



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

October 22, 2021

Hybrid

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IV. Information Item

(Frederick/Mittelman)

A. Review GRPC Part 7 Revisions

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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
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Vice Chairperson

R. Gary Spencer	2022
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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
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Disciplinary Rules and Procedures Committee
Meeting of September 1, 2021
Zoom meeting

MINUTES

Chair Michael Bagley called the meeting to order at 10:00 a.m.

Attendance:

Committee members: Michael Bagley, Erin H. Gerstenzang, John G. Haubenreich, Patrick H. Head, R. Javoyne Hicks, William D. James, Seth D. Kirschenbaum, Catherine Koura, Edward B. Krugman, David N. Lefkowitz, David S. Lipscomb, William Thomas, Jr., Peter Werdesheim, Patrick Wheale, and Hon. Paige Reese Whitaker.

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

Guests: Supreme Court Justice Peterson and Mazie Lynn Causey, General Counsel of the Georgia Association of Criminal Defense Lawyers.

Approval of Minutes:

The Committee approved the Minutes from the June 11, 2021 meeting.

Action Item:

GRPC Part Seven Revisions

By unanimous vote, the Committee voted to remove “the mailing of” in the last sentence of (c) (3) and accepted the subcommittee’s remaining changes to Rule 7.3. A copy of the Rule as amended appears at the end of these minutes.

The Committee agreed to circulate redline and clean versions of Rules 7.1, 7.2 (as approved at its 6/11/21 meeting) and Rule 7.3 along with an Executive Summary to Bar membership and Sections for comments.

Informational Items:

By unanimous vote, the Committee voted to consider the revisions to Rules 1.5 and 1.8 as requested by the Formal Advisory Opinion Board at its next meeting.

The Committee agreed to discuss the changes to ABA Rule 1.8 at its next meeting.

Report:

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

The meeting adjourned at 11:25 a.m.

Redline version of Rule 7.3

~~RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS~~

- ~~a. A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:~~

~~#Rule 7.3: Solicitation of Clients~~

~~(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.~~

~~(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:~~

~~(1) lawyer;~~

~~(2) person who has been a family, close personal, or prior business or professional relationship with the lawyer or law firm; or~~

~~(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.~~

~~(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:~~

~~1. (1) the target of the solicitation has made known to the lawyer that a person does not desire not to receive communications from be solicited by the lawyer; or~~

~~2. (2) the communications solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;~~

3. (3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or

4. (4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

~~b. Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.~~

~~c. A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:~~

~~1. A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:~~

- ~~i. does not engage in conduct that would violate the Rules if engaged in by a lawyer;~~
- ~~ii. provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and~~
- ~~iii. discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.~~

~~2. A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:~~

- ~~i. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;~~
- ~~ii. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;~~

iii. ~~the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and~~

iv. ~~a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.~~

3. ~~A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;~~

4. ~~A lawyer may pay for a law practice in accordance with Rule 1.17.~~

d. ~~A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a nonlawyer who has not sought advice regarding employment of a lawyer.~~

e. ~~A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization that would violate these Rules if engage in by a lawyer.~~

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

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal contact by a lawyer of prospective clients encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. #This form of contact subjects the laya person to the private importuning of athe trained advocate, in a direct interpersonal encounter. A prospective client often feels The person, who may already feel

overwhelmed by the situation-circumstances giving rise to the need for legal services, and may have an impaired capacity for reason, may find it difficult to fully evaluate all available alternatives with reasoned judgment and protective appropriate self-interest. Furthermore, in the lawyer seeking face of the retainer lawyer's presence and insistence upon an immediate response. The situation is faced fraught with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect possibility of undue influence, intimidation, and overreaching.

~~[2] The situation is therefore fraught with the possibility of undue influence, intimidation and overreaching. [3] The potential for abuse overreaching inherent in solicitation of prospective clients through personal live person-to-person contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an lawyers have alternative means of communicating conveying necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct, personal contact through an intermediary and live contact by telephone.~~

Direct Written Solicitation

~~[3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.~~

~~[4] Certain narrowly drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public's intelligent selection of counsel, including the restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.~~

~~[5] In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.~~

~~[6] This Rule does not prohibit communications [4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

~~[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the~~

lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law, such as or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e)

would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

Clean version of Rule 7.3

Rule 7.3: Solicitation of Clients

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

(3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the communication; or

(4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional

relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of

affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

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.

1 **GRPC 1.5 Fees**

2 ...

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

12 ...

13 **GRPC 1.8 Conflict of Interest: Prohibited Transactions**

14 ...

15 (h) A lawyer shall not make an agreement prospectively limiting the lawyer's
16 liability to a client for malpractice unless permitted by law and the client is
17 independently represented in making the agreement, or settle a claim for such
18 liability with an unrepresented client or former client without first advising that
19 person in writing that independent representation is appropriate in connection
20 therewith. To the extent that agreements to arbitrate disputes over a lawyer's
21 liability for malpractice are enforceable, a lawyer may enter into such an
22 agreement with a client or a prospective client if the client or prospective client
23 gives informed consent.

24 ...

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

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

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

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

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

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

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

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

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

24 (e) A lawyer shall not provide financial assistance to a client in connection with pending or
25 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 school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

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

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

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

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

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

(1) the client gives informed consent;

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims 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.

(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.

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

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the

lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or 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.

Gifts to Lawyers

[6] 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 a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not

suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

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

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests 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 paragraphs (a) and (i).

Financial Assistance

[10] 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.

[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 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 clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] 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.

Person Paying for a Lawyer's Services

[14] 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).

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

Aggregate Settlements

[16] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to

have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

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

[18] 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.

