
Ethics and Malpractice Risks

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Hypo 1

Doctor Jones botched a surgical procedure and caused some minor damage to his patient. Dr. Jones admitted he made a mistake and wanted to avoid being sued. He agreed to redo the surgery and pay the patient \$50,000 in return for the patient not filing a lawsuit. The doctor would like a Release. Can the doctor and the patient agree to all the terms of a settlement and then hire Dennis Cathey to draft the Release?

Is this ethically permitted?

Hypo 1

Would it matter if the doctor and the patient signed a conflict waiver?

Hypo 1

Rule 1.7—Conflict of Interest: General Rule

(c) Client informed consent is not permissible if the representation:

-is prohibited by law or these Rules;

-includes the assertion of a **claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or**

-involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Hypo 2

After a colleague refers you a great client, you would like to express your thanks by sending her a bottle of wine. May you do this?

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Rule 7.3(c) (Direct Contact with Prospective Clients)

Arizona Ethics Op. 2002-01 (2002) (restaurant certificate and movie tickets OK);

Philadelphia Ethics Op. 93-26 (1994) (gifts <\$100 OK if not related in timing or value to referrals).

Rhode Island Ethics Op. 89-5 (nominal gift less than \$100 improper)

South Carolina Ethics 75-04 (1975) (gift of candy improper)

Hypo 2

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

.....

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client...

Hypo 3

Your neighbor's wife was a victim of medical malpractice. Her husband asks you for the name of a great malpractice lawyer, and you give him Dennis' name. Later, Dennis calls and thanks you for the referral. He also tells you that he will give you 1/3 of the fee as an acknowledgment of the referral.

Is this agreement permitted by the Rules?

What disclosures must you make to the client?

When must you make the disclosures?

Rule 1.5 (e) (Fees)

Hypo 3

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Rule 1.5 (e) (Fees)

Hypo 3

1.5 (e) A division of a fee between lawyers who are not in the same firm may be made only if:

- 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;**
- 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
- the total fee is reasonable.

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Is the referring attorney entitled to his fee-split if the lawyers do not abide by Rule 1.5?

If not, who keeps that portion of the fee?

Hypo 4

As a lawyer, you have earned a juris doctor degree.

-If you are not an M.D., can you refer to yourself as Doctor Cathey in your med mal marketing materials?

-As a sole practitioner, can you name your firm "Cathey & Associates?"

-Can a sole practitioner name his firm "The Cathey Law Group?"

-How about "The Cathey Law Firm?"

(continued on next slide)

Rule 7.1 (Communications Concerning a Lawyer's Services)

Rule 7.4 (Communication of Fields of Practice)

Rule 7.5 (Firm Names and Letterheads)

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Rule 7.1 (Communications Concerning a Lawyer's Services)

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Formal Advisory Opinion 16-3

Question Presented: May a sole practitioner use a firm name that includes "group," "firm," "& Associates"?

FIRM NAMES

Summary Answer:

A sole practitioner may not use a firm name that includes “group” or “& Associates” because both terms would incorrectly imply that the sole practitioner practices with other lawyers. However, a sole practitioner may use a firm name that includes “firm.”

Hypo 4

- Can Dennis have a firm named "Pitbull Lawyer, LLC?"**
- How about "Cathey Pitbull Lawyer, LLC?"**
- How about "Cathey Better Than The Rest, LLC?"**

Rule 7.1 (Communications Concerning a Lawyer's Services)

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Rule 7.5 (Firm Names and Letterheads)

Hypo 4

Rule 7.5

(e) A trade name may be used by a lawyer in private practice if:

(1) the trade name includes the name of at least one of the lawyers practicing under said name. A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm; and

(2) the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection.

Hypo 4

-Can Dennis identify himself as a specialist in a particular practice area?

-Can three friends who share office space and facilities call themselves Smith, Jones & Johnson if they are not in any type of actual partnership relationship?

Rule 7.1 (Communications Concerning a Lawyer's Services)

Rule 7.4 (Communication of Fields of Practice)

Rule 7.5 (Firm Names and Letterheads)

Hypo 4

Rule 7.4

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

Hypo 4

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-Can three friends who share office space and facilities call themselves Smith, Jones & Johnson if they are not in any type of actual partnership relationship?

Rule 7.1 (Communications Concerning a Lawyer's Services)

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Rule 7.5 (Firm Names and Letterheads)

Hypo 4

Rule 7.5

Comment

[1] Firm names and letterheads are subject to the general requirement of all advertising that the communication must not be false, fraudulent, deceptive or misleading. Therefore, lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Jones and Jones," for that title suggests partnership in the practice of law.

