

Disciplinary Rules and Procedures Committee
Meeting of September 19, 2019
Atlanta, Georgia

MINUTES

Chair John Haubenreich called the meeting to order at 12:30 p.m.

Attendance:

Committee members: John G. Haubenreich, David Lipscomb, H. Michael Bagley (phone), Paul T. Carroll, II (phone), Patrick H. Head, R. Javoyne Hicks, William D. James, Edward B. Krugman, David N. Lefkowitz (phone), Patrick E. Longan, Jabu M. Sengova (phone), Roy M. Sobelson, R. Gary Spencer, and Hon. Paige Reese Whitaker.

Staff: Paula J. Frederick, William D. NeSmith, III, Jenny K. Mittelman, and Kathya S. Jackson.

Guests: Ben Greer, ITILS Chair, Wilmer “Buddy” Parker, Laurel Terry (phone), Ellyn Rosen (phone) Philip Whit Engle (phone)

Approval of Minutes:

The Committee approved the Minutes from the June 6, 2019 meeting.

Informational Item:

Report from the Executive Committee’s Consideration of Rules

David Lipscomb reported that the Executive Committee considered the Committee’s proposed revision to Rules 1.0(e) and 8.4(b) (definition of “conviction”) but declined to approve the proposal. Chair Haubenreich suggested additional amendments to make the definition consistent in both rules. The Committee agreed to review his proposed revisions to Rules 1.0(e) and 8.4(b) at its next meeting.

David Lipscomb reported that the Executive Committee approved all of the other proposals from the Committee’s January and June meetings.

Action Items:

Rule 1.2

The Committee voted to amend section (d) and add section (e) to allow Georgia lawyers to provide advice to clients regarding Georgia’s Hope Act, which will allow cannabis production in the state.

Ben Greer and other representatives from the International Trade in Legal Services Committee presented their proposal to add language to Rule 1.2 to help combat money laundering. After discussion the Committee voted to amend comment 9 to address ITILS's request.

Client Assistance Program

The Committee voted to change Consumer Assistance Program to Client Assistance Program in Rules 4-202, 4-204, 4-221.1, 4-222 and 4-224.

Rule 4-228

The Committee voted to amend section (h) and add section (k) to address fees and costs incurred by receivers.

Use of term "grievance"

Bar Counsel will email proposed changes to Rules 1.0, 9.3, 4-202, 4-203, 4-204, 4-204.1, 4-204.3, 4-208.2, 4-208.4, 4-222, 4-223, 4-224, and Client Security Fund Rule 10-106 for review. The Committee will discuss the changes at its next meeting.

The next meeting will be in January 2020.

Revisions as approved:

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

- a. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- b. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- c. A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- d. Except as provided in paragraph (e), a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in

such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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

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

Comment

Allocation of Authority between Client and Lawyer

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

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should

also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a) (3).

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

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

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

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. A lawyer's knowledge may be inferred from the circumstances. See Rule 1.0(m). Thus, a lawyer may not evade the prohibition in 1.2(d) by ignoring the obvious. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue

assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16 (a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

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

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

Rule 4-202. Receipt of Grievances; Initial Review by Bar Counsel

(a) Grievances shall be filed in writing with the Office of the General Counsel of the State Bar of Georgia. In lieu of a Memorandum of Grievance the Office of the General Counsel may begin an investigation upon receipt of an Intake Form from the Client Assistance Program. All grievances must include the name of the complainant and must be signed by the complainant.

(b) The Office of the General Counsel may investigate conduct upon receipt of credible information from any source after notifying the respondent lawyer and providing a written

description of the information that serves as the basis for the investigation. The Office of the General Counsel may deliver the information it obtains to the State Disciplinary Board for initiation of a grievance under Rule 4-203 (2).

(c) The Office of the General Counsel shall be empowered to collect evidence and information concerning any grievance. The screening process may include forwarding a copy of the grievance to the respondent in order that the respondent may respond to the grievance.

(d) The Office of the General Counsel may request the Chair of the State Disciplinary Board to issue a subpoena as provided by OCGA § 24-13-23 requiring a respondent or a third party to produce documents relevant to the matter under investigation. Subpoenas shall be enforced in the manner provided at Rule 4- 221 (c).

