-year terms:

(i) Three of the initial Association members (including the Georgia Trial Lawyers Association, the Georgia Defense Lawyers Association, the Georgia Association of Criminal Defense Lawyers, the Young Lawyers Division of the State Bar of Georgia and the Georgia District Attorneys Association) shall be appointed to one-year terms; two of the initial Association members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall be appointed for a term of two years;

(ii) Two of the initial members appointed from the State Bar of Georgia at-large (the "At-Large Members") shall be appointed to one-year terms; three of the initial At-Large Members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall be appointed for a term of two years;

(iii) Two of the initial members from the American Bar Association Accredited Law Schools shall be appointed to one-year terms; two of the initial law school members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall
be appointed for a term of two years;

(e) (4) All members shall be eligible for immediate reappointment by the President of the State Bar of Georgia to one additional two-year term. Thereafter, unless the President of the State Bar of Georgia, with approval of the Board of Governors of the State Bar of Georgia, deems it appropriate to may reappoint a member for one or more additional terms.

(fd) The Formal Advisory Opinion Board shall annually elect a chairperson and such other officers as it may deem proper at the first meeting of the Formal Advisory Opinion Board after July 1 of each year.

(ge) The Formal Advisory Opinion Board shall have the authority to prescribe its own rules of conduct and procedure.
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(2) One member of the Georgia Trial Lawyers Association;

(3) One member of the Georgia Defense Lawyers Association;

(4) One member of the Georgia Association of Criminal Defense Lawyers;

(5) One member of the Young Lawyers Division of the State Bar of Georgia;

(6) One member of the Georgia District Attorneys Association;

(7) One member of the faculty of each American Bar Association Accredited Law School operating within the State of Georgia;

(8) One member of the State Disciplinary Board;

(9) One member of the State Disciplinary Review Board; and

(10) One member of the Executive Committee of the State Bar of Georgia.

(c) All appointments will maintain staggered terms. All members are appointed for terms of two years, subject to the following exceptions:

(1) Any person appointed to fill a vacancy occasioned by resignation, death, disqualification, or disability shall serve only for the unexpired term of the member replaced unless reappointed;

(2) The members appointed from the State Disciplinary Board, and State Disciplinary Review Board, and the Executive Committee shall serve for a term of one year.

Commented [BD1]: The primary purpose for amending Rule 4-402 is to address sections (c) (3) and (4); however, other non-substantive amendments are being proposed to make the rule clearer and less ambiguous.

The words "shall" and "will" are often used interchangeably to convey a future action. However, "shall" is rarely used in modern English. The proposal to change the word "shall" to "will" is to incorporate the modern English word.

Additionally, the word "shall" is used with other verbs to form the future tense, and the word "are" captures what is actually happening now.

Commented [JS2]: The addition of “initially” and the amendments found below in paragraph (e) are necessary to accurately describe the appointment process followed by the Bar – First time appointed to the Board requires approval by the President and BOG (see (a)); first time reappointed to the Board requires approval only by the President (see (e)); and all reappointments thereafter require approval by President and BOG (see (e)).

Commented [JS3]: Since we are removing (c)(3), we wanted to make sure the rule still maintains the requirement of staggered terms.

Commented [BD4]: This proposed amendment is to correct the grammatical structure of the sentence.
(d) When a Formal Advisory Opinion Board member’s term expires, it does so at the conclusion of the Bar year. The terms of the current members of the Formal Advisory Opinion Board will terminate at the Annual Meeting of the State Bar of Georgia following the amendment of this Rule regardless of the length of each member's current term; thereafter all appointments will be as follows to achieve staggered, two-year terms:

(i) Three of the initial Association members (including the Georgia Trial Lawyers Association, the Georgia Defense Lawyers Association, the Georgia Association of Criminal Defense Lawyers, the Young Lawyers Division of the State Bar of Georgia and the Georgia District Attorneys Association) shall be appointed to one-year terms; two of the initial Association members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall be appointed for a term of two years;

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(iii) Two of the initial members from the American Bar Association Accredited Law Schools shall be appointed to one-year terms; two of the initial law school members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall be appointed for a term of two years;

(e)(4) All members are eligible for immediate reappointment by the President of the State Bar of Georgia to one additional two-year term. Thereafter, unless the President of the State Bar of Georgia, with approval of the Board of Governors of the State Bar of Georgia, deems it appropriate to reappoint a member for one or more additional terms.

Commented [JS5]: On February 1, 2000, the Supreme Court issued an order amending Rule 4-402 to add a Board member from the Georgia District Attorneys Association. Specifically, the amendment to section (c)(3) restructured the Board by terminating each current Board member’s term and establishing a new appointment structure. The new structure eliminated 3-year terms and replaced them with 2-year terms. Further, with a new Board in place, the section (c)(3) amendment made necessary adjustments to ensure staggered appointments. The proposed amendment to section (d) - previously section (c)(3) - makes the rule clearer as to when a member's term on the Board expires. The proposed amendment removes language that restructured the Board since such language is historical only, is no longer relevant or applicable, and its goal was accomplished. The proposed amendment maintains the current structure of the Board, including staggering appointments.

Commented [JS6]: The “two-year” reference was removed because some reappointed terms are for only one year. Other proposed changes to this subsection, including the addition of the phrase “by the President of the State Bar of Georgia” more accurately and clearly describe the intended reappointment process and how reappointments are and have been handled.

(f) The Formal Advisory Opinion Board shall annually elect a chairperson and such other officers as it may deem proper at the first meeting of the Formal Advisory Opinion Board after July 1 of each year.

