



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

January 7, 2022

Hybrid

	Page Nos.
<u>I. Welcome</u>	(Bagley) 3
<u>II. Approval of Minutes from 10/22/21 meeting</u>	(Bagley) 4-5
<u>III. Action Items</u>	(Frederick/Mittelman)
 A. Rule 3.4(f) <i>(The Georgia version of Rule 3.4(f)(1) has a typo in the first sentence that changes the meaning of the Rule. Since the typo was carried from the Bar's Motion to Amend and appears in the Court order amending the Rule, it requires a corrective Court order. Bar counsel would like to make other revisions to the rule to bring it in line with the ABA Model)</i>	
i. GRPC 3.4	6-8
ii. ABA Rule 3.4	9-11
iii. Redline version of 3.4(f)	12
 B. Request from the Formal Advisory Opinion Board (David Lefkowitz)	
i. Proposed revisions to Rule 1.5	13-20
ii. Proposed revisions to Rule 1.8	21-30
iii. David Lefkowitz's email to FAOB	31
iv. <u>Innovative Images LLC. v. James Darren Summerville, et al.</u>	32-58
v. ABA Formal Ethics Opinion 02-245	59-66

vi.	ABA Rule 1.8 Comment 17	67-68
-----	-------------------------	-------

C. Rule 1.8 (e)(3)

i.	ABA Rule 1.8	69-87
ii.	GRPC 1.8	88-95
iii.	Proposed revisions to GRPC 1.8	96-107

IV. Information Items

A. Registration of In-House Counsel

i.	ABA Report on Registration of In-House Counsel	108-113
----	--	---------

B. Report on status of previously amended rules.

V. Adjourn

2021-2022

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	2022
-----------------------	------

Vice Chairperson

R. Gary Spencer	2022
-----------------	------

Members

Hon. J. Antonio DelCampo	2022
Erin H. Gerstenzang	2023
John G. Haubenreich	2022
Patrick H. Head	2022
R. Javoyne Hicks	2022
William Dixon James	2022
Seth David Kirschenbaum	2022
Catherine Koura	2024
Edward B. Krugman	2022
David Neal Lefkowitz	2022
David S. Lipscomb	2022
Patrick E. Longan	2022
Jabu Mariette Sengova	2022
H. Craig Stafford	2023
William Hickerson Thomas, Jr.	2023
Peter Werdesheim	2024
Patrick John Wheale	2024
Hon. Paige Reese Whitaker	2022

Staff Liaison

Paula J. Frederick	2022
--------------------	------

Disciplinary Rules and Procedures Committee
Meeting of October 22, 2021
Hybrid meeting

MINUTES

Chair Michael Bagley called the meeting to order at 2:02 p.m.

Attendance:

Committee members: Michael Bagley, Mazie Lynn Causey (virtual), Hon. J. Antonio DelCampo, Erin H. Gerstenzang (virtual), John G. Haubenreich, Patrick H. Head, R. Javoyne Hicks, William D. James, Edward B. Krugman (virtual), David N. Lefkowitz (virtual), David S. Lipscomb (virtual), Patrick E. Longan (virtual), Jabu M. Sengova (virtual), William Thomas, Jr., Patrick Wheale (virtual), and Hon. Paige Reese Whitaker (virtual).

Staff: Damon Elmore, Paula Frederick, William D. NeSmith, III, and Kathya S. Jackson.

Guests: Supreme Court Justice Peterson and Supreme Court Justice Colvin.

Approval of Minutes:

The Committee approved the Minutes from the September 1, 2021 meeting.

Action Item:

Formal Advisor Opinion Board request:

After review and discussion of Innovative Images, LLC v. James Darren Summerville, et al., the Committee agreed to draft comments to Rules 1.5 and 1.8 for further discussion at its next meeting. David Lefkowitz volunteered to draft the new language.

Rule 1.8:

The Committee agreed to add ABA 1.8(e)(3) to GRPC 1.8 for further discussion at its next meeting. Further, the Committee will consider adding some of the ABA 1.8 comments to the proposed GRPC 1.8 at its next meeting.

Rule 5.5/John Fleming's request

Paula Frederick reported that John Fleming, pro bono partner at Eversheds Sutherland, contacted her to discuss a rule that would allow in-house counsel who are not licensed in Georgia to provide pro bono legal services through one of the recognized legal services organizations. Paula suggested that such a rule be paired with a rule requiring that in-house counsel register with the State Bar of Georgia. Mr. Fleming does not believe there would be widespread support for a registration rule, and the Committee did not take a position on that question. The Committee

asked Paula Frederick to provide statistics regarding how many states require in-house counsel to register and pay dues, before discussing the matter further.

Part 7 revisions

The Committee would like to hold a seminar (with a CLE professionalism credit) to discuss the proposed changes during the Midyear BOG meeting (January 2022) and invite comments. The Committee would consider all comments and make any necessary changes at the Spring BOG meeting (March 2022). Finally, the Committee would submit the final draft to the BOG at its Annual Meeting (June 2022).

Suggestions:

Patrick Wheale suggested that the Bar hold an annual seminar to discuss the most current rule changes.

Report:

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

The meeting adjourned at 2:54 p.m.

1 **RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

2
3
4 A lawyer shall not:

5 (a) unlawfully obstruct another party's access to evidence or unlawfully alter,
6 destroy or conceal a document or other material having potential evidentiary value.

7 A lawyer shall not counsel or assist another person to do any such act;

8 (b)

9 (1) falsify evidence;

10 (2) counsel or assist a witness to testify falsely; or

11 (3) pay, offer to pay, or acquiesce in the payment of compensation to a
12 witness contingent upon the content of the testimony or the outcome of the
13 case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

14 (i) expenses reasonably incurred by a witness in preparation,
15 attending or testifying; or

16 (ii) reasonable compensation to a witness for the loss of time in
17 preparing, attending or testifying; or

18 (iii) a reasonable fee for the professional services of an expert witness;

19 (c) Reserved.;

20 (d) Reserved.;

21 (e) Reserved.;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; or the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; and

(2) the information is not otherwise subject to the assertion of a privilege by the client;

(g) use methods of obtaining evidence that violate the legal rights of the opposing party or counsel; or

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

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

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Reserved.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

[5] As to paragraph (g), the responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of the opposing party or counsel. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence.

Rule 3.4: Fairness to Opposing Party & Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

21

22 (1) the person is a relative or an employee or other agent of a client; and

23 (2) the lawyer reasonably believes that the person's interests will not be

24 adversely affected by refraining from giving such information.

25 Comment

26 [1] The procedure of the adversary system contemplates that the evidence in a case

27 is to be marshalled competitively by the contending parties. Fair competition in the

28 adversary system is secured by prohibitions against destruction or concealment of

29 evidence, improperly influencing witnesses, obstructive tactics in discovery

30 procedure, and the like.

31 [2] Documents and other items of evidence are often essential to establish a claim or

32 defense. Subject to evidentiary privileges, the right of an opposing party, including

33 the government, to obtain evidence through discovery or subpoena is an important

34 procedural right. The exercise of that right can be frustrated if relevant material is

35 altered, concealed or destroyed. Applicable law in many jurisdictions makes it an

36 offense to destroy material for purpose of impairing its availability in a pending

37 proceeding or one whose commencement can be foreseen. Falsifying evidence is

38 also generally a criminal offense. Paragraph (a) applies to evidentiary material

39 generally, including computerized information. Applicable law may permit a lawyer

40 to take temporary possession of physical evidence of client crimes for the purpose

41 of conducting a limited examination that will not alter or destroy material
42 characteristics of the evidence. In such a case, applicable law may require the lawyer
43 to turn the evidence over to the police or other prosecuting authority, depending on
44 the circumstances.

45 [3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to
46 compensate an expert witness on terms permitted by law. The common law rule in
47 most jurisdictions is that it is improper to pay an occurrence witness any fee for
48 testifying and that it is improper to pay an expert witness a contingent fee.

49 [4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from
50 giving information to another party, for the employees may identify their interests
51 with those of the client. See also Rule 4.2.

1 **Rule 3.4 (f)**

2 (f) request a person other than a client to refrain from voluntarily giving relevant
3 information to another party unless:

4 (1) the person is a relative or an employee or other agent of a client; ~~or~~and

5 (2) the lawyer reasonably believes that the person's interests will not be

6 adversely affected by refraining from giving such information;~~and~~

7 ~~(2) the information is not otherwise subject to the assertion of a privilege by~~

8 ~~the client.~~

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.

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;

41 C. the amount of the attorney fee; and

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

46 d. A lawyer shall not enter into an arrangement for, charge, or collect:

- 47 1. any fee in a domestic relations matter, the payment or amount of
48 which is contingent upon the securing of a divorce or upon the amount
49 of alimony or support, or property settlement in lieu thereof; or
50 2. a contingent fee for representing a defendant in a criminal case.

51 e. A division of a fee between lawyers who are not in the same firm may be
52 made only if:

- 53 1. the division is in proportion to the services performed by each lawyer
54 or, by written agreement with the client, each lawyer assumes joint
55 responsibility for the representation;
56 2. the client is advised of the share that each lawyer is to receive and
57 does not object to the participation of all the lawyers involved; and
58 3. the total fee is reasonable.

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

61 Comment

62
63 Reasonableness of Fee and Expenses

64 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the
65 circumstances. The factors specified in (1) through (8) are not exclusive. Nor will
66 each factor be relevant in each instance. Paragraph (a) also requires that expenses
67 for which the client will be charged must be reasonable. A lawyer may seek
68 reimbursement for the cost of services performed in-house, such as copying, or for
69 other expenses incurred in-house, such as telephone charges, either by charging a
70 reasonable amount to which the client has agreed in advance or by charging an
71 amount that reasonably reflects the cost incurred by the lawyer.

72
73 [1A] A fee can also be unreasonable if it is illegal. Examples of illegal fees are
74 those taken without required court approval, those that exceed the amount allowed
75 by court order or statute, or those where acceptance of the fee would be unlawful,
76 e.g., accepting controlled substances or sexual favors as payment.

77
78 Basis or Rate of Fee

79 [2] When the lawyer has regularly represented a client, they ordinarily will have
80 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.

Arbitration

[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

121 lawyer should reveal to the client or prospective client that in arbitration: (1) the
122 client or prospective client waives the right to a jury trial, because the dispute will
123 be resolved by an individual arbitrator or a panel of arbitrators; (2) generally there
124 is no right to an appeal from an arbitration decision; (3) arbitration may not permit
125 the broad discovery that would be available in civil litigation; and (4) arbitration
126 may involve more substantial up-front costs than civil litigation. The lawyer should
127 also inform the client or prospective client that an agreement to arbitrate a dispute
128 over fees and expenses is not a waiver of the right to make a disciplinary complaint
129 regarding the lawyer.

131 Prohibited Contingent Fees

132 [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic
133 relations matter when payment is contingent upon the securing of a divorce or
134 upon the amount of alimony or support or property settlement to be obtained. This
135 provision does not preclude a contract for a contingent fee for legal representation
136 in connection with the recovery of post-judgment balances due under support,
137 alimony or other financial orders because such contracts do not implicate the same
138 policy concerns. See Formal Advisory Opinions 36 and 47.