(e) Upon completion of its screening of a grievance, the Office of the General Counsel shall be empowered to dismiss those grievances that do not present sufficient merit to proceed. Rejection of such grievances by the Office of the General Counsel shall not deprive the complaining party of any right of action he might otherwise have at law or in equity against the respondent.

(f) Those grievances that appear to allege a violation of Part IV, Chapter 1 of the Georgia Rules of Professional Conduct may be forwarded to the State Disciplinary Board pursuant to Bar Rule 4-204. In lieu of forwarding a matter to the State Disciplinary Board, the Office of the General Counsel may refer a matter to the Client Assistance Program so that it may direct the complaining party to appropriate resources.

Rule 4-204. Investigation and Disposition by State Disciplinary Board-Generally

(a) Each grievance that presents sufficient merit to proceed may be referred with a Notice of Investigation to the State Disciplinary Board for investigation and disposition in accordance with its rules. The Clerk of the State Disciplinary Boards shall assign a lawyer member of the State Disciplinary Board to be responsible for the investigation. The Office of the General Counsel shall simultaneously assign a staff investigator to assist the State Disciplinary Board member with the investigation. If the investigation of the State Disciplinary Board establishes Probable Cause to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of these rules, it shall:

- (1) issue a Formal Letter of Admonition;

- (2) issue a Confidential Reprimand;
- (3) issue a Notice of Discipline;
- (4) refer the case to the Supreme Court of Georgia for hearing before a Special Master and file a formal complaint with the Supreme Court of Georgia, all as hereinafter provided;
or
- (5) refer a respondent for evaluation by an appropriate medical or mental health professional pursuant to Bar Rule 4-104 upon the State Disciplinary Board's determination that there is cause to believe the lawyer is impaired.

All other cases may be either dismissed by the State Disciplinary Board or referred to the Client Assistance Program so that it may direct the complaining party to appropriate resources.

- (b) The primary investigation shall be conducted by the member of the State Disciplinary Board responsible for the investigation, assisted by the staff of the Office of the General Counsel, upon request of the State Disciplinary Board member. The Board of Governors of the State Bar of Georgia shall fund the Office of the General Counsel so that the Office of the General Counsel will be able to adequately investigate and prosecute all cases.

Rule 4-221.1 Confidentiality of Investigations and Proceedings

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- (e) The Office of the General Counsel may reveal confidential information to the following person if it appears that the information may assist them in the discharge of their duties:

...

- (9) The Client Assistance Program;

...

Rule 4-222. Limitation

- (a) No proceeding under Part IV, Chapter 2, shall be brought unless a Memorandum of

Grievance or a Client Assistance Program referral form has been received at the State Bar of Georgia headquarters or instituted pursuant to these rules within four years after the commission of the act; provided, however, this limitation shall be tolled during any period of time, not to exceed two years, that the offender or the offense is unknown, the offender's whereabouts are unknown, or the offender's name is removed from the roll of those authorized to practice law in this state.

(b) Referral of a matter to the State Disciplinary Board by the Office of the General Counsel shall occur within 12 months of the receipt of the Memorandum of Grievance at the State Bar of Georgia headquarters or institution of an investigation.

Rule 4-224. Expungement of Records

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(f) A lawyer may respond in the negative when asked if he has ever been professionally disciplined or determined to have violated any professional disciplinary rules if all grievances filed against the lawyer have either been referred to the Client Assistance Program, dismissed, or dismissed with a letter of instruction.

Rule 4-228-Receiverships

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(h) Professional Liability Insurance

To serve as a receiver, a lawyer must either maintain an Errors & Omissions insurance policy which includes coverage for conduct as a receiver.

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(k) State Bar of Georgia as a receiver.

If a lawyer who is an employee of the State Bar of Georgia is appointed as receiver of an Absent Lawyer's client files, the State Bar upon motion may request that the Supreme Court of Georgia enter an order assessing the absent lawyer the costs of receivership. The assessed amount must be paid in full by the absent lawyer before the Court will consider any application for reinstatement to the practice of law in this state.