(g) The Formal Advisory Opinion Board shall have the authority to prescribe its own rules of conduct and procedure.
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   (5) One member of the Young Lawyers Division of the State Bar of Georgia;
   (6) One member of the Georgia District Attorneys Association;
   (7) One member of the faculty of each American Bar Association Accredited Law School operating within the State of Georgia;
   (8) One member of the State Disciplinary Board;
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(c) All appointments will maintain staggered terms. All members are appointed for terms of two years, subject to the following exceptions:
(1) Any person appointed to fill a vacancy occasioned by resignation, death, disqualification, or disability will serve only for the unexpired term of the member replaced unless reappointed;

(2) The members appointed from the State Disciplinary Board, State Disciplinary Review Board, and the Executive Committee will serve for a term of one year;

(d) When a Formal Advisory Opinion Board member’s term expires, it does so at the conclusion of the Bar year.

(e) All members are eligible for immediate reappointment by the President of the State Bar of Georgia to one additional term. Thereafter, the President of the State Bar of Georgia, with approval of the Board of Governors of the State Bar of Georgia, may reappoint a member for one or more additional terms.

(f) The Formal Advisory Opinion Board will annually elect a chairperson and other officers as it may deem proper at the first meeting of the Formal Advisory Opinion Board after July 1 of each year.

(g) The Formal Advisory Opinion Board has the authority to prescribe its own rules of conduct and procedure.
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.

ITILS changes are in green and have been approved by the BOG. Cannabis subcommittee changes are in red.
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

ITILS changes are in green and have been approved by the BOG. Cannabis subcommittee changes are in red.
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

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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.

[9] Paragraph (d) prohibits a lawyer from knowingly or with willful blindness counseling or assisting a client to commit a crime or fraud. It permits a lawyer to advise a client regarding the validity, scope, and meaning of Georgia laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, Georgia laws, including statutes, regulations, orders, and other state or local provisions, even if the client’s actions might violate the conflicting federal or tribal law. If Georgia law conflicts with the federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4). 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 it The fact that a client uses advice in a course of action that is criminal or fraudulent of itself does not 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

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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).
Georgia House Votes to Increase Number of Medical Cannabis Production Licenses

Thu/Mar 9th/ by TG Branfalt

The Georgia House of Representatives on Tuesday passed a bill to increase the number of medical cannabis production licenses in the state from six to 15, the Albany Herald reports. The measure is meant to resolve lawsuits against the state by companies that lost bids to obtain cannabis production licenses.

In all, nine companies had sued the state after being denied licenses. If approved by the Senate, the bill would allow those nine companies to reapply for a production license.

Georgia legalized low-THC cannabis possession for medical purposes in 2015 but didn’t approve a bill to allow in-state production until 2019. The 2019 law created a state commission to oversee the program by issuing six licenses to winning bidders. The law created two Class 1 licenses, which allow cannabis to be grown in spaces up to 100,000 square feet, and four Class 2 licenses which allow for cultivation spaces of up to 50,000 square feet. The two Class 1 licenses have been awarded but the remaining licenses have been in limbo after the rejected companies sued the state.

The measure approved Tuesday, sponsored by Republican Rep. Alan Powell, calls for putting the commission that oversees the medical cannabis program under contracting rules set by the Georgia Department of Administrative Services. Appeals would be referred to Georgia’s Statewide Business Court.

The measure would also increase dispensary counts as the number of medical cannabis patients increases, creating an additional Class 2 license for every 5,000 new patients and a Class 1 license for every 10,000 new patients, the report says.

The measure moves next to the state Senate.
MEMORANDUM

To: Members, Disciplinary Rules Committee

From: Paula Frederick

Date: September 12, 2019

Re: Ethics issues from Georgia’s Hope Act

Georgia’s new Hope Act legalizes production and distribution of low-THC CBD oil in Georgia. A new state commission will license and regulate six private companies and two state universities that will grow marijuana and produce medical cannabis oil. I have attached an article that describes the new law in more detail.

The federal Controlled Substances Act classifies marijuana as a schedule 1 drug, so that growing it is a federal offense. Congress has considered decriminalizing marijuana but has not yet gotten beyond the stage of holding hearings on the issue.

Bar Rule 1.2(d) provides that a lawyer may not “counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct...”. The rule makes it difficult, if not impossible, for a Georgia lawyer to provide any legal help regarding the Hope Act.

Other jurisdictions have dealt with state legalization of cannabis or marijuana by amending their version of Rule 1.2 or by issuing advisory opinions that create exceptions to the Rule:

**Pennsylvania** added a new paragraph (e) to Rule 1.2:

(e): A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.

*(I don’t see a comment that explains this any further)*

**Washington State** has a comment to Rule 1.2 —

[18] Under Paragraph (d), a lawyer may counsel a client regarding Washington’s marijuana laws and may assist a client in conduct that the lawyer reasonably believes is permitted by those laws. If Washington law conflicts with federal or tribal law, the lawyer shall also advise the client regarding the related federal or tribal law and policy.
California’s format varies from the ABA Model and so their rule is 1.2.1 (which is substantially similar if not identical to Georgia’s 1.2(d). They added a comment as follows:

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client’s actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4)

This matter will be on the agenda for the Committee meeting on September 19 so that you may consider whether to revise Rule 1.2 or its comments.

pjf
To: Disciplinary Rules and Procedures Committee

From: Jenny Mittelman

Date: March 20, 2023

Re: The disciplinary process leading up to default

This is a summary of all that happens before a lawyer is held in default.

1. When the grievance comes into the office, we send it to the lawyer and ask if she would like to respond. We use the official membership address.

2. If we don’t hear from the lawyer we send a wake-up letter reminding her about the grievance and we give her additional time to respond. Though we may eventually skip the screening process or the wake-up letter if the lawyer has ignored us on multiple occasions, we only do so when we know it’s futile.