140 Division of Fee

141 [7] A division of fee is a single billing to a client covering the fee of two or more
142 lawyers who are not in the same firm. A division of fee facilitates association of
143 more than one lawyer in a matter in which neither alone could serve the client as
144 well. Joint responsibility for the representation entails financial and ethical
145 responsibility for the representation.

146

147 [8] Paragraph (e) does not prohibit or regulate division of fees to be received in the
148 future for work done when lawyers were previously associated in a law firm.

149

150 Disputes over Fees

151 [9] If a procedure has been established for resolution of fee disputes, such as an
152 arbitration or mediation procedure established by the State Bar of Georgia, the
153 lawyer should conscientiously consider submitting to it. Law may prescribe a
154 procedure for determining a lawyer's fee, for example, in representation of an
155 executor or administrator, a class or a person entitled to a reasonable fee as part of
156 the measure of damages. The lawyer entitled to such a fee and a lawyer
157 representing another party concerned with the fee should comply with the
158 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.

- 21 c. A lawyer shall not prepare an instrument giving the lawyer or a person
22 related to the lawyer as parent, grandparent, child, grandchild, sibling, or
23 spouse any substantial gift from a client, including a testamentary gift,
24 except where the client is related to the donee.
- 25 d. Prior to the conclusion of representation of a client, a lawyer shall not make
26 or negotiate an agreement giving the lawyer literary or media rights to a
27 portrayal or account based in substantial part on information relating to the
28 representation.
- 29 e. A lawyer shall not provide financial assistance to a client in connection with
30 pending or contemplated litigation, except that:
- 31 1. a lawyer may advance court costs and expenses of litigation, the
32 repayment of which may be contingent on the outcome of the matter;
33 or
- 34 2. a lawyer representing a client unable to pay court costs and expenses
35 of litigation may pay those costs and expenses on behalf of the client.
- 36 f. A lawyer shall not accept compensation for representing a client from one
37 other than the client unless:
- 38 1. the client gives informed consent;
39 2. there is no interference with the lawyer's independence of professional
40 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 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.

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

81 such transactions a review by independent counsel on behalf of the client is often
82 advisable. Furthermore, a lawyer may not exploit information relating to the
83 representation to the client's disadvantage. For example, a lawyer who has learned
84 that the client is investing in specific real estate may not, without the client's
85 informed consent, seek to acquire nearby property where doing so would adversely
86 affect the client's plan for investment. Paragraph (a) does not, however, apply to
87 standard commercial transactions between the lawyer and the client for products or
88 services that the client generally markets to others, for example, banking or
89 brokerage services, medical services, products manufactured or distributed by the
90 client, and utilities' services. In such transactions, the lawyer has no advantage in
91 dealing with the client, and the restrictions in paragraph (a) are unnecessary and
92 impracticable.

93 94 Use of Information to the Disadvantage of the Client

95 [1B] It is a general rule that an attorney will not be permitted to make use of
96 knowledge, or information, acquired by the attorney through the professional
97 relationship with the client, or in the conduct of the client's business, to the
98 disadvantage of the client. Paragraph (b) follows this general rule and provides that
99 the client may waive this prohibition. However, if the waiver is conditional, the
100 duty is on the attorney to comply with the condition.

101

102 Gifts from Clients

103 [2] A lawyer may accept a gift from a client, if the transaction meets general
104 standards of fairness. For example, a simple gift such as a present given at a
105 holiday or as a token of appreciation is permitted. If effectuation of a substantial
106 gift requires preparing a legal instrument such as a will or conveyance, however,
107 the client should have the objective advice that another lawyer can provide.
108 Paragraph (c) recognizes an exception where the client is a relative of the donee or
109 the gift is not substantial.

110

111 Literary Rights

112 [3] An agreement by which a lawyer acquires literary or media rights concerning
113 the subject of the representation creates a conflict between the interest of the client
114 and the personal interest of the lawyer. Measures suitable in the representation of
115 the client may detract from the publication value of an account of the
116 representation. Paragraph (d) does not prohibit a lawyer representing a client in a
117 transaction concerning literary property from agreeing that the lawyer's fee shall
118 consist of a share in ownership in the property, if the arrangement conforms to
119 Rule 1.5 and paragraph (j) of this rule.

120

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

[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 that in arbitration: (1) 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; and (4) arbitration
may involve more substantial up-front costs than civil litigation. 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.

180 Acquisition of Interest in Litigation

181 [10] Paragraph (j) states the traditional general rule that lawyers are prohibited
182 from acquiring a proprietary interest in litigation. This general rule, which has its
183 basis in the common law prohibition of champerty and maintenance, is subject to
184 specific exceptions developed in decisional law and continued in these rules, such
185 as the exception for reasonable contingent fees set forth in Rule 1.5 and the
186 exception for lawyer's fees and for certain advances of costs of litigation set forth
187 in paragraph (e).

From: Betty Derrickson

Sent: Wednesday, March 10, 2021 3:23 PM

To: 'Alfreda Lynette Sheppard' <ASheppard@watsonspence.com>; 'Amanda Rourk Clark Palmer' <aclark@gsllaw.com>; Betty Derrickson <BettyD@gabar.org>; 'C. Andrew Childers' <achilders@cssfirm.com>; 'Chris Steinmetz III' <cjs@ggsattorneys.com>; 'David N. Lefkowitz' <dnl@lefkowitzfirm.com>; 'Edward B. Krugman' <Krugman@bmelaw.com>; 'Jacob Edward Daly' <jdaly@finglaw.com>; 'Jeffrey Alan Van Detta' <jvandetta@johnmarshall.edu>; 'Jeffrey Hobart Schneider' <jeffreyschneider@wncwlaw.com>; 'Jennifer M. Romig' <jennifer.romig@gmail.com>; John Shiptenko <JohnS@gabar.org>; 'Letitia A. McDonald' <tmcdonald@kslaw.com>; 'Lonnie T. Brown Jr.' <ltbrown@uga.edu>; 'Mary Prebula' <mprebula@prebulallc.com>; 'Megan Elizabeth Boyd' <mboyd7@gsu.edu>; 'Elissa Haynes' <HaynesE@deflaw.com>; 'Norbert D. Hummel IV' <bert.hummel@lewisbrisois.com>; 'Patrick E. Longan' (longan_p@law.mercer.edu) <longan_p@law.mercer.edu>; 'Sherry Boston' <sboston@dekalbcountyga.gov>

Cc: Bill NeSmith <BillN@gabar.org>; Paula Frederick <PaulaF@gabar.org>

Subject: Message for David Lefkowitz Regarding March 18, 2021 Formal Advisory Opinion Board Meeting

Good afternoon Board members:

The Formal Advisory Opinion Board meeting scheduled for March 18, 2021 is canceled. At this time, there are no action items requiring the work of the Board.

Formal Advisory Opinion Request No. 20-R2 was the only action item on the March 18, 2021 meeting agenda. You will recall that on September 8, 2020, the Supreme Court of Georgia issued an order in Innovative Images, LLC v. Summerville (see attached) in which the Court discussed whether Georgia lawyers have an obligation under Rule 1.4 (b) to “fully apprise their clients of the advantages and disadvantages of arbitration before including a provision in a retainer agreement mandating arbitration of legal malpractice claims.” The Court declined to decide this issue, stating, “we will leave it to the State Bar of Georgia to address in the first instance whether this is a subject worthy of a formal advisory opinion or amendment to the GRPC.” On October 27, 2020, the Formal Advisory Opinion Board accepted this request for the drafting of a formal advisory opinion, and a subcommittee was appointed to draft a proposed opinion for the Board’s consideration. While working on a proposed draft, the subcommittee discussed whether a formal advisory opinion is the best way to provide guidance to Georgia lawyers on this issue. The subcommittee decided that the issue raised in the request might be better addressed through amending the Georgia Rules of Professional Conduct rather than an opinion. This matter will be an action item on the next Disciplinary Rules and Procedures Committee meeting agenda. The Disciplinary Rules and Procedures Committee is scheduled to meet on Friday, March 19, 2020.

Once there are action items for the Board to address, John and Betty will communicate with the Board about scheduling the next meeting.

Thank you.

David Lefkowitz, Chair

In the Supreme Court of Georgia

Decided: September 8, 2020

S19G1026. INNOVATIVE IMAGES, LLC v. JAMES DARREN
SUMMERVILLE, et al.

NAHMIAS, Presiding Justice.

Innovative Images, LLC (“Innovative”) sued its former attorney James Darren Summerville, Summerville Moore, P.C., and The Summerville Firm, LLC (collectively, the “Summerville Defendants”) for legal malpractice. In response, the Summerville Defendants filed a motion to dismiss the suit and to compel arbitration in accordance with the parties’ engagement agreement, which included a clause mandating arbitration for any dispute arising under the agreement. The trial court denied the motion, ruling that the arbitration clause was “unconscionable” and thus unenforceable because it had been entered into in violation of Rule 1.4 (b) of the Georgia Rules of Professional Conduct (“GRPC”) for

attorneys found in Georgia Bar Rule 4-102 (d). In Division 1 of its opinion in *Summerville v. Innovative Images, LLC*, 349 Ga. App. 592 (826 SE2d 391) (2019), the Court of Appeals reversed that ruling, holding that the arbitration clause was not void as against public policy or unconscionable. See *id.* at 597-598. We granted Innovative's petition for certiorari to review the Court of Appeals's holding on this issue.

As explained below, we conclude that regardless of whether Summerville violated GRPC Rule 1.4 (b) by entering into the mandatory arbitration clause in the engagement agreement without first apprising Innovative of the advantages and disadvantages of arbitration – an issue which we need not address – the clause is not void as against public policy because Innovative does not argue and no court has held that such an arbitration clause may *never* lawfully be included in an attorney-client contract. For similar reasons, the arbitration clause is not substantively unconscionable, and on the limited record before us, Innovative has not shown that the clause was procedurally unconscionable. Accordingly, we affirm the

judgment of the Court of Appeals.¹

1. *Facts and procedural history.*

As summarized by the Court of Appeals, the record shows the following:

In July 2013, Innovative retained Mr. Summerville and his law firm to represent it in post-trial proceedings following an adverse civil judgment, and the parties executed an attorney-client engagement agreement that set out the terms of the representation (the “Engagement Agreement”). A section of the Engagement Agreement entitled “Other Important Terms” included a choice-of-law clause stating that the “agreement and its performance are governed by the laws of the State of Georgia.” That section of the Engagement Agreement also included an arbitration clause (the “Arbitration Clause” or the “Clause”) stating:

Any dispute arising under this agreement will be submitted to arbitration in Atlanta, Georgia

¹ The trial court issued a separate order opening an automatic default against the Summerville Defendants under the “proper case” ground, see OCGA § 9-11-55 (b). Innovative cross-appealed that order, arguing that the Summerville Defendants had failed to provide a reasonable explanation for their failure to timely file an answer. See *Summerville*, 349 Ga. App. at 604. In Division 2 of its opinion, the Court of Appeals affirmed the trial court’s order, saying that “[f]or [the proper case] ground to apply, the defendant must provide a reasonable explanation for the failure to file a timely answer,” and holding that the Summerville Defendants had done so. *Id.* at 605-606. We recently disapproved *Summerville* to the extent that it holds that a reasonable excuse is required to open a default under the proper case ground. See *Bowen v. Savoy*, 308 Ga. 204, 209 n.7 (839 SE2d 546) (2020). Innovative’s petition for certiorari did not seek review of the Court of Appeals’s decision on the cross-appeal.

under the rules and procedures of the State Bar of Georgia Committee on the Arbitration of Attorney Fee Disputes, if concerning fees, or by an arbitrator to be agreed to by the parties, if concerning any other matter. Alternatively, you may choose to arbitrate any dispute arising under this agreement in Atlanta by a single arbitrator provided through the Atlanta office of Judicial Arbitration and Mediation Service (“JAMS”). The decision of any such arbitrator or arbitrators shall be binding, conclusive, and not appealable. In the event a dispute is not or cannot be arbitrated, the parties consent to the jurisdiction of and venue in the courts of Fulton County, Georgia.