Hypo 5

You represent a 42-year-old pilot who suffers from nerve damage primarily on his face. He sometimes drools, and the condition is permanent. Your client has been put on a narcotic pain reliever, which he takes 3x per day and which he expects to take for the rest of his life. The client tells you that if the airline finds out that he is on this medicine, he will lose his position as a pilot. Client makes approximately \$250K/year, and client obviously does not want to lose his job. You have researched the medicine, and your research shows that it is unsafe to drive a car while taking the medicine.

What steps should/may you take in response to what you have learned?

Rule 1.4

Rule 1.6

Rule 2.1, Comment 1

Hypo 5

Rule 1.6

a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

Hypo 5

- 1.6 b. 1. A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:
- i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
 - ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;
 - iii. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - iv. to secure legal advice about the lawyer's compliance with these Rules.

Hypo 5

A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

b. 2. In a situation described in paragraph (b) (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

3. Before using or disclosing information pursuant to paragraph (b) (1) (i) or (ii), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

Hypo 6

During the course of litigation, you feel that your opposing counsel has engaged in various ethical violations which have created an unfair advantage for the opposing side (and caused your blood to boil). The perceived ethical violations are: destroying documents, lying about witness whereabouts, destroying documents and coaching witnesses at depositions.

- When you become entirely fed up, may you threaten a bar complaint to gain leverage in settlement negotiations?**
- Must you report any of the above conduct to the State Bar?**

Rule 8.3 (Reporting Professional Misconduct)

ABA Model Rule 8.3 (Reporting Professional Misconduct)

Hypo 6

During the course of litigation, you feel that your opposing counsel has engaged in various ethical violations which have created an unfair advantage for the opposing side (and caused your blood to boil). The perceived ethical violations are: destroying documents, lying about witness whereabouts, destroying documents and coaching witnesses at depositions.

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Rule 8.3 (Reporting Professional Misconduct)

ABA Model Rule 8.3 (Reporting Professional Misconduct)

Hypo 6

- RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT
- (a) A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *should* inform the appropriate professional authority.
- (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.

There is no disciplinary penalty for a violation of this Rule.

ABA Formal Opinion 04-433 (A lawyer having knowledge of the professional misconduct of another licensed lawyer, including a non-practicing lawyer, *is obligated* under Model Rule 8.3 to report such misconduct if it raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer...)

Hypo 6

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

....

(h) present, participate in presenting or threaten to present criminal charges **solely** to obtain an advantage in a civil matter.

Hypo 7

Your plaintiff's firm is growing, and you decide to hire a defense lawyer, Donald, who you have litigated against for a few years. He is presently opposing counsel in one of your large personal injury cases.

If Donald joins your firm, can he work on the case he had been defending if the former client does not agree?

Rule 1.9 (Conflict of Interest-Former Client)

Rule 1.10 (Imputed Disqualification: General Rule)

Rules 1.11 and 1.12 (Government lawyers and former judges)

Formal Advisory Opinion 05-9 (Temporary Attorneys)

ABA Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule)

Hodge v. UFRA-Sexton, LP, 256 Ga. 136 (2014)

Hypo 7

Your plaintiff's firm is growing, and you decide to hire a defense lawyer, Donald, who you have litigated against for a few years. He is presently opposing counsel in one of your large personal injury cases.

If Donald joins your firm, can you continue to handle the case as counsel for the plaintiff if the opposing side objects?

Would the answer be different if Donald was a paralegal?

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Hypo 7

What if another lawyer from Donald's firm joined your firm. Would the answer be different?

Rule 1.9 (Conflict of Interest: Former Client)

Hypo 7

Rule 1.9 (Conflicts-Former Clients) would allow this, assuming this new lawyer had no knowledge of the facts.

Comment 5: These rules...operate "to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict."

Hypo 8

You are handling a complex, high-dollar transaction for woman who is selling her company. One day you open an email from the lawyer on the other side of the deal, and all it says is: "See attached." You click on the document and it opens on your monitor. The document is just a few sentences long, and it is entitled "Memo." You realize that the short memo was not intended for you, and it contains juicy information regarding the other side's willingness to negotiate the terms of the transaction.

What can you do with the memo?