3. Once we complete the screening process, we create a Notice of Investigation (NOI) that lists the potential rule violations and notifies the respondent that we’re sending the grievance to the State Disciplinary Board. We’re required to serve the NOI pursuant to Uniform Service Rule 4-203.1. First, we mail the NOI to the lawyer at her official membership address with an acknowledgement of service form, and ask her to acknowledge service. If she doesn’t acknowledge service the clerk usually calls the respondent.
before arranging for personal service (either sheriff service or investigator service.) If the sheriff or investigator is unable to find the respondent and serve her at her official address, we publish once a week for two weeks in the legal newspaper in respondent’s county. We’re required to mail a copy of the service documents (again) to the respondent’s official address when we publish.

4. If the lawyer doesn’t respond within 30 days of service and at least one of the rules listed in the NOI has a maximum sanction of disbarment, the Board or Board Chair can direct us to file a motion for interim suspension. Most of the Board members try calling or emailing the respondent before recommending this step. Generally they wait much longer than 30 days. We file the motion for interim suspension using the Court’s e-filing system. The Court’s e-filing system notifies the respondent by email when we file the motion. We also serve the respondent with a copy of the motion by mail. If the Court issues an order suspending the lawyer, the e-filing system notifies the respondent (if she is an e-filer) and the Court mails a copy of the order to the respondent at her official address by regular mail and by certified mail. If the lawyer files a sworn response to the NOI the Board directs us to move to lift the interim suspension. We serve the respondent with a copy of the
motion to lift the interim suspension by mail when we file it. Also, the
Court’s e-filing system notifies the respondent when we file the motion to
lift if the respondent is an e-filer. When the Court issues the order lifting the
suspension, the e-filing system notifies the respondent if she is an e-filer. If
not, the Court mails a copy of the order to the respondent at her official
address.

5. When the State Disciplinary Board directs the Office of the General Counsel
to file a Formal Complaint, we file the Formal Complaint and the Petition
for Appointment of Special Master using the Court’s e-filing system. That
means Respondent receives a notice by email when we file. We also mail a
copy of the pleadings to the respondent. When the Court enters an order
appointing the special master the respondent receives notice by email if
she’s an e-filer, or by regular mail if she isn’t. We then start the service
process that’s required in Uniform Service Rule 4-203.1 and go through all
the steps listed in #3 above. If we complete service and the respondent
doesn’t file an answer within 30 days, we file a motion for default using the
State Disciplinary Board (SDB) e-filing system. We mail a copy of that
motion to the respondent at her official address, and she also receives e-
mailed notice through the SDB e-filing system. If she doesn’t respond we
will communicate with the special master and the respondent, by mail and/or
e-mail, requesting an order finding respondent in default. If the special
master enters the default, he will e-file the order using the SDB e-filing
system, and will mail a copy of the order to the parties. Following the entry
of the default the special master will communicate with the parties to
schedule a hearing on aggravation, mitigation and appropriate discipline.
The special master then files a report and recommendation using the SDB e-
filling system, and mails a copy of the report to the parties. The clerk waits
30 days from the filing of the report, then files the record with the Court
using the Court’s e-filing system. The Clerk mails and emails a notice to the
parties and the special master when she files the records with the Court. The
parties also receive an e-filing notice when the Clerk e-files the record.

6. If the State Disciplinary Board directs the Office of the General Counsel to
file a Notice of Discipline (rather than a Formal Complaint) we file it using
the Court’s e-filing system and the respondent receives notice by email.
We’re required to serve the Notice of Discipline pursuant to the Uniform
Service Rule as described in #3. Once we’ve served the Notice of Discipline
we file a pleading called “Proof of Service” with the Court. The respondent
receives notice of that filing through the Court’s e-filing system and we
serve the pleading by mail. The respondent has 30 days from the time of service to file a rejection of the Notice of Discipline. If she doesn’t reject the Notice of Discipline the Court can impose any level of discipline it deems appropriate for the conduct admitted.
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
Current Bar Rule 4-203.1

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.
Rule 4-203.1. Uniform Service Rule (Subcommittee proposal)

a. Lawyers shall inform the Membership Department of the State Bar of Georgia, in writing, of their current name, official address, email address and telephone number. The Supreme Court of Georgia and the State Bar of Georgia may rely on the official address and email 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: When it appears from an affidavit made by the Office of the General Counsel that the respondent has departed from the State, cannot after due diligence be found at respondent’s address as shown in the records of the Membership Department of the State Bar of Georgia or seeks to avoid service, the Chair of the State Disciplinary Board or the Chair’s designee may authorize service by publication. If authorized, 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, the State Bar of Georgia shall 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.
shall email a copy of the service documents to respondent’s email address as shown in 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.

4. When a respondent’s address as shown in the records of the Membership Department is not in the United States, the Office of the General Counsel may serve the respondent by mailing and emailing copies of the service documents to respondent’s official address and email address on file with the Membership Department of the State Bar of Georgia. Service is complete upon mailing and emailing the documents.

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.
Rule 4-203.1. Uniform Service Rule *(OGC proposal)*

a. Lawyers shall inform the Membership Department of the State Bar of Georgia, in writing, of their current name, official address, email address and telephone number. The Supreme Court of Georgia and the State Bar of Georgia may rely on the official address and email 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 the State Bar of Georgia is unable to personally serve the respondent at respondent’s address, as shown on the records of the Membership Department of the State Bar of Georgia, 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, the State Bar of Georgia shall 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 and shall email a copy of the service documents to respondent’s email address as shown in 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.

4-5. When a respondent’s address is not in the United States, as shown in the records of the Membership Department of the State Bar of Georgia, the State Bar of Georgia may serve the respondent by mailing and emailing copies of the service documents to respondent’s address and email address on file with the Membership Department of the State Bar of Georgia. Service is complete upon mailing and emailing the documents.