Acquiring Proprietary Interest in Litigation

[19] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of 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 relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since

client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

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

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

Imputation of Prohibitions

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

From: Paula Frederick
To: Kathy Jackson; Jenny Mittelman; Bill NeSmith
Subject: FW: Possible amendment of Rule 5.5 to permit pro bono work by in-house lawyers
Date: Tuesday, August 24, 2021 10:23:12 AM
Attachments: GA Rule 5.5 Proposed Rule Change (004).docx

Here is the rule.

From: Fleming, John [mailto:johnfleming@eversheds-sutherland.com]
Sent: Monday, August 23, 2021 11:22 AM
To: Paula Frederick <PaulaF@gabar.org>
Cc: Naja, Cheryl <Cheryl.Naja@alston.com>
Subject: Possible amendment of Rule 5.5 to permit pro bono work by in-house lawyers

Paula:

I hope all is going great for you.

For several months Cheryl Naja and I have been discussing with an ad hoc group of corporate in-house lawyers plus the Access to Justice Committee of the State Bar a possible amendment to Georgia Bar Rule of Professional Development 5.5 which would expressly permit corporate in-house lawyers in Georgia who are not otherwise licensed to practice law here to provide pro bono legal services. Mike Monahan has been in the loop on this, and may have mentioned it to you. We have also interacted with PBI and several local legal service providers on this, and everyone seems receptive.

The Access to Justice Committee is scheduled to address the possible change again at its virtual meeting this Wednesday 8/25 at noon. I attach a working draft of the proposed change. Here is a link to a PBI/ABA summary of similar provisions in other states – [Guide to In-House Pro Bono Multijurisdictional Practice Rules](#) Georgia is an outlier in not expressly permitting this. I'll send shortly a memo supporting the rule change. Would you have a few minutes this afternoon or tomorrow to discuss this with me, so we can determine if we are missing anything significant from the perspective of the Honorable General Counsel of the State Bar? Let me know, and thanks so much for considering, John F.

John Fleming | Partner | Eversheds Sutherland (US) LLP

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[Biography](#) | [vCard](#)

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Memo

TO: Georgia State Bar Access to Justice Committee

FROM: Ad Hoc Committee on Corporate Pro Bono in Georgia

DATE: August 23, 2021

RE: Possible Amendment of R.P.C. 5.5

The undersigned group of Georgia in-house corporate lawyers and pro bono professionals at Georgia law firms respectfully propose that the State Bar adopt an amended Rule of Professional Conduct 5.5 to expressly permit corporate lawyers in Georgia who are barred elsewhere to engage in pro bono work when done under the auspices of a Georgia court, a Georgia state or local bar association, a Georgia law school legal clinic, a Georgia legal aid organization, a pro bono program of the lawyer's employer, or a pro bono program of a law firm which includes Georgia barred attorneys.

The need for pro bono attorney volunteers to help economically challenged and marginalized Georgians achieve access to justice is enormous. Essential non-profit legal service providers in Georgia have wonderful attorneys working very hard to help the disadvantaged, and they do help thousands. But the needs are much larger than they alone can meet.

Many of these organizations leverage the legal help they can provide to the underserved by utilizing volunteer pro bono work from Georgia attorneys in private practice. Working with Atlanta Legal Aid, Georgia Legal Services, the Atlanta Volunteer Lawyers Foundation, the Georgia Asylum and Immigration Network, the Pro Bono

Partnership of Atlanta, Georgia Appleseed, the Southern Center for Human Rights, the State Bar and many other organizations, hundreds of volunteer lawyers from firms and solo practitioners around the state contribute thousands of hours annually to providing legal representation to underserved individuals and communities. The types of cases these pro bono volunteers take on cover the range of legal problems a person or non-profit with very limited means might face – negotiating with landlords, counseling domestic abuse victims, addressing corporate governance or other legal issues for non-profits serving the poor, working with immigrants on visa and asylum petitions, participating in non-partisan election hotlines, and many others.

The need is much greater than can be met by the legal service providers, however, even with the addition of pro bono help from Georgia lawyers in private practice. One significant additional source of possible help would be from in-house lawyers in the many corporate legal departments with lawyers working in Georgia. Georgia, and Atlanta in particular, is the location of global, national and regional headquarters for many companies, and there are hundreds of in-house lawyers now working in Georgia.

Corporate lawyers, encouraged and supported by their employers, have become increasingly interested over the last decade in contributing to the communities where they live and work by providing pro bono legal services to individuals and worthy non-profits. Most of the in-house lawyers working in Georgia are not barred in Georgia, however.

Most states have specific bar rules which permit (and encourage) corporate lawyers working in that state to perform pro bono legal work without requiring bar admission in the state. Here is a link to a summary from the Pro Bono Institute and the A.B.A. of rules in

each of the 50 states. **Guide to In-House Pro Bono Multijurisdictional Practice Rules.**

Georgia presently has no such rule and, we submit, needs one.

Georgia authorizes non-Georgia barred lawyers to do legal work for their employers in Georgia. Rule 5.5 d.1. The rule permits a non-Georgia barred attorney to provide legal services “on a temporary basis” when those services are undertaken in association with a Georgia barred attorney “who actively participates in the matter.” Rule 5.5 c.1. And Georgia has a limited exception for non-barred lawyers to assist in pro bono work in very limited circumstances following a determination (by the Georgia Supreme Court) of a major disaster. Rule 5.5 h., referencing Supreme Court of Georgia Rules part XXI, Rule 121. This latter rule can be read to imply that non-Georgia barred in-house attorneys are not permitted to work on pro bono matters in Georgia in other circumstances, and there is understandable concern that pro bono work in Georgia by corporate lawyers only barred elsewhere could be construed as the unauthorized practice of law.

The time has come for Georgia to unlock this additional resource to help underserved individuals and non-profits to have their legal needs met. Georgia needs a rule, like those in most other states, which expressly permits non-Georgia barred attorneys who are working in Georgia to provide pro bono legal services. Four states (Virginia, New York, Illinois and Wisconsin) have rules permitting pro bono work by such lawyers without restriction. Those are each states which require registration by lawyers barred in other states, however. Georgia is an “authorization” state, so it is probably appropriate to place some modest limitation on the circumstances in which non-Georgia barred attorneys can do pro bono work.