Hypo 8

Here is what the document says:

Memo from Purchaser to Purchaser's attorney:

We have offered Susan Seller \$6,400,000 for his business, and we told him this is our highest offer. I thought about this last night, and I have decided I want to pay up-to \$10,000,000 for the business. Don't tell her lawyer that, but you have authority to bid that much to close the transaction.

Hypo 8

For litigators:

Plaintiff's lawyers, this is what you found:

Memo from claims representative to defense attorney:

You are authorized to offer \$600,000 at this time, with the understanding that we will settle this case for the \$2,000,000 policy limits if plaintiff and her attorney send a time-limit demand for that amount.

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Rule 3.4 Fairness to Opposing Party and Counsel.

Rule 4.4 Respect For Rights of Third Persons

ABA Formal Opinion 06-440 (Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382)

ABA Formal Opinion 05-437 (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368)

ABA Formal Opinion 06-442 (No prohibition on lawyers discovering and using metadata found in documents that other lawyers transmit to them)

Alston & Bird v. Mellon Ventures, 307 Ga. App. 640 (2010)

Hypo 9

Suppose you are representing a driver and passenger in a Personal injury lawsuit against Coke. Upon accepting the claim, the available evidence reflected that the Coke truck went through a red light prior to crashing into your clients' car.

Are there any ethical concerns with regard to representing the driver and the passenger in the claim against Coke?

Fiduciary Duties

Rule 1.4 (Communication)

Hypo 9

Suppose you are representing a driver and passenger in a Personal injury lawsuit against Coke. Upon accepting the claim, the available evidence reflected that the Coke truck went through a red light prior to crashing into your clients' car...

While preparing for the driver's deposition, he discloses to you that he was smoking pot at a friend's house prior to the crash. What disclosures can/must you make? Must you withdraw?

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While preparing for the driver's deposition, he discloses to you that he was smoking pot at a friend's house prior to the crash. What disclosures can/must you make? Must you withdraw?

Fiduciary Duties

Rule 1.4 (Communication)

Rule 1.7 (Conflict of Interest-General Rule)

Rule 1.6 (Confidentiality of Information)

Rule 1.16(a) (Declining or Terminating Representation)

Rule 1.9 Conflict of Interest: Former Client

Hypo 9

Defense lawyers, keep in mind that you have the same risks when defending two clients.

Don't forget that you need a conflict waiver when you are representing more than one client.

Hypo 10

Your opposing counsel calls you a day after his interrogatory responses are due, and he asks for an extension.

- **What should you do?**
- **What if the discovery responses which are overdue are Requests to Admit which may be dispositive of the liability issue in your case?**
- **What if you have three other cases with the same opposing counsel?**

Rule 1.2, Comment 1 (Scope of Representation and Allocation of Authority...)

Rule 1.3 (Diligence)

Rule 1.4 (Communication)

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Hypo 10

- **What if YOU are the attorney who has failed to respond to Interrogatories or Requests to Admit...**
- **What must you tell your client?**
- **When must you tell your client that you have missed a deadline?**
- **Can you tell your errors and omissions carrier before you tell your client?**

Rule 1.1 (Competence)

Rule 1.3 (Diligence)

Rule 1.4 (Communication)

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Hypo 11

Your spouse had a small growth removed from her skin and was told it might be malignant. As instructed, she calls the doctor's office the next day to obtain the results of the pathology lab.

The receptionist takes a message and says the doctor will call back promptly. How soon should the doctor (or someone at the office) call back?

Rule 1.4 (Communication)

Hypo 11

Your client has called you requesting an update on the status of his claim. You were in a meeting and receive the voicemail message upon returning to your desk. How soon should you return the client's call?

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Rule 1.4 (Communication)

Can you please ask
Dr. Jones to call me
with the test results?



Return the calls!!

Hypo 12

Is this an acceptable way to handle the client's file in your fee contract?

Upon the completion of my representation of you, I plan to destroy your entire file. This will assist in keeping your private matters from getting into the hands of others. If you desire that I provide the file to you, I will keep the originals and provide a copy to you at your expense. I will not provide copies of memos or legal research, as those documents are my work product and not considered part of your file. If you owe any attorney's fees or expenses, then I will maintain a lien on your file and will not produce it until such time as you have satisfied your debt to the firm.

Adams v Putnam County, 290 Ga. App. 20, 658 S.E.2d 805 (2008).

O.C.G.A. §15-19-14 (a). (Lien on client's file)

Formal Advisory Opinion of the State Bar of Georgia No. 87-5

Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 571 (2003)

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