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.
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.

e. The 30-day deadline to file exceptions or respond to exceptions may be extended by agreement of the parties, or with the consent of the Coordinating Special Master, for a period of time not to exceed 15 days.
Rules that use the term “counsel”

1. Rule 1.0 comment 6
2. Rule 1.1 comment 4
3. Rule 1.9 comment (last word)
4. Rule 1.13 comment 14
5. Rule 1.14 comment 10
6. Rule 1.16(d); comment 5
7. Rule 1.17 (c)(3), comment 5
8. Rule 3.3 comment 7
9. Rule 3.7 comment 3
10. Rule 3.8(b); comments 7 and 8
11. Rule 4.2 comments 3, 4A, 5, 6, 6A, 8 and title
12. Rule 4.3 (b); comment 2
13. Rule 6.1 comment 3
14. Rule 6.2 comments 2 and 3
15. Rule 6.5 comment 2
16. Rule 7.3 (2)(i); comment 4
17. Bar Rule 4-211(3)
18. Bar Rule 4-214(b)
20. Bar Rule 4-221 (b)
21. Bar Rule 4-221.3
22. Bar Rule 4-224 (d)

***The list excludes rules that use the following terms:

- Special Counsel
- General Counsel
- Bar Counsel
- Independent Counsel
- Defense Counsel

- Adverse Counsel
- Defendant’s Counsel
- Respondent’s Counsel
- Special Counsel
[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.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person subject to Rule 6.2: Accepting Appointments.

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There
are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Rule 1.13 comment 14

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Rule 1.14 comment 10

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Rule 1.16(d) and comment 5

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment
of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

... 

[5] Whether a client can discharge appointed counsel may depend on applicable law. To the extent possible, the lawyer should give the client an explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to be self-represented.

Rule 1.17(c)(3) and comment 5

(3) the client's right to retain other counsel or to take possession of the file; and

...

[5] The rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7: Conflict of Interest or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

Rule 3.3 comment 7

[7] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Georgia Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

Rule 3.7 comment 3

[3] Paragraph (a) (1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a) (2) recognizes that where the
testimony concerns the extent and value of legal services rendered in the action in which
the testimony is offered, permitting the lawyers to testify avoids the need for a second trial
with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand
knowledge of the matter in issue; hence, there is less dependence on the adversary process
to test the credibility of the testimony.

Rule 3.8(b), and comments 7 and 8

(b) refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain
counsel;

...  

[7] When a prosecutor knows of new, credible and material evidence creating a
reasonable likelihood that a person outside the prosecutor’s jurisdiction was convicted of a
crime that the person did not commit, paragraph (h) requires prompt disclosure to the court
or other appropriate authority, such as the chief prosecutor of the jurisdiction where the
conviction occurred. If the conviction was obtained in the prosecutor’s jurisdiction,
paragraph (h) requires the prosecutor to examine the evidence and undertake further
investigation to determine whether the defendant is in fact innocent or make reasonable
efforts to cause another appropriate authority to undertake the necessary investigation, and
to promptly disclose the evidence to the court and, absent court authorized delay, to the
deendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented
defendant must be made through the defendant’s counsel and, in the case of an
unrepresented defendant, would ordinarily be accompanied by a request to a court for the
appointment of counsel to assist the defendant in taking such legal measures as may be
appropriate.

[8] Under paragraph (i), once the prosecutor knows of clear and convincing evidence
that the defendant was convicted of an offense that the defendant did not commit, the
prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of
the evidence to the defendant, requesting that the court appoint counsel for an
unrepresented indigent defendant and, where appropriate, notifying the court that the
prosecutor has knowledge that the defendant did not commit the offense of which the
defendant was convicted.

Rule 4.2 comments 3, 4A, 5, 6A, 8
This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

In the case of an organization, this Rule prohibits communications with an agent or employee of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4 (f). Communication with a former employee of a represented organization is discussed in Formal Advisory Opinion 20-1.

The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See 1.0. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer’s communications are subject to Rule 4.3.

A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

The anti-contact rule serves important public interests which preserve the proper functioning of the judicial system and the administration of justice by a) protecting against misuse of the imbalance of legal skill between a lawyer and layperson; b) safeguarding the client-lawyer relationship from interference by adverse counsel; c) ensuring that all valid
claims and defenses are raised in response to inquiry from adverse counsel; d) reducing the likelihood that clients will disclose privileged or other information that might harm their interests; and e) maintaining the lawyers ability to monitor the case and effectively represent the client.

[8] Parties to a matter may communicate directly with each other because this Rule is not intended to affect communications between parties to an action entered into independent of and not at the request or direction of counsel.

Rule 4.3 (b) and comment 2

(b) give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client.

...  

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented persons interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 6.1 comment 3

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but who nevertheless cannot afford counsel. Legal services can be rendered to individuals or
to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

**Rule 6.2 comments 2 and 3**

201 [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1: Competence, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

209 [3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

**Rule 6.5 comment 2**

215 [2] A lawyer who provides free short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

**Rule 7.3 (2)(i) and comment 4**

223 (2)(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;

... [4] 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.

Rule 4-211(3)

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 4-214(b)

(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.