In October 2017, Innovative filed the present legal malpractice action in the State Court of Fulton County against the Summerville Defendants for the allegedly negligent post-trial representation of Innovative in the underlying civil suit, asserting claims for . . . professional negligence, breach of contract, and breach of fiduciary duties. During the course of the litigation, the Summerville Defendants filed a motion to stay discovery, compel arbitration, and dismiss the legal malpractice action based on the Arbitration Clause (the “Motion to Compel Arbitration”). Innovative opposed the Motion to Compel Arbitration, contending, among other things, that the Arbitration Clause was unconscionable because the Summerville Defendants had not advised Innovative of the possible disadvantages associated with arbitration.

The trial court denied the Summerville Defendants’ Motion to Compel Arbitration, agreeing with Innovative that the Arbitration Clause was unconscionable. The trial

court reasoned that although the [Georgia Arbitration Code (“GAC”), OCGA § 9-9-1 et seq.,] does not prohibit the arbitration of legal malpractice claims, Rule 1.4 (b) of the [GRPC] . . . and American Bar Association (“ABA”) Formal Opinion 02-425 support imposing a legal requirement on attorneys to explain to their prospective clients the possible disadvantages of binding arbitration clauses contained in attorney-client engagement contracts, such as the waiver of the right to a jury trial, the potential waiver of broad discovery, and the waiver of the right to appeal. And, because there was no evidence in the record that the Summerville Defendants explained the Arbitration Clause to their prospective client, Innovative, before the Engagement Agreement was signed, the trial court found that the Arbitration Clause was unconscionable and thus unenforceable.

Summerville, 349 Ga. App. at 593-595 (footnotes omitted).

The trial court issued a certificate of immediate review, and the Court of Appeals granted the Summerville Defendants’ application for interlocutory appeal. In its subsequent opinion reversing the trial court’s order, the Court of Appeals’s analysis bounced between case law and concepts related to whether a contract is unconscionable and case law and concepts related to whether a contract is void as against public policy. See *id.* at 595-598. The court ultimately “decline[d] to adopt a blanket rule that an arbitration

clause in an attorney-client contract is unconscionable and against public policy if the attorney did not explain the potential disadvantages of the clause to his prospective client before execution of the contract.” Id. at 597. The Court of Appeals also noted that this Court “has not addressed whether ABA Formal Opinion 02-425 should be adopted as the proper interpretation of [GRPC] Rule 1.4 (b),” and “for these combined reasons,” concluded “that the trial court erred in finding the Arbitration Clause unconscionable and in denying the Summerville Defendants’ Motion to Compel Arbitration.” Id. at 598.

Innovative petitioned for a writ of certiorari, which this Court granted, directing the parties to address two questions:

1. Under the Georgia Rules of Professional Conduct, is an attorney required to fully apprise his or her client of the advantages and disadvantages of arbitration before including a clause mandating arbitration of legal malpractice claims in the parties’ engagement agreement?
2. If so, does failing to so apprise a client render such a clause unenforceable under Georgia law?

We have now determined that we need not answer the first question

to answer the second question and decide this case.

2. We can decide this case without answering the first question that we asked in granting certiorari.

We consider first the question of whether an attorney violates the GRPC by entering into an agreement with a client mandating arbitration of legal malpractice claims without first fully apprising the client of the advantages and disadvantages of arbitration. As it did in the courts below, Innovative argues that because GRPC Rule 1.4 (b) is identical to ABA Model Rule of Professional Conduct 1.4 (b), we should adopt the reasoning in ABA Formal Opinion 02-425 and conclude that Summerville violated the GRPC by entering into the Arbitration Clause without first apprising Innovative of the potential consequences of arbitration. Innovative also points to several other states that have relied on the reasoning in ABA Formal Opinion 02-425 to similarly interpret their respective rules of professional conduct.

Both GRPC Rule 1.4 (b) and ABA Model Rule 1.4 (b) say, “A lawyer shall explain a matter to the extent reasonably necessary to

permit the client to make informed decisions regarding the representation.” In 2002, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 02-425, which concluded, relying principally on ABA Model Rule 1.4 (b), that lawyers must fully apprise their clients of the advantages and disadvantages of arbitration before including a provision in a retainer agreement mandating arbitration of legal malpractice claims. The ABA Committee reasoned that “[b]ecause the attorney-client relationship involves professional and fiduciary duties on the part of the lawyer that generally are not present in other relationships, the retainer contract may be subject to special oversight and review” (footnotes omitted), and that the requirement that a lawyer explain to the client the type of arbitration clause at issue in this case derives from those fiduciary duties.² Courts in

² In February 2002, a few weeks before the issuance of ABA Formal Opinion 02-425, ABA Model Rule of Professional Conduct 1.8, which deals with the client-lawyer relationship, was amended to add Comment 14 (now Comment 17). The comment says in pertinent part, “This paragraph does not . . . prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.” This comment has not been added in the GRPC.

several states have followed the reasoning of ABA Formal Opinion 02-425, interpreting their own rules of professional conduct regarding attorney-client relationships to require the same sort of advice about prospective arbitration clauses. See, e.g., *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 176 A3d 729, 737 (Me. 2017); *Castillo v. Arrieta*, 368 P3d 1249, 1257 (N.M. Ct. App. 2016); *Hodges v. Reasonover*, 103 S3d 1069, 1077 (La. 2012).³

ABA formal opinions and the opinions of other state courts and bar associations interpreting professional conduct rules analogous to Georgia's may be persuasive to this Court's interpretation of the GRPC. See, e.g., *In the Matter of Woodham*, 296 Ga. 618, 621-623 (769 SE2d 353) (2015); *Frazier v. State*, 257 Ga. 690, 694 (362 SE2d 351) (1987). We have determined, however, that we can and should

³ In other jurisdictions, the bar association has adopted the same requirement by advisory opinion relying principally on conflict-of-interest rules. See, e.g., Vt. Advisory Ethics Op. 2003-07; Ariz. Ethics Op. 94-05. Innovative does not argue that an attorney's entering into a mandatory arbitration provision without the client's informed consent violates any of the GRPC's conflict-of-interest rules, and the courts below did not address that question. We too do not address those rules or any other rules not argued by Innovative.

decide this case without deciding whether GRPC Rule 1.4 (b) prohibits attorneys from entering into agreements requiring arbitration of legal malpractice claims without their prospective clients' informed consent. Even if we assume – as we will for the remainder of this opinion – that such conduct *does* violate Rule 1.4 (b) such that an attorney may be subject to professional discipline, the Arbitration Clause in dispute here is neither void as against public policy nor unconscionable.

Rather than unnecessarily addressing this attorney ethics issue by judicial opinion, we will leave it to the State Bar of Georgia to address in the first instance whether this is a subject worthy of a formal advisory opinion about or amendment to the GRPC. We have before us only one factual scenario and the arguments only of the parties and one amicus curiae (the Georgia Trial Lawyers Association). Under these circumstances, the Bar's processes provide better opportunities to obtain input from all types of lawyers as well as the public and to consider all of the potentially applicable rules without limitation to a particular litigant's arguments. See

Georgia Bar Rules 4-101 (“The State Bar of Georgia is hereby authorized to maintain and enforce, as set forth in rules hereinafter stated, Georgia Rules of Professional Conduct to be observed by the members of the State Bar of Georgia and those authorized to practice law in the state of Georgia and to institute disciplinary action in the event of the violation thereof.”); 4-402 and 4-403 (establishing the Formal Advisory Opinion Board and the process for promulgating formal advisory opinions concerning the GRPC); 5-101 to 5-103 (establishing the process for amending Georgia Bar rules). See also *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 SW3d 494, 506-508 (Tex. 2015) (Guzman, J., concurring) (explaining that defining the parameters of an ethics rule requiring attorneys to fully inform clients about the potential consequences of arbitration before entering into an agreement mandating arbitration of legal malpractice claims is “more aptly suited to [the bar] rulemaking process, which invites the input of the bench and bar,” and that “[g]uidance is essential, but rather than articulating best-practices standards by judicial fiat, the rulemaking process

provides a better forum for achieving clarity and precision”).⁴

3. The Arbitration Clause is not unenforceable because it is neither void as against public policy nor unconscionable.

The trial court concluded that because Summerville’s entering into the Arbitration Clause without Innovative’s informed consent violated GRPC Rule 1.4 (b), the agreement was “unconscionable.” The trial court’s order cited no Georgia cases addressing whether a contract was void as against public policy or voidable as unconscionable. The Court of Appeals reversed the trial court’s unconscionability ruling after a discussion that blended Georgia case law and concepts related to the somewhat distinct doctrines of

⁴ We note that the State Bar of Georgia has not issued a pertinent formal advisory opinion or amended GRPC Rule 1.8 in the 18 years since the ABA issued its Formal Opinion 02-425 and added the comment to Model Rule 1.8, and this appears to be the first published Georgia case (civil or disciplinary) in which an arbitration clause of this type has been an issue. We do not know (and unlike the State Bar, we have no good way to ascertain) if Summerville’s inclusion of such an arbitration clause in his firm’s engagement agreement with Innovative was an aberration or reflective of a widespread or developing practice of using such arbitration provisions by Georgia lawyers, which might warrant further ethical guidance.

It is also important to recognize that discipline of lawyers for violating the GRPC does not occur through civil actions such as this but rather through the disciplinary process administered by the State Bar. See generally Georgia Bar Rules, Part IV, Chapter 2 (Disciplinary Proceedings); GRPC, Scope [18] (“[These rules] are not designed to be a basis for civil liability.”). Thus, our decision in this case would not have a disciplinary effect on Summerville.

unconscionable contracts and contracts that are void as against public policy, ultimately “declin[ing] to adopt a blanket rule that an arbitration clause in an attorney-client contract is unconscionable *and* against public policy if the attorney did not explain the potential disadvantages of the clause to his prospective client before execution of the contract.” *Summerville*, 349 Ga. App. at 597 (emphasis added).

In this Court, Innovative argues that the Arbitration Clause is unenforceable because it violates public policy and also suggests that the clause is procedurally unconscionable because the Summerville Defendants did not prove that Innovative was a sophisticated client. As explained below, we conclude that – even assuming that Summerville violated GRPC Rule 1.4 (b) by entering into the Arbitration Clause without Innovative’s informed consent – the clause is neither void as against public policy nor unconscionable and therefore is not unenforceable on either of those grounds.