In our view, the most appropriate limitation would be to require that the pro bono work be done under the auspices of a state or federal court in Georgia, a Georgia state or local bar association, a law school legal clinic, a legal aid organization, a pro bono program of the lawyer's employer, or a pro bono program of a law firm. In some and perhaps most of these situations, the in-house lawyer would be working with a Georgia barred attorney at the legal service provider and/or the law firm, so the work would also be permitted under Rule 5.5 c.1. But even if a Georgia barred lawyer were not "actively involved" so as to trigger that current exception, the fact that the Georgia barred legal service provider, court or law firm is associated with the project gives the Bar more than sufficient basis for any quality control that would be appropriate.

On the other hand, the proposed limitation would not significantly restrict an in-house lawyer's ability to take on meaningful pro bono work. As is the case with pro bono work done by private Georgia attorneys at law firms, almost all pro bono projects will be undertaken with legal service providers who provide training, vetting and back-up. An amended rule expressly permitting pro bono work by non-Georgia barred attorneys will permit in-house lawyers who want to provide pro bono help to do so. This will provide additional resources to address the serious access to justice challenges in our state. And this of course would cause no displacement of work away from Georgia barred attorneys.

We considered whether the amended rule should require that malpractice insurance be provided in connection with pro bono work by non-Georgia barred in-house lawyers. Most states do not require this. The exceptions are states like Oregon, and unlike Georgia, which require that all lawyers carry malpractice insurance. Of course in practice in-house

counsel will likely not take on pro bono matters unless such coverage is available. And it is in fact generally available through the non-profit legal service providers with whom the volunteers would typically be working. Rachel Spears of Pro Bono Partnership of Atlanta checked with nine Georgia non-profits which supervise pro bono work, and eight of them reported that they had such coverage. And many in-house legal departments carry their own coverage. See PBI's 2020 [Corporate Pro Bono Benchmarking Report](#) at p.12.

We also considered whether there should be a vetting and certification process for legal service providers under the auspices of which corporate in-house lawyers would be permitted to provide pro bono legal services. PBI advised against such a process, which is in effect in some states, as it can become quite burdensome for both the applicant and the reviewer. A few states place that burden on the state's Supreme Court, which seems unnecessary here. The incorporation of Rule 6.1 into the amended rule provides an effective definition of pro bono, and the major non-profit players in this space in Georgia are well known. There seems very little risk that in-house legal departments will be tempted to provide free legal services through legal service providers of dubious repute.

We believe that all stakeholders – corporations with legal staff in Georgia, those in-house lawyers, Georgia law firms engaged in pro bono work, Georgia legal service

providers seeking volunteers and, most importantly, Georgia individuals and non-profits in need of pro bono legal assistance – will benefit from and be supportive of this change.

We attach a proposed amended Rule 5.5 which we believe would accomplish the stated goal. Thank you for your consideration of this proposal.

In-House Pro Bono Practice Proposed Amendment to GA RPC 5.5

Below is a proposed amendment to Georgia Rule of Professional Conduct 5.5 to authorize non-locally licensed in-house counsel in Georgia to deliver pro bono legal services. The proposed amendments to the rule and the comments are presented in red text.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

- a. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- b. A Domestic Lawyer shall not:
 - 1. except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - 2. hold out to the public or otherwise represent that the Domestic Lawyer is admitted to practice law in this jurisdiction.
- c. A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - 1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - 2. are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the Domestic Lawyer, or a person the Domestic Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - 3. are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - 4. are not within paragraphs (c) (2) or (c) (3) and arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice.
- d. A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
 - 1. are provided to the Domestic Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
 - 2. are services that the Domestic Lawyer is authorized to provide by federal law or other law of this jurisdiction.
- e. A Foreign Lawyer shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a Foreign Lawyer does not engage in the

unauthorized practice of law in this jurisdiction when on a temporary basis the Foreign Lawyer performs services in this jurisdiction that:

1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 2. are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;
 3. are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice;
 4. are not within paragraphs (e) (2) or (e) (3) and
 - i. are performed for a client who resides or has an office in a jurisdiction in which the Foreign Lawyer is authorized to practice to the extent of that authorization; or
 - ii. arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
 - iii. are governed primarily by international law or the law of a non-United States jurisdiction.
- f. A Foreign Lawyer who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction subject to the following conditions:
1. The services are provided to the Foreign Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; and
 2. The Foreign Lawyer is and remains in this country in lawful immigration status and complies with all relevant provisions of United States immigration laws.
- g. For purposes of the grants of authority found in subsections (e) and (f) above, the Foreign Lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.
- h. A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XXI, Rule 121, Provision Of Legal Services Following Determination Of Major Disaster, may provide legal services in this state to the extent allowed by said Rules.
- i. A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XV, Rules 91-95, Student Practice Rule, may provide legal services in this state to the extent allowed by said Rules.
- j. A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XVI,

Rules 97-103, Law School Graduates, may provide legal services in this state to the extent allowed by said Rules.

- k. A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XX, Rules 114-120, Extended Public Service Program, may provide legal services in this state to the extent allowed by said Rules.
- l. Any domestic or foreign lawyer who has been admitted to the practice of law in Georgia pro hac vice, pursuant to the Uniform Rules of the various classes of courts in Georgia, shall pay all required fees and costs annually as set forth in those Rules. Failure to pay the annual fee by January 15 of each year of admission pro hac vice will result in a late fee of \$100 that must be paid no later than March 1 of that year. Failure to pay the annual fees may result in disciplinary action, and said lawyer may be subject to prosecution under the unauthorized practice of law statutes of this state.
- m. Notwithstanding the restrictions on the scope of practice set out in subsection (d)(1) above, any Domestic Lawyer authorized to practice by subsection (d)(1) may provide voluntary pro bono public services in accordance with Rule 6.1 of the Georgia Rules of Professional Conduct under the auspices of a [state or federal court in Georgia](#), a Georgia state or local bar association, a law school legal clinic, a legal aid organization, a pro bono program of said lawyer's employer, or a pro bono program of a law firm.