Rule 4-219 )b)(1)

(1) After a final judgment of disbarment or suspension, including a disbarment or suspension on a Notice
of Discipline, the respondent shall immediately cease the practice of law in Georgia and shall, within 30
days, notify all clients of his inability to represent them and of the necessity for promptly retaining new
[counsel], and shall take all actions necessary to protect the interests of his clients. Within 45 days after a
final judgment of disbarment or suspension, the respondent shall certify to the Court that he has
satisfied the requirements of this Rule. Should the respondent fail to comply with the requirements of
this Rule, the Supreme Court of Georgia, upon its own motion or upon motion of the Office of the
General Counsel, and after 10 days' notice to the respondent and proof of his failure to notify or protect
his clients, may hold the respondent in contempt and, pursuant to Rule 4-228, order that a member or
members of the State Bar of Georgia take charge of the files and records of the respondent and proceed
to notify all clients and to take such steps as seem indicated to protect their interests. Motions for
reconsideration may be taken from the issuance or denial of such protective order by either the
respondent or by the State Bar of Georgia.

Rule 4-221(b)

(b) Pleadings and Copies. Original pleadings shall be filed with the Clerk of the Boards at the
headquarters of the State Bar of Georgia, and the parties shall serve copies upon the Special Master and
the opposing party pursuant to the Georgia Civil Practice Act. Depositions and other original discovery
shall be retained by counsel and shall not be filed except as permitted under the Uniform Superior Court
Rules.

Rule 4-221.3

Pleadings and oral and written statements of members of the Boards, members and designees of the
Lawyer Assistance Program, Special Masters, Bar counsel and investigators, complainants, witnesses, and
respondents and their counsel made to one another or filed in the record during any investigation,
intervention, hearing, or other disciplinary proceeding under this Part IV, and pertinent to the
disciplinary proceeding, are made in performance of a legal and public duty, are absolutely privileged,
and under no circumstances form the basis for a right of action.

Rule 4-224 (d)

(d) Retention of Records. Upon application to the State Disciplinary Board by the Office of the General
Counsel, for good cause shown, with notice to the respondent and an opportunity to be heard, records
which would otherwise be expunged under this Rule may be retained for such additional period of time
not exceeding three years as the Board deems appropriate. Counsel may seek a further extension of the
period for which retention of the records is authorized whenever a previous application has been
granted for the maximum period permitted hereunder.
RESOLUTION
RESOLVED, That the American Bar Association adopts Comment [9] to Model Rule of Professional Conduct 1.1 as follows:

Model Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

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Maintaining Competence

[9] Lawyers should be aware that their mental, emotional, and physical well-being may impact their ability to represent clients and, as such, is an important aspect of maintaining competence to practice law. Resources supporting lawyer well-being are available at: [inset name of the jurisdiction’s lawyer assistance program]. Other Rules that may be relevant include those addressing declining or terminating representation, supervisory duties and reporting obligations. See Rules 1.16(a)(2), 5.1, 5.2, 5.3 and 8.3.
REPORT

I. Introduction

Since its founding, the American Bar Association (ABA) has served its members, the profession, and the public. Recent studies, surveys, and research have unequivocally shown that, members of the legal community exhibit elevated rates of substance use disorder and other mental health issues.¹ Mental health conditions and substance use disorders can lead to both dysfunction in the personal lives of legal professionals and can contribute to professional issues, including disciplinary complaints, malpractice claims and the betrayal of trust the public places in the legal profession. Complicating matters, members of the legal profession have been reluctant to seek help. That knowledge, combined with the experience of losing many members of the profession to those conditions,² has made it abundantly clear that raising awareness about the importance of legal professionals’ well-being and the nexus between lawyer well-being and lawyer competence has become an essential issue of our time.

Model Rule 1.1 of the ABA Model Rules of Professional Conduct requires lawyers to provide competent representation. “Maintaining Competence” is one of the subjects explained in the Comments of Model Rule 1.1. Adding a new Comment [9] addressing lawyer well-being, as proposed in this Resolution, elevates the importance of self-care and raises lawyer awareness about the nexus between maintaining well-being and meeting ethical obligations, including the duty of maintaining competence.

The proposed amendment, adding Comment [9] to Rule 1.1 of the ABA Model Rules of Professional Conduct, is consistent with policy previously adopted by the ABA House of Delegates. It is a logical extension of those policies and the ABA’s ongoing support and work to advance the well-being of the legal profession.

¹ See infra VI. Studies and Reports Support This Resolution.
II. The Proposal

This Resolution proposes that the ABA adopt new Comment [9] to Rule 1.1 of the ABA Model Rule of Professional Conduct:

[9] Lawyers should be aware that their mental, emotional, and physical well-being may impact their ability to represent clients and, as such, is an important aspect of maintaining competence to practice law. Resources supporting lawyer well-being are available at: [inset name of the jurisdiction’s lawyer assistance program]. Other Rules that may be relevant include those addressing declining or terminating representation, supervisory duties and reporting obligations. See Rules 1.16(a)(2), 5.1, 5.2, 5.3 and 8.3.

The proposal to add new Comment [9] to Model Rule 1.1 does not add any new obligations on lawyers - instead, it explains the nexus between competence and well-being. For example, Model Rule of Professional Conduct 1.16(a)(2) already requires that when a lawyer’s physical or mental condition “materially impairs the lawyer’s ability to represent the client”, the lawyer must decline the representation or, where representation has commenced, must withdraw from the representation.

Additional professional responsibilities can be found in existing Model Rules 5.1, 5.2, and 5.3, which impose certain responsibilities on lawyers who are partners, managers, supervisors, and subordinates. Model Rule 5.1(a) imposes a duty upon partners and lawyers, with comparable managerial authority, to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Paragraph (b) requires that direct supervisors make reasonable efforts to ensure that their subordinates’ conduct conforms to the Rules. Model Rule 5.3 imposes similar responsibilities regarding nonlawyers employed or retained by or associated with the firm. Model Rule 5.2 provides that a subordinate lawyer is not excused from the duty to act ethically simply because actions are taken at the direction of a supervisory lawyer but will not be subject to discipline for acting under a supervisory lawyer’s “reasonable” resolution of an arguable question of professional duty.