(a) *The Arbitration Clause is not void as against public policy.*

Innovative’s primary contention is that the Arbitration Clause is unenforceable because it is void as against public policy. We

disagree.

OCGA § 13-8-2 (a) says that “[a] contract that is against the policy of the law cannot be enforced,” and the statute then lists several types of contracts that are void as against public policy.⁵ The list in § 13-8-2 (a) is expressly non-exhaustive, and Georgia courts have on occasion voided contracts as contravening public policy based on policies found outside of that and other Georgia statutes. See *Emory Univ. v. Porubiansky*, 248 Ga. 391, 393-394 (282 SE2d 903) (1981) (holding void as against public policy an exculpatory clause in an agreement between a patient and a dentist and dental school because it violates public policy to contract away the common law duty of reasonable care). See also *Edwards v. Grapefields, Inc.*,

⁵ OCGA § 13-8-2 (a) says in full:

A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:

- (1) Contracts tending to corrupt legislation or the judiciary;
- (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;
- (3) Contracts to evade or oppose the revenue laws of another country;
- (4) Wagering contracts; or
- (5) Contracts of maintenance or champerty.

267 Ga. App. 399, 404 (599 SE2d 489) (2004).

However, recognizing that “all people who are capable of contracting shall be extended the full freedom of doing so if they do not in some manner violate the public policy of this state,” this Court has long emphasized that “courts must exercise extreme caution in declaring a contract void as against public policy” and may do so only “where the case is free from doubt and an injury to the public clearly appears.” *Porubiansky*, 248 Ga. at 393 (citations and punctuation omitted). Importantly, a contract is void as against public policy not because the *process* of entering the contract was improper and objectionable by one party or the other, but rather because the *resulting agreement* itself is illegal and normally unenforceable by either party. See *Dept. of Transp. v. Brooks*, 254 Ga. 303, 312 (328 SE2d 705) (1985) (“A contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something

which is in violation of law.” (citation omitted)).

As both parties in this case recognize, binding arbitration agreements generally are not in contravention of the public policy of this State. To the contrary, “[i]n enacting the [Georgia Arbitration Code], the General Assembly established ‘a clear public policy in favor of arbitration.’” *Order Homes, LLC v. Iverson*, 300 Ga. App. 332, 334-335 (685 SE2d 304) (2009) (citation omitted). There is nothing about attorney-client contracts in general that takes them outside this policy and makes mandatory arbitration of disputes arising under them illegal. In fact, the State Bar, with the approval of this Court, long ago established a program for the arbitration of fee disputes between attorneys and clients. See Georgia Bar Rules, Part VI. See also GRPC Rule 1.5, Comment [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.”).

Nor are attorney-client agreements mandating arbitration of prospective legal malpractice claims categorically against public

policy in Georgia. The General Assembly effectively excluded *medical* malpractice claims from the GAC. See OCGA § 9-9-2 (c) (10) (excluding from the GAC “any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort”). But it did not similarly exclude *legal* malpractice claims. Moreover, the ABA’s Standing Committee on Ethics and Professional Responsibility and all of the states that have followed the reasoning of ABA Formal Opinion 02-425 agree that attorney-client agreements mandating arbitration of future legal malpractice claims without limiting the scope of the lawyer’s potential liability are not prohibited per se; instead, only the *process* of entering into such arbitration clauses is regulated by requiring the lawyer to obtain the client’s informed consent. See, e.g., ABA Formal Op. 02-425; *Snow*, 176 A3d at 736; *Castillo*, 368 P3d at 1257; *Hodges*, 103 S3d at 1077.⁶ Innovative and the amicus curiae take the same

⁶ As explained in ABA Formal Opinion 02-425:

The concern most frequently expressed about provisions mandating the use of arbitration to resolve fee disputes and malpractice claims stems from [ABA Model] Rule 1.8 (h) [which is

position.

Nevertheless, citing one case from this Court and a few from the Court of Appeals in which contracts that implicate the attorney-client relationship were held void as against public policy, Innovative argues that when an attorney violates the GRPC with regard to an engagement agreement, the resulting agreement contravenes public policy and is therefore void. See *AFLAC, Inc. v. Williams*, 264 Ga. 351, 353-354 (444 SE2d 314) (1994); *Eichholz Law Firm, P.C. v. Tate Law Group, LLC*, 310 Ga. App. 848, 850-851 (714 SE2d 413) (2011); *Nelson & Hill, P.A. v. Wood*, 245 Ga. App. 60, 65-

substantially identical to GRPC Rule 1.8 (h)], which prohibits the lawyer from prospectively agreeing to limit the lawyer's malpractice liability unless such an agreement is permitted by law and the client is represented by independent counsel. Commentators and most state bar ethics committees have concluded that mandatory arbitration provisions do not prospectively limit a lawyer's liability, but instead only prescribe a procedure for resolving such claims. The Committee agrees that mandatory arbitration provisions are proper unless the retainer agreement insulates the lawyer from liability or limits the liability to which she otherwise would be exposed under common or statutory law.

(Footnote omitted.)

66 (537 SE2d 670) (2000); *Brandon v. Newman*, 243 Ga. App. 183, 187 (532 SE2d 743) (2000). We do not read these cases in the way Innovative does.⁷

In *Williams*, without any mention or analysis of the then-applicable rules of professional conduct, we held that a provision in an attorney's retainer agreement that required the client to pay liquidated damages in the event the client terminated the attorney was unenforceable because it prevented the client from exercising the client's "absolute right to discharge the attorney and terminate the relation at any time, even without cause." *Williams*, 264 Ga. at 353 (citation omitted). No amount of advice from the attorney to the client could have rendered the damages provision lawful, because as a matter of public policy, "a client must be free to end the relationship whenever 'he ceases to have absolute confidence in . . . the attorney,'" and "requiring a client to pay damages for terminating its attorney's employment contract eviscerates the

⁷ Our reading of these cases makes it unnecessary to decide whether they were all correctly decided.

client's absolute right to terminate." *Id.* at 353 (citations and punctuation omitted). Similarly, in the three Court of Appeals cases cited by Innovative, that court held void as against public policy what the court deemed to be flatly illegal agreements affecting the attorney-client relationship. See *Eichholz*, 310 Ga. App. at 850-853 (voiding a fee-splitting agreement in which an attorney was to receive a portion of a contingency fee that was earned after he had been discharged, citing case law and GRPC Rule 1.5 (e) (2)); *Nelson & Hill*, 245 Ga. App. at 65-66 (in an alternative holding, noting that evidence of an oral contingency fee agreement would be inadmissible to support a quantum meruit claim because such an unwritten agreement violated public policy, citing *Williams*, a then-applicable standard of conduct, and an advisory opinion interpreting that standard); *Brandon*, 243 Ga. App. at 186 (voiding an attorney referral reward based on an illegal fee-splitting agreement between an attorney and a non-lawyer, citing a then-applicable disciplinary standard).

As these cases and the list enumerated in OCGA § 13-8-2 (a)

illustrate, a contract is void as against public policy when the agreement itself effectuates illegality; no change in the *process* of entering into such an agreement will render it legal and fully enforceable. Because the Arbitration Clause in dispute here would be lawful if (as Innovative argues and we are assuming) Summerville had obtained Innovative's informed consent in compliance with GRPC Rule 1.4 (b), the clause is not void as against public policy. See *Watts v. Polaczyk*, 619 NW2d 714, 717-718 (Mich. Ct. App. 2000) (concluding that even though the State Bar of Michigan had issued informal advisory opinions saying that a lawyer should allow a client to seek independent counsel before entering into a retainer agreement mandating arbitration of legal malpractice claims, the arbitration clause at issue had been entered in violation of those opinions, and the attorney might face a disciplinary proceeding, the arbitration clause was not void as against public policy because such binding arbitration agreements are permissible under Michigan law).

(b) *The Arbitration Clause is not substantively or procedurally*

unconscionable.

Although Innovative does not specifically argue in this Court that the Arbitration Clause in dispute is unconscionable, it does suggest that the Clause was procedurally unconscionable, arguing that the Summerville Defendants did not prove that Innovative was a sophisticated client. Moreover, as noted previously, the Court of Appeals conflated the analyses for whether a contract is void as against public policy with whether it is unconscionable. We therefore turn to the question of whether the Arbitration Clause is unenforceable because it is unconscionable.

This Court has defined an unconscionable contract as one that “no sane man not acting under a delusion would make and that no honest man would take advantage of,” one that is “abhorrent to good morals and conscience,” and “one where one of the parties takes a fraudulent advantage of another.” *NEC Technologies, Inc. v. Nelson*, 267 Ga. 390, 391 n.2 (478 SE2d 769) (1996) (citations

omitted).⁸ We examine unconscionability from the perspective of *substantive* unconscionability, which “looks to the contractual terms themselves,” and *procedural* unconscionability, which considers the “process of making the contract.” *Id.* at 392.

Innovative makes no argument that the Arbitration Clause in dispute is substantively unconscionable. If an arbitration clause of this type were substantively unconscionable, no amount of advice from an attorney would render it fully enforceable; it would be voidable or operable at the election of the injured client. See *Brooks*, 254 Ga. at 313. But as discussed above, Innovative concedes that the Arbitration Clause would be mutually enforceable if the engagement agreement had been entered into after Summerville fully apprised

⁸ *NEC Technologies* involved a contract that was subject to the Georgia Uniform Commercial Code, so we interpreted the doctrine of unconscionability in that case consistent with authority on unconscionability under the UCC. See 267 Ga. at 391; OCGA § 11-2-302. But the basic standards that we set forth in *NEC Technologies* were drawn from common-law unconscionability cases, and we have since applied them in a non-UCC case. See *Dept. of Transp. v. American Ins. Co.*, 268 Ga. 505, 509 n.19 (491 SE2d 328) (1997) (noting that “principles of unconscionability [are] not limited to commercial settings”). See also John K. Larkins, Jr., GA. CONTRACTS LAW AND LITIGATION § 3:18 (2019) (explaining that “there has been a virtual merger of the common law and UCC doctrine of unconscionability in Georgia.”).

Innovative of the potential consequences of arbitration. Moreover, the General Assembly has expressed a policy permitting arbitration agreements in the GAC, and arbitration can be beneficial to either attorneys or clients, so we cannot say that no sane client would enter a contract that mandated arbitration of future legal malpractice claims and no honest lawyer would take advantage of such a provision. See Louis A. Russo, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 HOFSTRA L. REV. 327, 334-337 (2006) (explaining a number of potential benefits to clients of arbitrating legal malpractice claims, including speed, efficiency, and confidentiality).

As for procedural unconscionability, Innovative suggests that the Arbitration Clause is unconscionable because the Summerville Defendants did not prove that Innovative was a sophisticated client. But Innovative improperly shifts the burden of proof: where, like other contracts, a binding arbitration agreement is bargained for and signed by the parties, it is the complaining party that bears the burden of proving that it was essentially defrauded in entering the

agreement. See, e.g., *R.L. Kimsey Cotton Co., Inc. v. Ferguson*, 233 Ga. 962, 966-967 (214 SE2d 360) (1975) (holding that the trial court erred in denying the plaintiff's motion for summary judgment seeking enforcement of contracts that the defendants argued were unconscionable because the defendants did not sufficiently prove unconscionability). See also *Saturna v. Bickley Constr. Co.*, 252 Ga. App. 140, 142 (555 SE2d 825) (2001) (explaining that “the mere existence of an arbitration clause does not amount to unconscionability” (citation omitted)).