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

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a Domestic Lawyer violates paragraph (b) and a Foreign Lawyer violates paragraph (e) if the Domestic or Foreign Lawyer establishes an office or

other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the Domestic or Foreign Lawyer is not physically present here. Such Domestic or Foreign Lawyer must not hold out to the public or otherwise represent that the Domestic or Foreign Lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a Domestic or Foreign Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances for the Domestic Lawyer. Paragraph (e) identifies four such circumstances for the Foreign Lawyer. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a Domestic Lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a Domestic or Foreign Lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c) or paragraph (e). Services may be "temporary" even though the Domestic or Foreign Lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the Domestic Lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to Domestic Lawyers. Paragraphs (e), (f) and (g) apply to Foreign Lawyers. Paragraphs (c) and (e) contemplate that the Domestic or Foreign Lawyer is authorized to practice in the jurisdiction in which the Domestic or Foreign Lawyer is admitted and excludes a Domestic or Foreign Lawyer who while technically admitted is not authorized to practice, because, for example, the Domestic or Foreign Lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a Domestic Lawyer associates with a lawyer licensed to practice in this jurisdiction. Paragraph (e)(1) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice in this jurisdiction. For these paragraphs to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Domestic Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a Domestic Lawyer does not violate this Rule when the Domestic Lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a Domestic Lawyer to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the Domestic Lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a Domestic Lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the Domestic Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Domestic Lawyer is authorized to practice law or in which the Domestic Lawyer reasonably expects to be admitted

pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Domestic Lawyer may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the Domestic Lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a Domestic Lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate Domestic Lawyers may conduct research, review documents, and attend meetings with witnesses in support of the Domestic Lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a Domestic Lawyer, and paragraph (e)(3) permits a Foreign Lawyer, to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic or Foreign Lawyer's practice in a jurisdiction in which the Domestic or Foreign Lawyer is admitted to practice. The Domestic Lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so requires.

[13] Paragraph (c)(4) permits a Domestic Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (e)(4)(i) permits a Foreign Lawyer to provide certain legal services in this jurisdiction on behalf of a client who resides or has an office in the jurisdiction in which the Foreign Lawyer is authorized to practice. Paragraph (e)(4)(ii) permits a Foreign Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to a matter that has a substantial connection to the jurisdiction in which the Foreign Lawyer is authorized to practice. These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted. Paragraphs (e)(3) and (e)(4)(ii) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors may evidence such a relationship. These include but are not limited to the following:

- a. The Domestic or Foreign Lawyer's client may have been previously represented by the Domestic or Foreign Lawyer; or
- b. The Domestic or Foreign Lawyer's client may be resident in, have an office in, or have substantial contacts with the jurisdiction in which the Domestic or Foreign Lawyer is admitted; or

- c. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction in which the Domestic or Foreign Lawyer is admitted; or
- d. Significant aspects of the Domestic or Foreign Lawyer's work in a specific matter might be conducted in the jurisdiction in which the Domestic or Foreign Lawyer is admitted or another jurisdiction; or
- e. A significant aspect of a matter may involve the law of the jurisdiction in which the Domestic or Foreign Lawyer is admitted; or
- f. Some aspect of the matter may be governed by international law or the law of a non-United State jurisdiction; or
- g. The Lawyer's work on the specific matter in this jurisdiction is authorized by the jurisdiction in which the lawyer is admitted; or
- h. The client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Domestic or Foreign Lawyer in assessing the relative merits of each; or
- i. The services may draw on the Domestic or Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraphs (d) and (m) identify three ~~Paragraph (d) identifies two~~ circumstances in which a Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1), ~~and~~ (d)(2), ~~and~~ (m), a Domestic Lawyer who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a Domestic Lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The Domestic Lawyer's ability to represent the employer outside the jurisdiction in which the Domestic 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 Domestic Lawyer's qualifications and the quality of the Domestic Lawyer's work.

[17] If an employed Domestic Lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the Domestic Lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a Domestic Lawyer may provide legal services in a jurisdiction in which the Domestic Lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

Paragraph (e)(4)(iii) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction.

[19] A Domestic or Foreign Lawyer who practices law in this jurisdiction pursuant to paragraphs (c), (d), (e), ~~or~~ (f) or (m) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a Domestic Lawyer who practices law in this jurisdiction pursuant to paragraphs (c), ~~or~~ (d), or (m) may have to inform the client that the Domestic Lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4.

[21] Paragraphs (c), (d), (e) and (f) do not authorize communications advertising legal services to prospective clients in this jurisdiction by Domestic or Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Domestic or Foreign Lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

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RULE 7.1: COMMUNICATIONS CONCERNING A ~~LAWYER'S~~LAWYER'S SERVICES

~~a.~~ A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. ~~By way of illustration, but not limitation, a~~A communication is false or misleading if it: contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

- ~~1. contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;~~
- ~~2. is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;~~
- ~~3. compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;~~
- ~~4. fails to include the name of at least one lawyer responsible for its content; or~~
- ~~5. contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:~~

~~"Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client."~~

- ~~6. contains the language "no fee unless you win or collect" or any similar phrase and fails to conspicuously present the following disclaimer:~~

~~"No fee unless you win or collect" [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.~~

~~b. A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication.~~

~~c. A lawyer retains ultimate responsibility to insure that all communications concerning the lawyer or the lawyer's services comply with the Georgia Rules of Professional Conduct.~~

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

Comment

[1] ~~This rule~~Rule governs ~~the content of~~ all communications about a ~~lawyer's~~lawyer's services, including ~~the various types of advertising permitted by Rules 7.3 through 7.5.~~ Whatever means are used to make known a ~~lawyer's~~lawyer's services, statements about them ~~should~~must be truthful.