Model Rule 8.3(a) requires an attorney to report to the appropriate professional authority when the attorney knows that, another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.
Additional guidance is provided in ABA Formal Opinion 03-429 (June 2003) and ABA Formal Opinion 03-431 (August 2003).³ Opinion 03-429 addresses lawyer impairment issues in the law firm context and identifies the obligations of lawyers in the law firm, including removing the lawyer from representing clients, making required disclosures to clients while balancing against the lawyer’s right to privacy, and reporting the lawyer if the firm is aware that the lawyer engaged in dishonest or criminal conduct under Model Rule 8.3(a).⁴ Opinion 03-431 also discusses Model Rule 1.16(a)(2) and offers a different scenario, outlining the obligations of a lawyer who has knowledge that another lawyer suffers from a physical or mental condition that materially impairs that lawyer’s ability to represent a client, noting that lawyers’ failure to withdraw from representation while suffering from a condition materially impairing their ability to practice would raise a substantial question and may require a reporting under Model Rule 8.3.⁵

III. Proposed New Comment [9] and the Rationale for Adding It

By adopting new Comment [9], the ABA encourages lawyers to prioritize their well-being as part of their duty of competence, promote the importance of self-care and remove the stigma, fear of retribution, and other professional barriers to seeking help.⁶ This Resolution protects all members of the legal profession and the public and ensures a brighter future for our profession.

Studies have shown that legal professionals struggle with anxiety, depression, suicidal thoughts, and problematic substance use disorders at a rate three times higher than that of the general population.⁷ These mental health conditions and substance use disorders can impair an attorney’s ability to practice and to adequately and competently represent clients. This, in turn, can lead to disciplinary complaints, discipline, malpractice claims, and the betrayal of trust the public places in the legal profession. It is imperative that each lawyer, judge, and law student recognize the nexus between their health and their professional competence and know how to access care and resources to address any condition that may impair their ability to practice law. They should also feel supported and encouraged to seek such help without fear of harm to their reputation. That is why the Comments to Model Rule 1.1 is the optimal place to address this issue.

New Comment [9] to Model Rule 1.1 of the ABA Model Rules of Professional Conduct does not impose new requirements on the legal profession,

⁴ Model Rules of Prof'l Conduct R. 8.3(a).
⁵ Model Rules of Prof'l Conduct R. 8.3.
⁶ See discussion of American Bar Association [ABA] Res. 300A infra.
but instead highlights that mental, physical, and emotional health may impact lawyers’ ability to represent clients, and therefore is a component of maintaining requisite competence. Proposed Comment [9] reminds lawyers to consider the effect their well-being - mental, emotional, and physical health - may have on their professional responsibilities including maintaining competence as outlined in Model Rule 1.1.8

This proposal to create new Comment [9] to Model Rule of Professional Conduct 1.1 is based on more than five years of ABA policy on lawyer well-being issues. For example, in February 2018, the ABA House adopted Resolution 105, supporting “…the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students.”9 Additionally, Resolution 105 urged “all federal, state, local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions of legal education, lawyer assistance programs, professional liability carriers, law firms, and other entities” to “consider the recommendations set out in the report10, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, published by the ABA and the National Task Force on Lawyer Well-Being (“NTF Report”).11 One of the recommendations directed to regulators included revising ABA Model Rule of Professional Conduct 1.1 or its Comment to “more clearly include lawyers’ well-being in the definition of competence.”12

Additionally, Resolution 300A13, adopted by the House at the 2021 Midyear Meeting, urged all legal stakeholders to “develop, assemble,

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8 See also, Model Rule of Professional Conduct 1.16(a)(2), that requires withdrawal when a lawyer’s physical and mental health condition materially impairs the lawyer’s ability to represent their clients.
9 American Bar Association [ABA] Res. 18M105 (2018) (enacted). In February 2017, the ABA House adopted Model Rule for Minimum Continuing Legal Education (MCLE) and Comments. These model rules recommend that, as part of their MCLE requirements, jurisdictions mandate lawyers attend one hour of CLE programming that addresses the prevention, detection, and treatment of mental health or substance use disorders. The report accompanying Resolution 106 on MCLE noted, “Across the country, numerous bar association committees, lawyer assistance programs, and other entities have recognized attorney wellness and well-being as compelling and important issues that affect attorney professionalism, character, competence, and engagement.”
11 Id.
12 Id.
disseminate, promote, and to collaborate to make resources accessible that advance well-being in the entire legal profession, including but not limited to, educational programming, mental health providers, screening, employee assistance programs, referrals to community support groups and state and local lawyer assistance programs” and “adopt policies that encourage lawyers, judges, and law students to seek out these resources, taking into account the barriers of stigma, retribution, actual or perceived confidentiality challenges, and other negative effects on the reputation of legal professionals.”

Other ABA initiatives also support the implementation of new Comment [9] to Model Rule 1.1 of the ABA Model Rules of Professional Conduct. The 2009 ABA Model Rule on Conditional Admission, recognized law students hesitancy to seek needed treatment for fear of having to disclose treatment information on bar applications. ABA House Resolution 102, urged state licensing authorities to eliminate questions about mental health history, diagnosis, or treatment from applications required for admission to the bar character and fitness inquiries. Also, in February 2016, the House of Delegates adopted Model Regulatory Objectives for the Provision of Legal Services as a guide for lawyer regulators to include in their existing lawyer regulatory framework, the objective of, “advancement of appropriate preventive or wellness programs.”