Innovative has not met its burden. This case was adjudicated on a motion to dismiss and to compel arbitration, and there is no evidence in the limited existing record that the Summerville Defendants took fraudulent advantage of Innovative by including the Arbitration Clause in the Engagement Agreement. Innovative argued in the trial court that the Arbitration Clause was “unconscionable” only because it violated the GRPC, not because it was the result of fraud. Innovative now argues that there is no evidence in the record to support a finding that it *was* a

sophisticated client, such that a finding of unconscionability is not foreclosed. But the record indicates that Innovative is a business that had been involved in litigation before entering the Arbitration Clause, and in any event, “lack of sophistication or economic disadvantage of one attacking arbitration will not amount to unconscionability” without more. *Saturna*, 252 Ga. App. at 142 (citation omitted). Accordingly, Innovative has not proven that the Arbitration Clause is unconscionable. See *NEC Technologies*, 267 Ga. at 394.

(c) In summary, whether or not a lawyer may be subject to professional discipline under GRPC Rule 1.4 (b) for entering into an engagement agreement with a client requiring the arbitration of future legal malpractice claims without first fully apprising the client of the advantages and disadvantages of arbitration, such an arbitration clause is neither void as against public policy nor substantively unconscionable, and Innovative has not proven that the Arbitration Clause at issue here is procedurally unconscionable either. Because Innovative has not established that the Arbitration

Clause is unenforceable on these grounds, we affirm the judgment of the Court of Appeals.

Judgment affirmed. All the Justices concur.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 02-425

February 20, 2002

Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims

It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.

Overview

The use of binding arbitration provisions in retainer agreements has increased significantly in recent years.¹ Provisions requiring the arbitration of fee disputes have gained more willing acceptance than those involving malpractice claims.² The Model Rules of Professional Conduct, in a comment to Rule 1.5, provide that when a “procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the

1. See Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, ARB. J. 8 (June 1993) (“Twenty years ago, alternative dispute resolution (ADR) was primarily the concern of a few ‘ivory tower’ academics; 10 years ago, it was a part of the practice of a few idealistic practitioners; today, it is an integral part of the practice of law.”); David Hechler, *ADR Finds True Believers*, NAT’L L.J., July 2, 2001, at A-1 (reporting increased use of ADR, including report that that in 1996, 76,200 ADR cases were filed with the American Arbitration Association and that in 2000, 198,491 cases were filed). In D.C. Eth. Op. 218 (June 18, 1991), the Bar Association of the District of Columbia stated that Rule 1.6(d)(5) encourages lawyers to minimize the disclosure of client confidences in fee collection actions. Because of its private nature, arbitration arguably furthers the goal of Rule 1.6(b)(2) because it enables the lawyer to avoid, and thereby limit, the public disclosure of otherwise confidential information in seeking to recover a fee or defend against a malpractice claim. *Id.*

Moreover, mandatory arbitration has its detractors. *San Francisco Chronicle* staff writer Reynolds Holding wrote a series of articles available at <http://www.sfgate.com>

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312)988-5300 CHAIR: Marvin L. Karp, Cleveland, OH □ Loretta C. Argrett, Washington, DC □ Michael E. Bragg, Bloomington, IL □ Thomas M. Fitzpatrick, Seattle, WA □ Mark I. Harrison, Phoenix, AZ □ Daniel W. Hildebrand, Madison, WI □ Donald B. Hilliker, Chicago, IL □ William H. Jeffress, Jr., Washington, DC □ Bruce Alan Mann, San Francisco, CA □ M. Peter Moser, Baltimore, MD □ CEN-TER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

lawyer should conscientiously consider submitting to it.”³ The greater acceptance of such provisions by lawyers also is attributable to the fact that there are ABA Model Rules for Fee Arbitration and that most bar associations have implemented fee arbitration programs that have been upheld by the courts.⁴ The Model Rules do not specifically address provisions for arbitration of disputes with clients over matters other than fees.

Because the attorney-client relationship involves professional and fiduciary duties on the part of the lawyer that generally are not present in other relationships,⁵ the retainer contract may be subject to special oversight and review.⁶ The authority for this oversight comes from the Model Rules, which impose rigorous disclosure obligations on the lawyer and expressly limit and condition the lawyer’s freedom to enter into contractual arrangements with clients.⁷ We now turn to an examination of the rules implicated by the inclusion of mandatory arbitration provisions in retainer agreements.

sharply critical of mandatory arbitration provisions in a variety of commercial contexts, reporting that millions of consumers are losing their legal rights in the process. *See Private Justice - Millions are losing their legal rights - Supreme Court forces disputes from court to arbitration - a system with no laws*, S.F. CHRON., October 7, 2001; *Can public count on fair arbitration? - Financial ties to corporations are conflict of interest, critics say*, S.F. CHRON., October 8, 2001; *Judges’ action casts shadow on court’s integrity - Lure of high-paying jobs as arbitrators may compromise impartiality*, S.F. CHRON., October 9, 2001; *Arbitration attacked in front of high court - Justices disagree on expanding its reach*, S.F. CHRON., October 11, 2001. *See also* *Circuit City Stores v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002) (mandatory arbitration agreement was both procedurally and substantively unconscionable under California law); *Paone v. Dean Witter Reynolds*, 789 A.2d 221, 227 (Pa. Super. 2001) (court must determine whether the proponent of the arbitration provision has met its burden of showing that the provision is fair under all the circumstances, that it was entered into with knowledge of its nature and consequences, and that the provision was not itself a result of a violation of the trust reposed in the confidential relationship. If this burden is not met, then the arbitration provision is unenforceable.).

2. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 990-991 (1995); HALT, *ARBITRATING LAWYER-CLIENT FEE DISPUTES: A NATIONAL SURVEY* (1988) (nationwide survey of states and District of Columbia bar-run programs for arbitrating fee disputes between lawyers and their clients conducted in 1987 by HALT - An Organization of Americans for Legal Reform).

3. Model Rules of Professional Conduct Rule 1.5, cmt. 9 (2002).

4. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 628-29 (1997).

5. Matthew J. Clark, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients To Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 845 (1999); Powers, *supra* note 4, at 645-46.

6. Powers, *id.* at 646.

7. Rule 1.4 (duty to explain to clients the risks and benefits of alternative courses of

Prospective Agreements to Limit the Lawyer's Liability

The concern most frequently expressed about provisions mandating the use of arbitration to resolve fee disputes and malpractice claims stems from Rule 1.8(h), which prohibits the lawyer from prospectively agreeing to limit the lawyer's malpractice liability unless such an agreement is permitted by law and the client is represented by independent counsel. Commentators and most state bar ethics committees have concluded that mandatory arbitration provisions do not prospectively limit a lawyer's liability, but instead only prescribe a procedure for resolving such claims.⁸ The Committee agrees that mandatory arbitration provisions are proper unless the retainer agreement insulates the lawyer

action); Rule 1.8(a) (guidelines governing business transactions with clients); Rule 1.8(h) (requirement of independent representation when prospectively limiting liability to clients); Rule 1.8(d) (prohibition against entering into agreements for literary/media rights); 1.5 (requirements governing fee agreements with clients); and Rules 1.7, 1.8, 1.9 (conflicts between lawyer and client that require disclosure and informed consent).

8. *E.g.*, 2 G.C. HAZARD AND W.W. HODES, *THE LAW OF LAWYERING* (3d ed. 2001) §12.18 at 12-50 (“[Agreements requiring mandatory arbitration of malpractice claims] would not violate Rule 1.8(h), for they merely provide a procedure for resolving disputes, and do not attempt to ‘limit’ the lawyer’s liability in advance.”); Me. Eth. Op. 170 (December 23, 1999) (“An agreement to limit liability is, in substance, an agreement that says that even though the lawyer errs in fulfilling certain duties to the client, the lawyer will not be liable to the extent that common and statutory law would otherwise make the lawyer liable.”). *See also* Comments [14] and [5] to Rule 1.8(h):

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

from liability or limits the liability to which she otherwise would be exposed under common or statutory law. For example, if the law of the jurisdiction precludes an award of punitive damages in arbitration but permits punitive damages in malpractice lawsuits, the provision would violate Rule 1.8(h) unless the client is independently represented in making the agreement.⁹ The mere fact that a client is required to submit disputes to arbitration rather than litigation does not violate Rule 1.8(h), even though the procedures implicated by various mandatory arbitration provisions can markedly differ from typical litigation procedures. The Committee believes, however, that clients must receive sufficient information about these differences and their effect on the clients' rights to permit affected clients to make an informed decision about whether to accept an agreement that includes such a provision.

The Duty to Fully Disclose the Risks and Benefits of Mandatory Binding Arbitration

The lawyer's duty to explain matters to a client expressed in Rule 1.4(b)¹⁰ derives in large measure from the lawyer's fiduciary duty to clients¹¹ and includes the duty to advise clients of the possible adverse consequences as well as the ben-

Model Rules of Professional Conduct Rule 1.8, cmts. 14 and 15 (2002). *Contra* Md. Eth. Op. 90-12 (October 19, 1990) (the differences between arbitration and court proceedings so significant as to constitute an attempt to limit liability prospectively).

9. See e.g., N.Y. County Lawyers' Ass'n Eth. Op. 723 (July 17, 1997) ("Outside the context of domestic relations matters, as to which special rules apply, and provided that New York law authorizes an arbitrator to award punitive damages in a malpractice claim submitted to arbitration under an agreement, a lawyer may ethically include a condition in a retainer agreement requiring that all disputes arising under the agreement shall be subject to arbitration in an appropriate forum authorized to award all relief available in a court of law, provided that the lawyer fully discloses the consequences of that condition to the client and allows the client the opportunity, should the client so choose, to seek independent counsel regarding the provision."). Other, unusual requirements in mandatory arbitration provisions also might be deemed to have the effect of limiting a lawyer's liability when they are one-sided. The validity of such requirements, for example, requiring that arbitration be conducted in a specific location distant from the client's abode, permitting the lawyer to choose the arbitrator, or unequally allocating the cost of the arbitration, thus might be called into question under Rule 1.8(h).

10. Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"; cf. MODEL RULES OF PROFESSIONAL CONDUCT Preamble cmt. [17] (2002) ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties . . . that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.").