[2] ~~The prohibition in sub-paragraph (a)(2) of this Rule 7.1: Communications Concerning a Lawyer's Services of~~ Misleading truthful statements that may create "unjustified expectations" are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would ordinarily preclude advertisements about results obtained believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar results can be obtained for others matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

Affirmative Disclosure

~~[3] In general, the intrusion on the First Amendment right of commercial speech resulting from rationally based affirmative disclosure requirements is minimal, and is therefore a preferable form of regulation to absolute bans or other similar restrictions. For example, there is no significant interest in failing to include the name of at least one accountable attorney in all communications promoting the services of a lawyer or law firm as required by sub-paragraph (a)(4) of Rule 7.1: Communications Concerning a Lawyer's Services. Nor is there any substantial burden imposed as a result of the affirmative disclaimer requirement of sub-paragraph (a)(6) upon a lawyer who wishes to make a claim in the nature of "no fee unless you win." Indeed, the United States Supreme Court has specifically recognized that affirmative disclosure of a client's liability for costs and expenses of litigation may be required to prevent consumer confusion over the technical distinction between the meaning and effect of the use of such terms as "fees" and "costs" in an advertisement.~~

~~[4] Certain promotional communications of a lawyer may, as a result of content or circumstance, tend to mislead a consumer to mistakenly believe that the communication is something other than a form of promotional communication for which the lawyer has paid. Examples of such a communication might include advertisements for seminars on legal topics directed to the lay public when such seminars are sponsored by the lawyer, or a newsletter or newspaper column which appears to inform or to educate about the law. Paragraph (b) of this Rule 7.1: Communications Concerning a Lawyer's Services would require affirmative disclosure that a lawyer has given value in order to generate these types of public communications if such is in fact the case.~~

Accountability

~~[5] Paragraph (c) makes explicit an advertising attorney's ultimate responsibility for all the lawyer's promotional communications and would suggest that review by the lawyer prior to dissemination is advisable if any doubts exist concerning conformity of the end product with these Rules. Although prior review by disciplinary authorities is not required by these Rules, lawyers are certainly encouraged to contact disciplinary authorities prior to authorizing a promotional communication if there are any doubts concerning either an interpretation of these Rules or their application to the communication.~~

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(a)(4). See also Rule 8.4(a)(6) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or

by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

1 RULE 7.2: ~~ADVERTISING~~ COMMUNICATIONS CONCERNING A LAWYER'S SERVICES: SPECIFIC
2 RULES

3 ~~a.~~ Subject to the requirements of Rules 7.1 and 7.3, (a) A lawyer may ~~advertise~~ communicate
4 information regarding the lawyer's services through: any media.

5 ~~1. public media, such as a telephone directory, legal directory, newspaper or other~~
6 ~~periodical;~~

7 ~~2. outdoor advertising;~~

8 ~~3. radio or television;~~

9 ~~4. written, electronic or recorded communication.~~

10 ~~b. A copy or recording of an advertisement or communication shall be kept for two years~~
11 ~~after its last dissemination along with a record of when and where it was used.~~

12 ~~c. Prominent disclosures. Any advertisement for legal services directed to potential clients~~
13 ~~in Georgia, or intended to solicit employment for delivery of any legal services in~~
14 ~~Georgia, must include prominent disclosures, clearly legible and capable of being read~~
15 ~~by the average person, if written, and clearly intelligible by an average person, if spoken~~
16 ~~aloud, of the following:~~

17
18 ~~1. Disclosure of identity and physical location of attorney. Any advertisement shall~~
19 ~~include the name, physical location and telephone number of each lawyer or law~~
20 ~~firm who paid for the advertisement and who takes full personal responsibility~~
21 ~~for the advertisement. In disclosing the physical location, the responsible lawyer~~
22 ~~shall state the full address of the location of the principal bona fide office of each~~
23 ~~lawyer who is prominently identified pursuant to this paragraph. For the~~
24 ~~purposes of this Rule, a bona fide office is defined as a physical location~~
25 ~~maintained by the lawyer or law firm from which the lawyer or law firm~~
26 ~~furnishes legal services on a regular and continuing basis. In the absence of a~~
27 ~~bona fide physical office, the lawyer shall prominently disclose the full address~~
28 ~~listed with the State Bar of Georgia or other Bar to which the lawyer is~~
29 ~~admitted. A lawyer who uses a referral service shall ensure that the service~~
30 ~~discloses the location of the lawyer's bona fide office, or the registered bar~~
31 ~~address, when a referral is made.~~

32 ~~2. Disclosure of referral practice. If the lawyer or law firm will refer the majority of~~
33 ~~callers to other attorneys, that fact must be disclosed and the lawyer or law firm~~
34 ~~must comply with the provisions of Rule 7.3(c) regarding referral services.~~

35 ~~3. Disclosure of spokespersons and portrayals. Any advertisement that includes a~~
36 ~~non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a~~
37 ~~client by a non-client, or any paid testimonial or endorsement, shall include~~
38 ~~prominent disclosure of the use of a non-attorney spokesperson, portrayal of a~~
39 ~~lawyer by a non-lawyer, or of a client by a non-client.~~

40 ~~4. Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for~~
41 ~~specified legal services shall, at the time of fee publication, have available to the~~
42 ~~public a written statement clearly describing the scope of each advertised~~
43 ~~service, which statement shall be available to the client at the time of retainer~~
44 ~~for any such service.~~

45 ~~5. Appearance of legal notices or pleadings. Any advertisement that includes any~~
46 ~~representation that resembles a legal pleading, notice, contract or other legal~~
47 ~~document shall include prominent disclosure that the document is an~~
48 ~~advertisement rather than a legal document.~~

49
50 The maximum penalty for a violation of this Rule is a public reprimand.