Finally, this Resolution advances three of the four ABA Goals. The addition of Comment [9] in Model Rule 1.1, providing that well-being is an important component of a lawyer’s duty of competence furthers the objectives of Goal I to “promote professional growth and quality of life” and Goal II to “promote competence, ethical conduct and professionalism.” In addition, the resolution advances the objectives of Goal III, (eliminate bias and enhance diversity) by advancing inclusion of those who may suffer from mental, emotional, or physical health challenges or impairments.

IV. What This Resolution Is Not

Proposed Comment [9] is intended to educate lawyers about the potential nexus between their health and their conduct. It seeks to encourage lawyers to obtain help when needed before mental health conditions affect their ability to

14 American Bar Association [ABA] Res. 09M112 (2009) (enacted). The Commentary to the Model Rule on Conditional Admission states that “the Rule focuses on rehabilitation from conduct or behavior or effective treatment of a condition which was associated with a previous lack of fitness.”

15 American Bar Association [ABA] Res.15A102 (2015) (enacted). The Report accompanying Resolution 102, emphasizes that “questions about mental health history, diagnoses, or treatment are inherently discriminatory, invade privacy, stigmatize and needlessly exclude applicants with disabilities, are ineffective in identifying applicants who are unfit, and discourage some applicants from seeking necessary treatment.”


17 The four Goals of the ABA are to: 1) serve its members; 2) improve the profession; 3) eliminate bias and enhance diversity; and 4) advance the rule of law.
competently represent a client. This proposal is not intended to expose lawyers to discipline for simply failing to seek help for any health concern, including substance use or mental health disorders. As stated in the Preamble of the Model Rules of Professional Conduct, “[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”

Rather, the addition of proposed Comment [9] to Model Rule of Professional Conduct 1.1 demonstrates to members of the legal community and the public that the ABA prioritizes well-being in the legal profession and raises lawyers’ awareness about its relationship to the duty of competence. By elevating the awareness and importance of lawyer self-care, the proposed language may provide additional assistance in helping to reduce the stigma associated with seeking help.

The National Task Force Report defines well-being as a continual process of thriving in each dimension of one’s life: Emotional, Occupational, Intellectual, Spiritual, Physical, and Social. Thriving across each of these dimensions is an important component of well-being.

V. The Resolution Is Consistent with Action Taken by the Conference of Chief Justices and Other Jurisdictions

An amendment to address this issue is supported by the Conference of Chief Justices, which in 2017 adopted Resolution 6, supporting “the concept of lawyer well-being as a critical component of lawyer competence.” Following the Conferences’ resolution, four states adopted either a Comment to their version of Model Rule 1.1 noting that a lawyer’s well-being may impact lawyer competence or included a similar statement in their black letter rules.


A lawyer’s mental, emotional, and physical well-being impacts the lawyer’s ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

In July 2019, the Vermont Supreme Court adopted Comment [9] to Vermont Rule of Professional Conduct 1.1, which reads:

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18 ABA Model Rules of Professional Conduct, Scope [14] and [20-21].
19 CONFERENCE OF CHIEF JUSTICES, Resolution 6, Recommending Consideration of the Report on Lawyer Well-Being.
A lawyer’s mental, emotional, and physical well-being may impact the lawyer’s ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical well-being necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

Notes of the Vermont Professional Responsibility Board explain that the amendment to Rule 1.1 “is intended to address behavioral health issues that adversely affect a lawyer’s fitness to practice,” “urges lawyers to be cognizant of the toll that the profession may take on its members if behavioral health issues are ignored,” and “remind lawyers that their behavioral health may impact clients and the administration of justice, and to encourage lawyers to employ preventive strategies and self-care.” Further, the Board emphasized that disciplinary proceedings should not follow from poor health. Enforcement should proceed only in cases of actionable misconduct.

In 2018, the New Mexico Supreme Court amended New Mexico Rule 16-501, Responsibilities of Partners, Managers, and Supervisory Lawyers, adopting paragraph (D). Paragraph (D) requires that a “partner in a law firm and any lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall take prompt action to address any concern that a lawyer in the law firm is exhibiting signs of a severe impairment of the lawyer’s cognitive function.”

Comment [8] to the New Mexico rule explains:

[8] Paragraph D recognizes a law firm’s obligation to address concerns that a lawyer in the firm may be exhibiting signs of severe cognitive impairment. … If a partner in a law firm or any lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm observes another lawyer in the firm exhibiting signs of a severe cognitive impairment, such as a marked change in (1) the lawyer’s short or long term memory; (2) the ability to properly orient as to time, people, or place; or (3) the ability to engage in deductive or abstract reasoning, steps shall be taken that may include assisting the lawyer who appears to be impaired to seek medical care, reporting the concerns to the New Mexico Judges and Lawyers Assistance Program or to the Office of Disciplinary Counsel, or taking other steps designed to prevent the lawyer whose cognitive abilities appear to be severely impaired from taking substantive actions on behalf of clients.

21 Id.
Finally, California took the approach of including a black letter obligation on this subject. In May 2018, the Supreme Court of California adopted revised California Rule of Professional Conduct 1.1(b) which reads, “For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Although the black letter approach is instructive to highlight the importance some state courts have placed on wellness and competence, this resolution is not recommending such an approach in order to encourage those who need help to seek assistance without fearing retribution.

VI. ABA Studies Support the Adoption of the Resolution

The ABA has a long history in advancing research and policy addressing various aspects of well-being among the members of the legal profession and providing assistance and support to lawyers, judges, and law students. The ABA Commission on Lawyer Assistance Programs (ABA CoLAP) was created in 1988 to “assure that every judge, lawyer and law student has access to support and assistance when confronting alcoholism, substance use disorders or mental health issues so that lawyers are able to recover, families are preserved and clients and other members of the public are protected.” ABA CoLAP is the only ABA entity whose sole mission is advancing well-being for all stakeholders in the legal profession and offering support, assistance and well-being resources through the work of state and local lawyer assistance programs. Yet many legal professionals who need help or know of colleagues who need help do not access the resources available through state and national bar associations and lawyer assistance programs due to stigma, shame, and fear.