11. See, e.g., *Sage Realty v. Proskauer, Rose & Goetz*, 91 N.Y.2d 30, 37, 689 N.E.2d 879, 882, 666 N.Y.S.2d 985, 988 (N.Y.App.Div. 1997) ("Among the duties of an attorney as fiduciary and agent of the client are those of openness and conscientious disclosure.").

efits that may arise from the execution of an agreement.¹² The Committee is of the opinion that Rule 1.4(b) applies when lawyers ask prospective clients to execute retainer agreements that include provisions mandating the use of arbitration to resolve fee disputes and malpractice claims.¹³

Rule 1.4(b) requires the lawyer to “explain” the implications of the proposed binding arbitration provision “to the extent reasonably necessary to permit the client to make (an) informed decision” about whether to agree to the inclusion of the binding arbitration provision in the agreement.¹⁴ Depending on the sophistication of the client and to the extent necessary to enable the client to make an “informed decision,” the lawyer should explain the possible adverse consequences as well as the benefits arising from execution of the agreement. For example, the lawyer should make clear that arbitration typically results in the client’s waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal.¹⁵ The

12. *See, e.g.,* Matter of Morse, 266 Ga. 652, 653, 470 S.E.2d 232, 234 (Ga. 1996) (lawyer asked client to sign agreement settling workers’ compensation claim without explaining legal effect of agreement); Matter of Ragland, 697 N.E.2d 44, 47 (Ind.1998) (lawyer failed to explain impact of executing settlement and indemnity agreements); Viccinelli v. Causey, 401 S.2d 1243 (La. Ct. App.), *writ denied*, 409 So.2d 615 (La. 1981) (lawyer failed to explain to divorce client significance of judgment against property she received in property settlement guilty of malpractice); Matter of Disciplinary Proceedings Against Winkel, 217 Wis.2d 339, 344, 577 N.W.2d 9, 11 (Wis.1998) (lawyer’s failure to inform clients about risk of criminal prosecution if clients surrendered business assets to bank and law firm without arranging to pay subcontractor bills amounted to failure to explain matter to extent reasonably necessary to enable clients to make informed decision). *See also* Smith v. St. Paul Fire & Marine Ins. Co., 366 F.Supp. 1283, 1290 (M.D.La. 1973), *aff’d* 500 F.2d 1131 (5th Cir. 1974) (lawyer need not advise client about every possible alternative, only those where reason to believe adverse consequences may result), Ariz. Eth. Op. 97-6 (Sept. 8, 1997) (criminal defense lawyer whose client enters cooperation agreement with law enforcement agencies must fully advise client of real-world consequences of such cooperation).

13. The majority of the Committee’s prior opinions construing Rule 1.4(b) have focused on communications bearing primarily on the *subject-matter of the representation* rather than on the *client-lawyer relationship* itself. However, because the factors that affect and define the client-lawyer relationship often impact the representation, the Committee concludes that, in appropriate circumstances, such as the present situation, the duty of communication imposed by Rule 1.4(b) may extend to *both* the client-lawyer relationship and the subject-matter of the representation.

14. Significantly, “informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.0(e) (2002).

15. At least one major malpractice insurance carrier has advised its lawyer-insureds that arbitration of malpractice claims is not always advisable and has suggested that litigation may provide benefits to the lawyer-insured unavailable through arbitration. This carrier requires its insureds to provide notice to the carrier of the insureds’ intent

lawyer also might explain that the case will be decided by an individual arbitrator or panel of arbitrators and inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration.

The duties of communication and disclosure imposed on lawyers by Rule 1.4 find substantial support in other Model Rules, most notably 1.7(b).¹⁶ Rule 1.7 gen-

to refer a claim to arbitration. *See* Mark D. Nozette and Brian J. Redding, *Arbitration of Malpractice Claims—Is It A Good Idea?*, ALAS LOSS PREVENTION JOURNAL 2 (Fall 2001).

16. *See also* cases and opinions interpreting Rule 1.5(b) that focus upon the lawyer's fiduciary obligation to ensure that the client is fully informed about the terms of the fee agreement. *E.g.*, *Wong v. Michael Kennedy*, 853 F.Supp. 73, 80 (E.D.N.Y. 1994) (lawyer who drafts fee agreement stands in fiduciary relationship to client and has burden of showing that agreement is fair, reasonable and fully known and understood by client); ABA Formal Op. 93-379 (1993) (Billing for Professional Fees; Disbursements and Other Expenses) *in* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 218-20 (ABA 2000) (disclosure of basis of fees and charges should be made at outset of representation pursuant to Rules 1.4, 1.5(b), and 7.1). Although many of the ethics opinions that have addressed the question now before the Committee have relied heavily on Rule 1.8(a), we do not believe that that rule applies. In the Committee's opinion, the establishment of a lawyer-client relationship is not a "business transaction" within the meaning of Rule 1.8(a). *See* Me. Eth. Op. 170 ("a retention . . . agreement does not constitute a covered 'business transaction' between a lawyer and client"). However, we do find it significant that the Comment to Rule 1.8(a) states that "[a]s a general principle, *all transactions* between client and lawyer should be fair and reasonable to the client." (Emphasis added). A Comment to Rule 1.8(a) states that Rule 1.8 (a)(1) "requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a), cmt. (2) (2002).

We also note that although Rule 1.8(a) does not apply to the transaction establishing the lawyer-client relationship, some or all of the protections provided to clients by the rule nonetheless have been imposed by various state ethics opinions discussing the propriety of a provision in an attorney-client retainer agreement requiring the arbitration of fee disputes and malpractice claims. *See, e.g.*, Va. Legal Eth. Op. 1586 (April 11, 1994) ("[A] provision requiring mandatory arbitration of fee disputes and designating the situs of the arbitration is not per se violative of the Code of Professional Responsibility, provided that there is . . . full and adequate disclosure as to all possible consequences of such a transaction and the transaction must not be unconscionable, unfair or inequitable when made."); Md. Eth. Op. 94-40 (July 12, 1994) (a retainer agreement may provide for binding arbitration of fee disputes provided that it includes language advising the client that the agreement "may affect the client's legal rights, including a relinquishment of a right to a jury trial. The client should also be advised of a right to confer with other counsel with respect to any adverse consequences which might result from agreeing to mandatory arbitration, including the possible effects of

erally governs and limits the ability of lawyers to represent clients in conflict of interest situations and provides for the resolution of such conflicts only with the client's informed consent. Pertinent to the present opinion, Rule 1.7, Comment [6], states: "If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." Fee disputes with lawyers and claims against lawyers for malpractice obviously implicate such concerns. Therefore, a provision in a retainer agreement that *requires* the submission of such disputes and claims to binding arbitration may present the kind of potential conflict that can be neutralized only by the lawyer providing full disclosure and an explanation sufficient "to permit the client to make an informed decision" about whether to agree to a binding arbitration provision.

Conclusion

It is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law.

res judicata or collateral estoppel."); Md. Eth. Op. 90-12 ("before a lawyer can enter into a written agreement with a client providing for the submission to arbitration of all disputes arising out of the attorney-client relationship, the client must be represented by independent counsel in connection with that written agreement. If the client refuses to seek independent counsel, then the lawyer is prohibited from entering into such a written agreement."); D.C. Eth. Op. 211 (May 15, 1990) (mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under Rule 1.8(a) unless client "has actual counsel from another lawyer, who has no conflict of interest, upon whom the client can rely to assess the complexities posed by arbitration."); Mich. Eth. Op. RI-196 (March 7, 1994) (lawyer must advise client that independent representation appropriate in order to validate mandatory ADR provision). See also Comments [14] and [5] to revised Rule 1.8(h), *supra* note 8.

ABA Rule 1.8 Current Clients: Specific Rules

...

Comments

...

Limiting Liability and Settling Malpractice Claims

[17] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes

21 the obligations of representation illusory will amount to an attempt to limit
22 liability.

1 **ABA Rule 1.8: Current Clients: Specific Rules**

2 *Client-Lawyer Relationship*

3 (a) A lawyer shall not enter into a business transaction with a client or knowingly
4 acquire an ownership, possessory, security or other pecuniary interest adverse to a
5 client unless:

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

9 (2) the client is advised in writing of the desirability of seeking and is given a
10 reasonable opportunity to seek the advice of independent legal counsel on the
11 transaction; and

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

15 (b) A lawyer shall not use information relating to representation of a client to the
16 disadvantage of the client unless the client gives informed consent, except as
17 permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(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;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(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 and a lawyer representing an indigent client pro bono through a law

37 school clinical or pro bono program may provide modest gifts to the client for
38 food, rent, transportation, medicine and other basic living expenses. The lawyer:
39 (i) may not promise, assure or imply the availability of such gifts prior to retention
40 or as an inducement to continue the client-lawyer relationship after retention;
41 (ii) may not seek or accept reimbursement from the client, a relative of the client
42 or anyone affiliated with the client; and
43 (iii) may not publicize or advertise a willingness to provide such gifts to
44 prospective clients.

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

47 (f) A lawyer shall not accept compensation for representing a client from one
48 other than the client unless:

49 (1) the client gives informed consent;
50 (2) there is no interference with the lawyer's independence of professional
51 judgment or with the client-lawyer relationship; and
52 (3) information relating to representation of a client is protected as required by
53 Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or 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 lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) 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 authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

ABA Rule 1.8

DRPC 1/7/22 meeting

(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) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and

lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not 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.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives

111 and should explain why the advice of independent legal counsel is desirable. See
112 Rule 1.0(e) (definition of informed consent).

113 [3] The risk to a client is greatest when the client expects the lawyer to represent
114 the client in the transaction itself or when the lawyer's financial interest otherwise
115 poses a significant risk that the lawyer's representation of the client will be
116 materially limited by the lawyer's financial interest in the transaction. Here the
117 lawyer's role requires that the lawyer must comply, not only with the requirements
118 of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the
119 lawyer must disclose the risks associated with the lawyer's dual role as both legal
120 adviser and participant in the transaction, such as the risk that the lawyer will
121 structure the transaction or give legal advice in a way that favors the lawyer's
122 interests at the expense of the client. Moreover, the lawyer must obtain the client's
123 informed consent. In some cases, the lawyer's interest may be such that Rule 1.7
124 will preclude the lawyer from seeking the client's consent to the transaction.

125 [4] If the client is independently represented in the transaction, paragraph (a)(2) of
126 this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is
127 satisfied either by a written disclosure by the lawyer involved in the transaction or
128 by the client's independent counsel. The fact that the client was independently

represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

147 Gifts to Lawyers

148 [6] A lawyer may accept a gift from a client, if the transaction meets general
149 standards of fairness. For example, a simple gift such as a present given at a
150 holiday or as a token of appreciation is permitted. If a client offers the lawyer a
151 more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it,
152 although such a gift may be voidable by the client under the doctrine of undue
153 influence, which treats client gifts as presumptively fraudulent. In any event, due to
154 concerns about overreaching and imposition on clients, a lawyer may not suggest
155 that a substantial gift be made to the lawyer or for the lawyer's benefit, except
156 where the lawyer is related to the client as set forth in paragraph (c).

157 [7] If effectuation of a substantial gift requires preparing a legal instrument such
158 as a will or conveyance, the client should have the detached advice that another
159 lawyer can provide. The sole exception to this Rule is where the client is a relative
160 of the donee.

161 [8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a
162 partner or associate of the lawyer named as executor of the client's estate or to
163 another potentially lucrative fiduciary position. Nevertheless, such appointments
164 will be subject to the general conflict of interest provision in Rule 1.7 when there is
165 a significant risk that the lawyer's interest in obtaining the appointment will

166 materially limit the lawyer's independent professional judgment in advising the
167 client concerning the choice of an executor or other fiduciary. In obtaining the
168 client's informed consent to the conflict, the lawyer should advise the client
169 concerning the nature and extent of the lawyer's financial interest in the
170 appointment, as well as the availability of alternative candidates for the position.