51
52 **Comment**

53
54 ~~[1] To assist the public in obtaining legal services, lawyers should be allowed to make~~
55 ~~known their services not only through reputation but also through organized~~
56 ~~information campaigns in the form of advertising. Advertising involves an active quest~~
57 ~~for clients, contrary to the tradition that a lawyer should not seek clientele. However,~~
58 ~~the public's need to know about legal services can be fulfilled in part through~~
59 ~~advertising. This need is particularly acute in the case of persons of moderate means~~
60 ~~who have not made extensive use of legal services. The interest in expanding public~~
61 ~~information about legal services ought to prevail over considerations of tradition.~~
62 ~~Nevertheless, advertising by lawyers entails the risk of practices that are misleading or~~
63 ~~overreaching.~~

64 -

65 ~~[2](b) A lawyer shall not compensate, give or promise anything of value to a person for~~
66 ~~recommending the lawyer's services except that a lawyer may:~~

67 ~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

68 ~~(2) pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service~~
69 ~~does not engage in conduct that would violate the Rules if engaged in by a lawyer;~~

70 ~~(3) pay the usual and reasonable fees or dues charged by a bar-operated non-profit referral~~
71 ~~service, including a fee which is calculated as a percentage of the legal fees earned by the~~
72 ~~lawyer to whom the service has referred a matter, provided such bar-operated non-profit~~
73 ~~lawyer referral service meets the following criteria:~~

i. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the Office of the General Counsel a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

ii. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

iii. the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and

iv. a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

(4) pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(5) pay for a law practice in accordance with Rule 1.17;

(6) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(7) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

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

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

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

Comment

[1] This Rule permits public dissemination of information concerning a ~~lawyer's name~~ lawyer's or ~~firm~~ law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the ~~lawyer's~~ lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a ~~lawyer's~~ lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

~~{3} Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.~~

~~[4] Neither this Rule nor Rule 7.3: Direct Contact with Prospective Clients prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

~~Record of Advertising~~

~~[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.~~

~~-~~

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(7), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(7) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

153 [5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as
154 long as the lead generator does not recommend the lawyer, any payment to the lead generator
155 is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the
156 lawyer), and the lead generator's communications are consistent with Rule 7.1
157 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not
158 pay a lead generator that states, implies, or creates a reasonable impression that it is
159 recommending the lawyer, is making the referral without payment from the lawyer, or has
160 analyzed a person's legal problems when determining which lawyer should receive the referral.
161 See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and
162 law firms with respect to the conduct of nonlawyers); Rule 8.4(a)(1) (duty to avoid violating the
163 Rules through the acts of another).

164 [6] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. A
165 legal service plan is a prepaid or group legal service plan or a similar delivery system that assists
166 people who seek to secure legal representation. A lawyer referral service, on the other hand, is
167 any organization that holds itself out to the public as a lawyer referral service.

168 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a
169 lawyer referral service must act reasonably to assure that the activities of the plan or service
170 are compatible with the lawyer's professional obligations. Legal service plans and lawyer
171 referral services may communicate with the public, but such communication must be in
172 conformity with these Rules. Thus, advertising must not be false or misleading, as would be the
173 case if the communications of a group advertising program or a group legal services plan would
174 mislead the public to think that it was a lawyer referral service sponsored by a state agency or
175 bar association.

176 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in
177 return for the undertaking of that person to refer clients or customers to the lawyer. Such
178 reciprocal referral arrangements must not interfere with the lawyer's professional judgment as
179 to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except

180 as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer
181 professional must not pay anything solely for the referral, but the lawyer does not violate
182 paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer
183 professional, so long as the reciprocal referral agreement is not exclusive and the client is
184 informed of the referral agreement. Conflicts of interest created by such arrangements are
185 governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and
186 should be reviewed periodically to determine whether they comply with these Rules. This Rule
187 does not restrict referrals or divisions of revenues or net income among lawyers within firms
188 comprised of multiple entities.

189 Communications about Fields of Practice

190 [9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does
191 not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer
192 “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields
193 based on the lawyer’s experience, specialized training or education, but such communications
194 are subject to the “false and misleading” standard applied in Rule 7.1 to communications
195 concerning a lawyer’s services.

196 [10] The Patent and Trademark Office has a long-established policy of designating lawyers
197 practicing before the Office. The designation of Admiralty practice also has a long historical
198 tradition associated with maritime commerce and the federal courts. A lawyer’s
199 communications about these practice areas are not prohibited by this Rule.

200 Required Contact Information

201 [11] This Rule requires that any communication about a lawyer or law firm’s services include
202 the name of, and contact information for, the lawyer or law firm. Contact information includes
203 a website address, a telephone number, an email address or a physical office location.

1 ~~RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS~~

2 ~~a. A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the~~
3 ~~lawyer's firm, lawyer's partner, associate or any other lawyer affiliated with the lawyer or~~
4 ~~the lawyer's firm, a written communication to a prospective client for the purpose of~~
5 ~~obtaining professional employment if:~~

6 ~~#Rule 7.3: Solicitation of Clients~~

7 (a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or
8 law firm that is directed to a specific person the lawyer knows or reasonably should know needs
9 legal services in a particular matter and that offers to provide, or reasonably can be understood
10 as offering to provide, legal services for that matter.

11 (b) A lawyer shall not solicit professional employment by live person-to-person contact when a
12 significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless
13 the contact is with a:

14 (1) lawyer;

15 (2) person who has been a family, close personal, or prior business or professional relationship
16 with the lawyer or law firm; or

17 (3) person who routinely uses for business purposes the type of legal services offered by the
18 lawyer.