Between 2016 and 2020, ABA CoLAP conducted several research studies on the well-being of lawyers, law students, and judges. ABA CoLAP’s studies, in partnership with Hazelden Betty Ford Foundation, University of St. Thomas School of Law, and The College of Saint Scholastica, demonstrated that lawyers, law students, and judges respectively suffer from elevated rates of depression, anxiety, and stress reactions that are sometimes compounded by substance use disorders and mental health issues.

22 ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS MISSION STATEMENT, https://www.americanbar.org/groups/lawyer_assistance/about_us/.
23 As an example, a compendium of well-being resources, including a curated list of Mental Health Resources for the Legal Profession; an ABA Well-Being Toolkit; a Well-Being Template for Legal Employers; a Substance Use and Mental Health Toolkit for Law Students; and a Directory of State and Local Lawyer Assistance Programs can be found at the Commission on Lawyer Assistance Programs website. COMMISSION ON LAWYER ASSISTANCE PROGRAMS, https://www.americanbar.org/groups/lawyer_assistance/ (last visited Jan. 19, 2021).
According to the 2016 national study of attorneys, 20.6% of respondents struggled with problematic drinking. Younger respondents reported significantly higher frequencies of drinking and higher quantities of alcohol were reported. This same research also indicated that 61.1% of the respondents struggled with anxiety, 45.7% struggled with depression, and 11.5% of the respondents reported suicidal thoughts at some point in their career. The 2016 study found two barriers to seeking help identified for respondents—not wanting others to find out they needed help (25.7%) and concerns regarding privacy and confidentiality (23.4%).

Research conducted in the same year showed similar results about law students. Approximately one-quarter to one-third of the law student survey respondents reported frequent binge drinking, drug misuse, and/or mental health challenges. Moreover, the results indicated that significant majorities of those law students most in need of help were reluctant to seek it.

A 2020 report on the Commission’s National Judicial Stress and Resiliency Survey revealed that 20% of respondents struggle with depression, 23% of respondents struggle with anxiety, and 2% have experienced suicidal thoughts. In addition, 9.5% of respondents reported problematic alcohol use.

In 2017, the National Task Force on Lawyer Well-Being was created. After analyzing the data of the ABA lawyer and law student studies and seeking input from numerous sources, the Task Force issued its Report (“NTF Report”), outlining 44 recommendations directed at various stakeholders within the justice system, including judges, regulators, legal employers, law schools, bar associations, and lawyer professional liability carriers. The recommendations are designed to be transformative when implemented by shifting the legal profession’s culture to focus on well-being and strengthen the legal profession to ensure the public has a justice system that is competent, fair, and just.

Following the publication of the NTF Report, the ABA Board of Governors, at the request of then President Hilarie Bass, established the ABA Working Group to Advance Well-Being in the Legal Profession. The Working Group’s goal was to address the alarming rates of alcohol and other substance use disorders and mental health issues among lawyers. One of the Working

24 Id. et al., supra note 1, at 48.
25 Id. at 50.
26 Id.
28 Id.
29 Id.
31 Id.
Group’s key deliverables was the ABA Well-Being Campaign. The primary vehicle for the Campaign is the ABA Pledge which describes a seven-point framework for legal employers to adopt and prioritize to encourage lawyers and staff to improve their physical, mental, and emotional well-being.

In the spring of 2020, at the request of the ABA’s then-President Judy Perry Martinez and the ABA’s then-President-Elect Patricia Lee Refo, the ABA Coordinating Group on Practice Forward (Practice Forward) was established by the ABA Board of Governors to leverage the power of the entire ABA by coordinating pandemic-responsive resources throughout the ABA. The focus is to harness expertise to address potential long-term changes to the practice of law and the judicial system. The essential goal is to help members through this fundamental shift so they can better serve their clients.

Practice Forward launched a survey of ABA members (Practice Forward Survey) in 2021, seeking to understand the increased burden on lawyers caused by the COVID-19 pandemic and the shift to remote work. The survey results revealed that the pandemic has resulted in increased substance abuse and other mental health concerns, which has had a devastating impact on those in the legal profession. The data collected also revealed that lawyers surveyed were anxious, stressed, and showing signs of burnout more than they did a year before the pandemic. Respondents to the survey reported finding it harder to keep work and home life separate, feeling overwhelmed and stressed, thought their day would never end, and had trouble taking time off from work. These feelings were more pronounced for women, lawyers of color, and younger lawyers, particularly those with young children. The survey revealed that lawyers want their employers to provide programs and policies around

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32 The ABA Well-Being Campaign and Pledge was launched to improve the substance use and mental health landscape of the legal profession with an emphasis on helping legal employers support a healthy work environment. See ABA Wellbeing Pledge Campaign, Slide Deck, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls-colap-working-group-pledge-and-campaign.pdf.


35 Id.


37 Id.

38 Id.

39 Id.
wellness, better resources for working parents, and comprehensive plans for family leave and sick leave.\textsuperscript{40}

\textbf{VII. Conclusion}

For the foregoing reasons, the ABA should adopt proposed Comment [9] to Model Rule 1.1 of the ABA Model Rules of Professional Conduct.

Respectfully submitted,

Chair ________, Commission on Lawyer Assistance Programs
Chair ________, Standing Committee on Professionalism
Chair ________, Standing Committee on Ethics and Professional Responsibility
Chair ________, ABA Coordinating Group on Practice Forward

\textsuperscript{40} Id.