171 Literary Rights

172 [9] An agreement by which a lawyer acquires literary or media rights concerning
173 the conduct of the representation creates a conflict between the interests of the
174 client and the personal interests of the lawyer. Measures suitable in the
175 representation of the client may detract from the publication value of an account of
176 the representation. Paragraph (d) does not prohibit a lawyer representing a client in
177 a transaction concerning literary property from agreeing that the lawyer's fee shall
178 consist of a share in ownership in the property, if the arrangement conforms to
179 Rule 1.5 and paragraphs (a) and (i).

180 Financial Assistance

181 [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on
182 behalf of their clients, including making or guaranteeing loans to their clients for
183 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.

[11] 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.

[12] 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

203 abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or
204 implying the availability of financial assistance prior to retention or as an
205 inducement to continue the client-lawyer relationship after retention; (ii) seeking or
206 accepting reimbursement from the client, a relative of the client or anyone
207 affiliated with the client; and (iii) publicizing or advertising a willingness to
208 provide gifts to prospective to clients beyond court costs and expenses of litigation
209 in connection with contemplated or pending litigation or administrative
210 proceedings.

211 [13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may
212 be provided even if the representation is eligible for fees under a fee-shifting
213 statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in
214 other contemplated or pending litigation in which the lawyer may eventually
215 recover a fee, such as contingent-fee personal injury cases or cases in which fees
216 may be available under a contractual fee-shifting provision, even if the lawyer does
217 not eventually receive a fee.

218 Person Paying for a Lawyer's Services

219 [14] Lawyers are frequently asked to represent a client under circumstances in
220 which a third person will compensate the lawyer, in whole or in part. The third
221 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).

[15] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client,

241 unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the
242 informed consent must be confirmed in writing.

243 Aggregate Settlements

244 [16] Differences in willingness to make or accept an offer of settlement are among
245 the risks of common representation of multiple clients by a single lawyer. Under
246 Rule 1.7, this is one of the risks that should be discussed before undertaking the
247 representation, as part of the process of obtaining the clients' informed consent. In
248 addition, Rule 1.2(a) protects each client's right to have the final say in deciding
249 whether to accept or reject an offer of settlement and in deciding whether to enter a
250 guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph
251 is a corollary of both these Rules and provides that, before any settlement offer or
252 plea bargain is made or accepted on behalf of multiple clients, the lawyer must
253 inform each of them about all the material terms of the settlement, including what
254 the other clients will receive or pay if the settlement or plea offer is accepted. See
255 also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of
256 plaintiffs or defendants, or those proceeding derivatively, may not have a full
257 client-lawyer relationship with each member of the class; nevertheless, such
258 lawyers must comply with applicable rules regulating notification of class

259 members and other procedural requirements designed to ensure adequate
260 protection of the entire class.

261 Limiting Liability and Settling Malpractice Claims

262 [17] Agreements prospectively limiting a lawyer's liability for malpractice are
263 prohibited unless the client is independently represented in making the agreement
264 because they are likely to undermine competent and diligent representation. Also,
265 many clients are unable to evaluate the desirability of making such an agreement
266 before a dispute has arisen, particularly if they are then represented by the lawyer
267 seeking the agreement. This paragraph does not, however, prohibit a lawyer from
268 entering into an agreement with the client to arbitrate legal malpractice claims,
269 provided such agreements are enforceable and the client is fully informed of the
270 scope and effect of the agreement. Nor does this paragraph limit the ability of
271 lawyers to practice in the form of a limited-liability entity, where permitted by law,
272 provided that each lawyer remains personally liable to the client for his or her own
273 conduct and the firm complies with any conditions required by law, such as
274 provisions requiring client notification or maintenance of adequate liability
275 insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that
276 defines the scope of the representation, although a definition of scope that makes

277 the obligations of representation illusory will amount to an attempt to limit
278 liability.

279 [18] Agreements settling a claim or a potential claim for malpractice are not
280 prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take
281 unfair advantage of an unrepresented client or former client, the lawyer must first
282 advise such a person in writing of the appropriateness of independent
283 representation in connection with such a settlement. In addition, the lawyer must
284 give the client or former client a reasonable opportunity to find and consult
285 independent counsel.

286 Acquiring Proprietary Interest in Litigation

287 [19] Paragraph (i) states the traditional general rule that lawyers are prohibited
288 from acquiring a proprietary interest in litigation. Like paragraph (e), the general
289 rule has its basis in common law champerty and maintenance and is designed to
290 avoid giving the lawyer too great an interest in the representation. In addition,
291 when the lawyer acquires an ownership interest in the subject of the representation,
292 it will be more difficult for a client to discharge the lawyer if the client so desires.
293 The Rule is subject to specific exceptions developed in decisional law and
294 continued in these Rules. The exception for certain advances of the costs of
295 litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth

exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[20] 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

315 relationships may make it difficult to predict to what extent client confidences will
316 be protected by the attorney-client evidentiary privilege, since client confidences
317 are protected by privilege only when they are imparted in the context of the client-
318 lawyer relationship. Because of the significant danger of harm to client interests
319 and because the client's own emotional involvement renders it unlikely that the
320 client could give adequate informed consent, this Rule prohibits the lawyer from
321 having sexual relations with a client regardless of whether the relationship is
322 consensual and regardless of the absence of prejudice to the client.

323 [21] Sexual relationships that predate the client-lawyer relationship are not
324 prohibited. Issues relating to the exploitation of the fiduciary relationship and
325 client dependency are diminished when the sexual relationship existed prior to the
326 commencement of the client-lawyer relationship. However, before proceeding with
327 the representation in these circumstances, the lawyer should consider whether the
328 lawyer's ability to represent the client will be materially limited by the relationship.
329 See Rule 1.7(a)(2).

330 [22] When the client is an organization, paragraph (j) of this Rule prohibits a
331 lawyer for the organization (whether inside counsel or outside counsel) from
332 having a sexual relationship with a constituent of the organization who supervises,

333 directs or regularly consults with that lawyer concerning the organization's legal
334 matters.

335 Imputation of Prohibitions

336 [23] Under paragraph (k), a prohibition on conduct by an individual lawyer in
337 paragraphs (a) through (i) also applies to all lawyers associated in a firm with the
338 personally prohibited lawyer. For example, one lawyer in a firm may not enter into
339 a business transaction with a client of another member of the firm without
340 complying with paragraph (a), even if the first lawyer is not personally involved in
341 the representation of the client. The prohibition set forth in paragraph (j) is
342 personal and is not applied to associated lawyers.

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.

- 21 c. A lawyer shall not prepare an instrument giving the lawyer or a person
22 related to the lawyer as parent, grandparent, child, grandchild, sibling, or
23 spouse any substantial gift from a client, including a testamentary gift,
24 except where the client is related to the donee.
- 25 d. Prior to the conclusion of representation of a client, a lawyer shall not make
26 or negotiate an agreement giving the lawyer literary or media rights to a
27 portrayal or account based in substantial part on information relating to the
28 representation.
- 29 e. A lawyer shall not provide financial assistance to a client in connection with
30 pending or contemplated litigation, except that:
- 31 1. a lawyer may advance court costs and expenses of litigation, the
32 repayment of which may be contingent on the outcome of the matter;
33 or
- 34 2. a lawyer representing a client unable to pay court costs and expenses
35 of litigation may pay those costs and expenses on behalf of the client.
- 36 f. A lawyer shall not accept compensation for representing a client from one
37 other than the client unless:
- 38 1. the client gives informed consent;
39 2. there is no interference with the lawyer's independence of professional
40 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 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.

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

121 listed above.

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

123 [5] Lawyers are frequently asked to represent a client under circumstances in
124 which a third person will compensate the lawyer, in whole or in part. The third
125 person might be a relative or friend, an indemnitor (such as a liability insurance
126 company) or a co-client (such as a corporation sued along with one or more of its
127 employees). Because third-party payers frequently have interests that differ from
128 those of the client, including interests in minimizing the amount spent on the
129 representation and in learning how the representation is progressing, lawyers are
130 prohibited from accepting or continuing such representations unless the lawyer
131 determines that there will be no interference with the lawyer's independent
132 professional judgment and there is informed consent from the client. See also Rule
133 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who
134 recommends, employs or pays the lawyer to render legal services for another).

135 Settlement of Aggregated Claims

136 [6] Paragraph (g) requires informed consent. This requirement is not met by a
137 blanket consent prior to settlement that the majority decision will rule.

138 Agreements to Limit Liability

139 [7] A lawyer may not condition an agreement to withdraw or the return of a client's
140 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.

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.

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).

1 **RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS**

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

- 7 1. the transaction and terms on which the lawyer acquires the interest are
8 fair and reasonable to the client and are fully disclosed and
9 transmitted in writing to the client in a manner which can be
10 reasonably understood by the client;
11 2. the client is advised in writing of the desirability of seeking and is
12 given a reasonable opportunity to seek the advice of independent
13 counsel in the transaction; and
14 3. the client gives informed consent, in a writing signed by the client, to
15 the essential terms of the transaction and the lawyer's role in the
16 transaction, including whether the lawyer is representing the client in
17 the transaction.

18 b. A lawyer shall not use information gained in the professional relationship
19 with a client to the disadvantage of the client unless the client gives
20 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 and a lawyer representing an indigent client pro bono through a law school clinical or pro bono

41 program may provide modest gifts to the client for food, rent,
42 transportation, medicine and other basic living expenses. The lawyer:

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

46 (ii) may not seek or accept reimbursement from the client, a
47 relative of the client or anyone affiliated with the client; and

48 (iii) may not publicize or advertise a willingness to provide
49 such gifts to prospective clients.

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

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

- 54 1. the client gives informed consent;
- 55 2. there is no interference with the lawyer's independence of professional
56 judgment or with the client-lawyer relationship; and
- 57 3. information relating to representation of a client is protected as
58 required by Rule 1.6.

59 g. A lawyer who represents two or more clients shall not participate in making
60 an aggregate settlement of the claims for or against the clients, nor in a

61 criminal case an aggregated agreement as to guilty or nolo contendere pleas,
62 unless each client gives informed consent, in a writing signed by the client.

63 The lawyers disclosure shall include the existence and nature of all claims or
64 pleas involved and of the participation of each person in the settlement.

65 h. A lawyer shall not make an agreement prospectively limiting the lawyer's
66 liability to a client for malpractice unless permitted by law and the client is
67 independently represented in making the agreement, or settle a claim for
68 such liability with an unrepresented client or former client without first
69 advising that person in writing that independent representation is appropriate
70 in connection therewith.

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

77 j. A lawyer shall not acquire a proprietary interest in the cause of action or
78 subject matter of litigation the lawyer is conducting for a client, except that
79 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.

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

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

Settlement of Aggregated Claims

[10] 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

[11] 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.

[12] 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

[13] 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

[14] 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

220 as the exception for reasonable contingent fees set forth in Rule 1.5 and the
221 exception for lawyer's fees and for certain advances of costs of litigation set forth
222 in paragraph (e).