19 (c) A lawyer shall not solicit professional employment even when not otherwise prohibited by
20 paragraph (b), if:

21 ~~1. (1) the target of the solicitation has~~ made known to the lawyer ~~that a person does not a~~
22 ~~desire~~ not ~~to receive communications from~~ be solicited by the lawyer; or

23 ~~2. (2) the communication solicitation~~ involves coercion, duress, fraud, overreaching,
24 harassment, intimidation or undue influence; or

25 ~~3.~~ (3) the written communication concerns an action for personal injury or wrongful death
26 or otherwise relates to an accident or disaster involving the person to whom the
27 communication is addressed or a relative of that person, unless the accident or disaster
28 occurred more than 30 days prior to the ~~mailing of the~~ communication; or

29 ~~4.~~ (4) the lawyer knows or reasonably should know that the physical, emotional or mental
30 state of the person is such that the person could not exercise reasonable judgment in
31 employing a lawyer.

32 ~~b. Written communications to a prospective client, other than a close friend, relative, former~~
33 ~~client or one whom the lawyer reasonably believes is a former client, for the purpose of~~
34 ~~obtaining professional employment shall be plainly marked "Advertisement" on the face~~
35 ~~of the envelope and on the top of each page of the written communication in type size no~~
36 ~~smaller than the largest type size used in the body of the letter.~~

37 ~~c. A lawyer shall not compensate or give anything of value to a person or organization to~~
38 ~~recommend or secure the lawyer's employment by a client, or as a reward for having~~
39 ~~made a recommendation resulting in the lawyer's employment by a client; except that the~~
40 ~~lawyer may pay for public communications permitted by Rule 7.1 and except as follows:~~

41 ~~1. A lawyer may pay the usual and reasonable fees or dues charged by a lawyer~~
42 ~~referral service, if the service:~~

43 ~~i. does not engage in conduct that would violate the Rules if engaged in by a~~
44 ~~lawyer;~~

45 ~~ii. provides an explanation to the prospective client regarding how the~~
46 ~~lawyers are selected by the service to participate in the service; and~~

47 ~~iii. discloses to the prospective client how many lawyers are participating in~~
48 ~~the service and that those lawyers have paid the service a fee to participate~~
49 ~~in the service.~~

50 ~~2. A lawyer may pay the usual and reasonable fees or dues charged by a bar-~~
51 ~~operated non-profit lawyer referral service, including a fee which is calculated as~~
52 ~~a percentage of the legal fees earned by the lawyer to whom the service has~~
53 ~~referred a matter, provided such bar-operated non-profit lawyer referral service~~
54 ~~meets the following criteria:~~

55 ~~i. the lawyer referral service shall be operated in the public interest for the~~
56 ~~purpose of referring prospective clients to lawyers, pro bono and public~~
57 ~~service legal programs, and government, consumer or other agencies who~~
58 ~~can provide the assistance the clients need. Such organization shall file~~
59 ~~annually with the State Disciplinary Board a report showing its rules and~~
60 ~~regulations, its subscription charges, agreements with counsel, the number~~
61 ~~of lawyers participating and the names and addresses of the lawyers~~
62 ~~participating in the service;~~

63 ~~ii. the sponsoring bar association for the lawyer referral service must be open~~
64 ~~to all lawyers licensed and eligible to practice in this state who maintain~~

an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

iii. ~~the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and~~

iv. ~~a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.~~

3. ~~A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;~~

4. ~~A lawyer may pay for a law practice in accordance with Rule 1.17.~~

d. ~~A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a nonlawyer who has not sought advice regarding employment of a lawyer.~~

e. ~~A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization that would violate these Rules if engage in by a lawyer.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

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

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is

not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects the lay person to the private importuning of the trained advocate, in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, and may have an impaired capacity for reason, may find it difficult to fully evaluate all available alternatives with reasoned judgment and protective appropriate self-interest. Furthermore, in the lawyer seeking face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect possibility of undue influence, intimidation, and overreaching.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation and overreaching. [3] The potential for abuse overreaching inherent in solicitation of prospective clients through personal live person-to-person contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating conveying necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct, personal contact through an intermediary and live contact by telephone.

Direct Written Solicitation

[3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

~~[4] Certain narrowly drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public's intelligent selection of counsel, including the restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.~~

~~[5]. In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons~~particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

~~[6] This Rule does not prohibit communications~~[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political,

159 social, civic, fraternal, employee or trade organizations whose purposes include providing or
160 recommending legal services to their members or beneficiaries.

161 [6] A solicitation that contains false or misleading information within the meaning of Rule 7.1,
162 that involves coercion, duress, fraud, overreaching, harassment, intimidation or undue
163 influence within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has
164 made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule
165 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially
166 vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those
167 whose first language is not English, or the disabled.

168 [7] This Rule does not prohibit a lawyer from contacting representatives of organizations or
169 groups that may be interested in establishing a group or prepaid legal plan for their members,
170 insureds, beneficiaries or other third parties for the purpose of informing such entities of the
171 availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm
172 is willing to offer. This form of communication is not directed to people who are seeking legal
173 services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary
174 capacity seeking a supplier of legal services for others who may, if they choose, become
175 prospective clients of the lawyer. Under these circumstances, the activity which the lawyer
176 undertakes in communicating with such representatives and the type of information
177 transmitted to the individual are functionally similar to and serve the same purpose as
178 advertising permitted under Rule 7.2.

179 [8] Communications authorized by law, such as or ordered by a court or tribunal include a
180 notice to potential members of a class in class action litigation.

