Chair Michael Bagley called the meeting to order at 2:00 p.m.

Attendance:

Committee members: Michael Bagley, R. Gary Spencer, Erin H. Gerstenzang (virtual), Mazie Lynn Guertin, John G. Haubenreich, Patrick H. Head (virtual), Seth D. Kirschenbaum (virtual), Catherin Koura (virtual), Edward B. Krugman, David N. Lefkowitz (virtual), David S. Lipscomb, Patrick E. Longan (virtual), David O’Neal (virtual), Jabu M. Sengova (virtual), Patrick Wheale (virtual), and Hon. Paige Reese Whitaker.

Staff: Paula J. Frederick, Jenny K. Mittelman (virtual), William D. NeSmith, III, Mercedes Ball, Billy Hearnburg, and Kathya S. Jackson (virtual)

Guests: Supreme Court Justice Peterson

Approval of Minutes:

The Committee approved the Minutes from the April 1, 2022 meeting. Once the OGC receives the draft of ABA Rule 8.4(g) from the group of lawyers requesting the changes it will be included in the agenda.

Action Items:

Formal Advisory Opinion Board request:

By unanimous vote, the Committee voted to adopt the proposed changes to Rules 1.5 and 1.8 to address the propriety of entering an agreement with a client requiring arbitration of fee disputes and/or malpractice claims. A copy of the Rules as adopted appears at the end of these minutes.

Rule 1.8

The Committee reviewed the previously approved (at its 1/7/22 meeting) draft of Rule 1.8 along with the proposed revisions by the FAOB. The Committee voted to revise e(3) to read: “a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization pro bono, or a lawyer representing an indigent client 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 Committee voted to revise comment 6 to read: “Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts…”

Garry Spencer opposed.

A copy of the Rule as revised (previously approved changes in green, approved FAOB changes in red, and current changes in blue) appear at the end of these minutes.

**ITILS/Rule 1.2 Comment 9**

David Lipscomb raised concerns about the proposed comment and the use of the words “knowledge” and “wilful blindness.” After discussion, the motion to adopt ITILS’s revised draft failed.

Justice Peterson suggested that Patrick Longan and David Lipscomb meet with ITILS members to draft a revised version of Rule 1.2. They will report at the Committee’s next meeting.

**Discussion Item:**

**Proposed changes to Part VII**

The Committee discussed comments received from the Georgia Association of Criminal Defense Lawyers. The Committee decided to review the comments again (including Justice Peterson’s comment and supporting case) and vote on the proposed revisions at its next meeting.

**Informational Item:**

**Report:**

Paula Frederick provided the Committee with a report regarding the status of previously amended rules.

The next meeting will be in August at Bar Headquarters.

The meeting adjourned at 3:21 p.m.
RULE 1.5 FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be
communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. To the extent that agreements to arbitrate disputes over fees or expenses are enforceable, a lawyer may enter into such an agreement with a client or 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.

(c)

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses
are to be deducted before or after the contingent fee is calculated.

(2) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:

   (i) the outcome of the matter; and,

   (ii) if there is a recovery showing:

       (A) the remittance to the client;

       (B) the method of its determination;

       (C) the amount of the attorney fee; and

       (D) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

   (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

   (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

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

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[1A] A fee can also be unreasonable if it is illegal. Examples of illegal fees are those taken without required court approval, those that
exceed the amount allowed by court order or statute, or those where acceptance of the fee would be unlawful, e.g., accepting controlled substances or sexual favors as payment.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule. In determining whether a particular contingent fee is reasonable, or whether it is
reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16 (d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8 (a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability
to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] Paragraph (b) requires informed consent to an agreement to arbitrate disputes over fees and expenses. 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 trial 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 regarding the existence and operation of the State Bar of Georgia’s Fee Arbitration Program, regardless of whether the attorney seeks an agreement to submit any future fee disputes to that program. 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.

Prohibited Contingent Fees
Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns. See Formal Advisory Opinions 36 and 47.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Joint responsibility for the representation entails financial and ethical responsibility for the representation.

Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the State
Bar of Georgia, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

a. A lawyer shall neither enter into a business transaction with a client if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, nor shall the lawyer knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

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

b. A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
c. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

d. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

e. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or

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

or

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

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

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

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

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

f. A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client gives informed consent;

2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

3. information relating to representation of a client is protected as required by Rule 1.6.

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 counsel in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith. To the extent that agreements to arbitrate disputes over a lawyer’s liability for malpractice are enforceable, a lawyer may enter into such an agreement with a client or a prospective client if the client or prospective client gives informed consent in a writing signed by the client or prospective client. The agreement to arbitrate and the attorney’s disclosures regarding arbitration must be set out in a separate paragraph, written in a font size at least as large as the rest of the contract, and separately initialed by the client and the lawyer.

i. A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by
the other lawyer unless his or her client gives informed consent regarding
the relationship. The disqualification stated in this paragraph is personal and
is not imputed to members of firms with whom the lawyers are associated.
j. A lawyer shall not acquire a proprietary interest in the cause of action or
subject matter of litigation the lawyer is conducting for a client, except that
the lawyer may:

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

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

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

Comment

Transactions Between Client and Lawyer

[1A] As a general principle, all transactions between client and lawyer should be
fair and reasonable to the client. The client should be fully informed of the true
nature of the lawyer's interest or lack of interest in all aspects of the transaction. In
such transactions a review by independent counsel on behalf of the client is often
advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's informed consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Use of Information to the Disadvantage of the Client

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

Gifts from Clients

[2] A lawyer may accept a gift from a client, if the transaction meets general
standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the objective advice that another lawyer can provide.

Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

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

Financial Assistance to Clients

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

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

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

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.

[812] 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.

Family Relationships Between Lawyers

Arbitration

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

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

Acquisition of Interest in Litigation

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).