REPORT

Introduction and Executive Summary

The Resolution accompanying this Report proposes to amend the ABA Model Rule for Registration of In-House Counsel (Model Registration Rule) to clarify an ambiguity between it and Rule 5.5 of the ABA Model Rules of Professional Conduct. Model Rule 5.5(d)(1) sets forth an exception to the unauthorized practice of law under paragraph (a) of the Rule for in-house counsel practicing via systematic and continuous presence in a jurisdiction in which they are not admitted. The black letter and Comment to Model Rule 5.5 relating to paragraph (d)(1) contain no language restricting a qualifying entity to an organization or affiliate whose business consists of activities other than the practice of law or the provision of legal services. The Model Registration Rule, the intent of which is to implement the provisions of Model Rule 5.5(d), does have this limitation. This Resolution seeks to resolve that ambiguity by deleting the restrictive language from the Model Registration Rule.

The proposed amendments also seek to make clear by such deletion that law firm general counsel¹, whose client is the law firm, is included among those in-house counsel encompassed by the Model Registration Rule. The Standing Committee on Professional Regulation concluded that client law firms and their in-house counsel would benefit from consistency across jurisdictions on this issue, and that such changes are responsive to the growth over the years in the number of law firms with general counsel whose client is the firm. These firms, like multijurisdictional companies, may want their in-house counsel to have an established presence at the office of the firm in a jurisdiction where that lawyer is not licensed. Arizona recently amended its Rules to permit this, and as discussed below, several other jurisdictions do not have the limitation currently set forth in the Model Registration Rule.

The proposed amendments to the Model Registration Rule do not require changes to the Rule's Comments or changes to Model Rule 5.5. They would provide state supreme courts with a comprehensive regulatory approach that reflects the reality of multijurisdictional and in-house practice for law firms.

Relevant History

In August 2002, the ABA House of Delegates adopted recommendations proposed by the Commission on Multijurisdictional Practice (MJP Commission) to amend Rule 5.5 of the ABA Model Rules of Professional Conduct (02A201B).² Model Rule 5.5(d)(1) provides that in-house lawyers may establish a systematic and continuous presence in a jurisdiction in which they are not licensed when they do so to provide legal services to the

¹ The term general counsel is intended to capture all lawyers in the firm for whom the firm is the client.

² COMMISSION ON MULTIJURISDICTIONAL PRACTICE,
https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/ (last visited Apr. 29, 2021).

lawyer's organizational client and its affiliates. Since then, Model Rule 5.5 was amended to include foreign in-house counsel (13M107A).³

Comment [16] to Model Rule 5.5 states, in relevant part, that paragraph (d)(1) applies to “in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer’s ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work.” As noted in Comment [17], such in-house counsel may also be subject to registration requirements and other requirements, including continuing legal education and client protection fund assessments.⁴

In 2008, the ABA adopted the Model Registration Rule (08A112A). The purpose of the Model Registration Rule was to enable jurisdictions that chose to adopt a registration approach to implementing their versions of Model Rule 5.5(d)(1) to have a regulatory mechanism in place allowing them to identify, monitor, and better regulate those in-house lawyers who are subject to the disciplinary authority of the local jurisdiction.⁵

The Model Registration Rule also provides sanctions for those who fail to register. Not all jurisdictions that have adopted the provisions of Model Rule 5.5(d)(1) require registration. Currently, thirty-three jurisdictions require registration whether or not they follow the Model Registration Rule.⁶

The Model Registration Rule has been amended several times, most recently in 2016 (16M103), to allow the highest court of appellate jurisdiction the discretion to allow someone who does not meet the Rule’s other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register.

³ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES REVISED 107A, RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107a_resolution_only_redline.pdf.

⁴ Subsequent to the adoption of the Model Registration Rule, Comment [17] was amended to cite to it.

⁵ See also ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_5_disciplinary_authority_choice_of_law/ (last visited Apr. 29, 2021).

⁶ See ABA CHART, IN-HOUSE CORPORATE REGISTRATION RULE (May 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in-house-corporate-counsel-registration-rules-charts.pdf.

The Proposed Amendments to the Model Rule for Registration of In-House Counsel

A. Clarifying the Ambiguity Between Model Rule 5.5(d)(1) and the Model Registration Rule

As noted above, Model Rule 5.5(d)(1) and its Comments do not restrict the type of qualifying organization or its affiliates to those “whose business consists of activities other than the practice of law or the provision of legal services,” as set forth in the Model Registration Rule. The Professional Regulation Committee has been unable to identify a justification for inserting that limitation in the Model Registration Rule. The Report accompanying the 2008 Resolution proposing the Model Registration Rule does not address that issue. While the ABA Commission on Ethics 20/20 proposed amendments to the Model Registration Rule to include qualifying foreign in-house counsel and relocated in the Rule the language prohibiting the organizational client from engaging in the practice of law, its focus was not on whether that existing restriction should continue.

As a result, the Professional Regulation Committee recommends that this ambiguity between Model Rule 5.5(d)(1) and its Comments and the Model Registration Rule be resolved by deleting the limitation from the Model Registration Rule. As the Model Registration Rule is intended as a means by which to identify and monitor in-house counsel practicing in a jurisdiction pursuant to Model Rule 5.5(d)(1), the provisions and intent of Model Rule 5.5(d)(1) should govern.

In addition, inquiry by the Professional Regulation Committee indicates that, while such was not the case in 2008 when the Model Registration Rule was proposed and adopted by the House, it is now a well-established practice for a significant number of large and medium sized law firms to utilize in-house counsel whose client is the firm. These in-house functions have been formalized and these lawyers have been integrated into the managerial and operational structures of the firm departmentally. The Committee believes that, consistent with Model Rule 5.5(d)(1) and retaining all protections in the Registration Rule, ABA policy should reflect contemporary law practice and these law firm in-house lawyers should be treated the same as other in-house counsel.

The Professional Regulation Committee considered that some law firm in-house counsel may be non-equity or equity partners in the organization, as opposed to employees in a technical sense. The Committee does not believe that the manner in which a law firm in-house counsel is compensated should be or was intended to be determinative. The Report of the Commission on Multijurisdictional Practice, which proposed paragraph (d)(1), does not refer to the basis of the in-house counsel’s compensation, but rather focuses on risk to the public and client of allowing the lawyer to have a systematic and continuous presence in the host jurisdiction. The basis for the exception in paragraph (d)(1) to otherwise applicable prohibitions was to “facilitate multijurisdictional law practice in identifiable situations that serve the interests of clients and the public and do not create

an unreasonable regulatory risk.”⁷ The change proposed by this Resolution does not increase risk to the public or the law firm client.

B. The Model Registration Rule Should Reflect Modern Law Practice

As noted above, the Professional Regulation Committee recommends that the Model Registration Rule reflect the evolution of law practice since its 2008 adoption. While the provision in the Model Registration Rule restricting the organization to those whose business is legal and consists of activities other than the practice of law or the provision of legal services has been followed by most jurisdictions that have adopted a registration approach, some jurisdictions’ rules contain no such limiting language. Arizona recently amended its Rule specifically to eliminate the restriction for the reasons set forth in this Report.

In 2019, the Arizona Supreme Court proposed amendments to its Rules providing for admission via means other than examination. Specifically, the Court proposed and ultimately amended, effective May 1, 2020, Rule 38(a) that applies to Certification and Limited Admission for In-House Counsel. In its Petition to amend that Rule, the Court stated that it was proposing to remove language providing that the entity for which in-house counsel works must engage in business “other than the practice of law or provision of legal services.” The Court stated in its Petition that the proposed amendment was based on the proposition that the Rule should not prohibit “lawyers from practicing as an in-house counsel for a law firm or other legal office. . .” and that these lawyers, upon registration, should be able to work for their law firm as an in-house counsel “with all rights and restrictions provided in the rules.”

The Professional Regulation Committee reviewed the comments on the Arizona Supreme Court’s website that were submitted in response to the Petition to amend the Rules. There were no comments expressing opposition to this change. Arizona Supreme Court Rule 38(a) now states that:

(1) *General Statement and Eligibility.* As used in this rule, “in-house counsel” shall refer to an attorney who is employed within the State of Arizona as in-house counsel or a related position for a single for-profit or non-profit corporation, association, or other organizational entity, which can include its parents, subsidiaries and/or affiliates, the business of which is lawful.

Colorado Supreme Court Rule 204.1, entitled “Single-Client Certification,” also lacks the limiting language found in the Model Registration Rule. It states in relevant part that in “its discretion, the Supreme Court may certify an attorney who is not licensed to practice law in Colorado, but who declares domicile in Colorado, to act as counsel for a single client if all of the following conditions are met. . . (e) The attorney’s practice of law is limited to

⁷02A201B; ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES REPORT 201(B) (Aug. 2002), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201b.pdf.

acting as counsel for such single client (which may include a business entity or an organization and its organizational affiliates).”

Kentucky Supreme Court Rule 2.111, which sets forth the requirements for receiving a Limited Certificate of Admission to Practice Law and does not include the law firm exclusion, states in relevant part that:

(1) Every attorney not a member of the Bar of this Commonwealth who performs legal services in this Commonwealth solely for his/her employer, its parent, subsidiary, or affiliated entities, shall file with the Kentucky Office of Bar Admissions on a form provided, an application for limited certificate of admission to practice law in this Commonwealth. . . . If approved, a limited certificate of admission to practice law shall be granted, and shall be effective as of the date such application is approved, provided that the following prerequisites are satisfied. . . . (b) The attorney applying for limited certificate of admission to practice law shall sign a sworn statement certifying to the Court that. . . . (iv) He/she will perform legal services in this Commonwealth solely for his employer, its parent, subsidiary, affiliated entities, or on a pro bono basis as permitted under paragraph (4)(c) below.

Rhode Island Supreme Court Rule 9(b), Registration of In-House Counsel, provides that an “attorney who is employed by a corporation or other entity at an office in this state, and who is a member in good standing of the bar of any other state but is not a member of the bar of this state, may be permitted to practice law in Rhode Island consistent with this rule upon electronically filing the Petition for Registration as In-House Counsel available on the Rhode Island Supreme Court Attorney Portal and after satisfying this Court that the attorney is a member in good standing of said court.” The Rule further states that the “in-house counsel shall be permitted to practice law in this state but only on behalf of the corporation or other entity by which the in-house counsel is employed, its directors, officers, and employees in their respective official or employment capacities, and/or its commonly owned or controlled organizational affiliates. . . .”

While not a registration rule, §10-206 of the Maryland Business Occupations and Professions Code provides that a Maryland license to practice law is not required when a lawyer providing legal advice to a corporation located in Maryland is employed by the company and admitted to practice in another jurisdiction. The statute does not contain language restricting the nature of the entity to one that does not engage in the practice of law or delivery of legal services.

Conclusion

The Professional Regulation Committee proposes the deletion of the limiting language describing the nature of the in-house lawyer’s organizational client for the reasons set forth above. The proposed change would not result in heightened risk to the client or the public and would bring ABA policy in line with contemporary practice. The Committee

100

respectfully requests that the House of Delegates adopt this Resolution and approve the proposed amendments to the Model Rule for Registration of In-House Counsel.

Respectfully Submitted,

Hon. Daniel J. Crothers, Chair
Standing Committee on Professional
Regulation

August 2021