181 *Paying Others to Recommend a Lawyer*

182 ~~[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not~~
183 ~~permitted to pay another person for channeling professional work. This restriction does not~~
184 ~~prevent an organization or person other than the lawyer from advertising or recommending the~~
185 ~~lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal~~
186 ~~insurance organization may pay to advertise legal services provided under its auspices.~~

187 [9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses
188 personal contact to enroll members for its group or prepaid legal service plan, provided that the
189 personal contact is not undertaken by any lawyer who would be a provider of legal services
190 through the plan. The organization must not be owned by or directed (whether as manager or
191 otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e)
192 would not permit a lawyer to create an organization controlled directly or indirectly by the
193 lawyer and use the organization for the person-to-person solicitation of legal employment of
194 the lawyer through memberships in the plan or otherwise. The communication permitted by
195 these organizations must not be directed to a person known to need legal services in a
196 particular matter, but must be designed to inform potential plan members generally of another
197 means of affordable legal services. Lawyers who participate in a legal service plan must
198 reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

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

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other

lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(a)(4). See also Rule 8.4(a)(6) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

RULE 7.2: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES: SPECIFIC RULES

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service does not engage in conduct that would violate the Rules if engaged in by a lawyer;

(3) pay the usual and reasonable fees or dues charged by a bar-operated non-profit referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

i. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the Office of the General Counsel a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

ii. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

iii. the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and

iv. a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

(4) pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(5) pay for a law practice in accordance with Rule 1.17;

(6) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(7) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

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

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

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

48 Comment

49 [1] This Rule permits public dissemination of information concerning a lawyer's or law firm's
50 name, address, email address, website, and telephone number; the kinds of services the lawyer
51 will undertake; the basis on which the lawyer's fees are determined, including prices for specific
52 services and payment and credit arrangements; a lawyer's foreign language ability; names of
53 references and, with their consent, names of clients regularly represented; and other
54 information that might invite the attention of those seeking legal assistance.

55 Paying Others to Recommend a Lawyer

56 [2] Except as permitted under paragraphs (b)(1)-(b)(7), lawyers are not permitted to pay others
57 for recommending the lawyer's services. A communication contains a recommendation if it
58 endorses or vouches for a lawyer's credentials, abilities, competence, character, or other
59 professional qualities. Directory listings and group advertisements that list lawyers by practice
60 area, without more, do not constitute impermissible "recommendations."

61 [3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by
62 this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads,
63 television and radio airtime, domain-name registrations, sponsorship fees, Internet-based
64 advertisements, and group advertising. A lawyer may compensate employees, agents and
65 vendors who are engaged to provide marketing or client development services, such as
66 publicists, public-relations personnel, business-development staff, television and radio station
67 employees or spokespersons and website designers.

68 [4] Paragraph (b)(7) permits lawyers to give nominal gifts as an expression of appreciation to a
69 person for recommending the lawyer's services or referring a prospective client. The gift may
70 not be more than a token item as might be given for holidays, or other ordinary social
71 hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement
72 or understanding that such a gift would be forthcoming or that referrals would be made or
73 encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a)(1) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except

as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

Required Contact Information

[11] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

1 Rule 7.3: Solicitation of Clients

2 (a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or
3 law firm that is directed to a specific person the lawyer knows or reasonably should know needs
4 legal services in a particular matter and that offers to provide, or reasonably can be understood
5 as offering to provide, legal services for that matter.

6 (b) A lawyer shall not solicit professional employment by live person-to-person contact when a
7 significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless
8 the contact is with a:

9 (1) lawyer;

10 (2) person who has a family, close personal, or prior business or professional relationship with
11 the lawyer or law firm; or

12 (3) person who routinely uses for business purposes the type of legal services offered by the
13 lawyer.

14 (c) A lawyer shall not solicit professional employment even when not otherwise prohibited by
15 paragraph (b), if:

16 (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by
17 the lawyer; or

18 (2) the solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or
19 undue influence; or

20 (3) the written communication concerns an action for personal injury or wrongful death or
21 otherwise relates to an accident or disaster involving the person to whom the communication is
22 addressed or a relative of that person, unless the accident or disaster occurred more than 30
23 days prior to the communication; or

(4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

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

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person,

49 who may already feel overwhelmed by the circumstances giving rise to the need for legal
50 services, may find it difficult to fully evaluate all available alternatives with reasoned judgment
51 and appropriate self-interest in the face of the lawyer's presence and insistence upon an
52 immediate response. The situation is fraught with the possibility of undue influence,
53 intimidation, and overreaching.

54 [3] The potential for overreaching inherent in live person-to-person contact justifies its
55 prohibition, since lawyers have alternative means of conveying necessary information. In
56 particular, communications can be mailed or transmitted by email or other electronic means
57 that do not violate other laws. These forms of communications make it possible for the public
58 to be informed about the need for legal services, and about the qualifications of available
59 lawyers and law firms, without subjecting the public to live person-to-person persuasion that
60 may overwhelm a person's judgment.

61 [4] The contents of live person-to-person contact can be disputed and may not be subject to
62 third-party scrutiny. Consequently, they are much more likely to approach (and occasionally
63 cross) the dividing line between accurate representations and those that are false and
64 misleading.

65 [5] There is far less likelihood that a lawyer would engage in overreaching against a former
66 client, or a person with whom the lawyer has a close personal, family, business or professional
67 relationship, or in situations in which the lawyer is motivated by considerations other than the
68 lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person
69 contacted is a lawyer or is known to routinely use the type of legal services involved for
70 business purposes. Examples include persons who routinely hire outside counsel to represent
71 the entity; entrepreneurs who regularly engage business, employment law or intellectual
72 property lawyers; small business proprietors who routinely hire lawyers for lease or contract
73 issues; and other people who routinely retain lawyers for business transactions or formations.
74 Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally
75 protected activities of public or charitable legal-service organizations or bona fide political,

social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e)

103 would not permit a lawyer to create an organization controlled directly or indirectly by the
104 lawyer and use the organization for the person-to-person solicitation of legal employment of
105 the lawyer through memberships in the plan or otherwise. The communication permitted by
106 these organizations must not be directed to a person known to need legal services in a
107 particular matter, but must be designed to inform potential plan members generally of another
108 means of affordable legal services. Lawyers who participate in a legal service plan must
109 reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

110