



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

April 1, 2022

Hybrid

Page Nos.

<u>I. Welcome</u>	(Bagley)	3
<u>II. Approval of Minutes from 1/7/22 meeting</u>	(Bagley)	4-15
<u>III. Action Items</u>	(Frederick/Mittelman)	
A. Request from the Formal Advisory Opinion Board	(Lefkowitz/Longan)	
i. Proposed revisions to Rule 1.5		16-24
ii. Proposed revisions to Rule 1.8		25-35
iii. Recent Order Amending Fee Arb Rules		36-48
<i>(the committee wanted to review these amendments before finalizing its proposed changes to Rules 1.5 and 1.8)</i>		
iv. David Lefkowitz's email to FAOB		49
v. <u>Innovative Images LLC. v. James Darren Summerville, et al.</u>		50-76
vi. ABA Formal Ethics Opinion 02-245		77-83
vii. ABA Rule 1.8 Comment 17		84
B. Rule 4-203.1 <i>(amendment to address lawyers living outside of the U.S.)</i>		
i. Bar Rule 4-203.1		85-88

C. Subcommittee on In-House Counsel *(The subcommittee will make a recommendation regarding an in-house counsel rule for Georgia).*

- i. Proposed draft 89-92

D. Rule 1.8 *(consider adopting ABA version)*

- i. Previously approved Rule 1.8 6-15
- ii. ABA Rule 1.8 93-111
- iii. Current version of Rule 1.8 112-119
- iv. Redline version 120-142
- v. Clean version 143-161

IV. Discussion Item

(Frederick/Mittelman)

A. Proposed changes to Part VII/Next steps

B. Special Bar Counsel

(amendment regarding situations where the office has a conflict) 162

V. Information Items

(Frederick/Mittelman)

A. Rule 8.4 *(A group of lawyers plans to recommend we adopt ABA Rule 8.4(g))*

- i. ABA Rule 8.4 163-167
- ii. GRPC 8.4 168-172
- iii. Article re: PA Court's recent rejection of proposed anti-bias amendment to 8.4 173-175
- iv. Zachary Greenberg v. John P. Goodrich, etc., et al. 176-253

B. Report on status of previously amended rules

VI. Adjourn

2021-2022

Disciplinary Rules & Procedures

This standing committee shall advise the Executive Committee and Board of Governors with respect to all procedural and substantive disciplinary rules, policies, and procedures.

Chairperson

Harold Michael Bagley	2022
-----------------------	------

Vice Chairperson

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

Members

Hon. J. Antonio DelCampo	2022
Erin H. Gerstenzang	2023
Mazie Lynn Guertin	2022
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
David O'Neal	2023
Jabu Mariette Sengova	2022
H. Craig Stafford	2023
William Hickerson Thomas, Jr.	2023
Peter Werdesheim	2024
Patrick John Wheale	2024
Hon. Paige Reese Whitaker	2022

Staff Liaison

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

Disciplinary Rules and Procedures Committee
Meeting of January 7, 2022
Zoom meeting

MINUTES

Chair Michael Bagley called the meeting to order at 1:06 p.m.

Attendance:

Committee members: Michael Bagley, R. Gary Spencer, Hon. J. Antonio DelCampo, Erin H. Gerstenzang, Mazie Lynn Guertin, 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, Patrick E. Longan, David O’Neal, Jabu M. Sengova, William Thomas, Jr., Peter Werdesheim, Patrick Wheale, and Hon. Paige Reese Whitaker.

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

Guests: Supreme Court Justice Peterson, Kimberly Dymecki, Jill Travis, and Olivia Williams.

Approval of Minutes:

The Committee approved the Minutes from the October 22, 2021 meeting.

Action Items:

Formal Advisory Opinion Board request:

After a thorough discussion, there is an apparent consensus to adopt the revisions to Rules 1.5 and 1.8 as presented.

The Committee agreed to wait until after the Supreme Court enters a ruling on the proposed fee arbitration rules before voting on the proposed revisions to Rules 1.5 and 1.8. The Committee will consider adding a sentence to proposed Rule 1.5 addressing the fee arbitration rules at its next meeting.

Rule 3.4:

The Committee voted to amend section (f) to correct a typo and bring it in line with the ABA rule. Mazie Lynn Guertin opposed. A copy of the Rule as amended appears at the end of these minutes.

Rule 1.8(e)(3):

By unanimous vote, the Committee voted to add section (e)(3), comments 5-8, and amend comment 4 to bring it in line with the ABA rule. The Committee voted to replace “and” with “or” after “public interest organization...” and add a comma after medicine. A copy of the Rule as amended appears at the end of these minutes.

Information Items:**Registration of In-House Counsel:**

Paula Frederick reported that Elizabeth Fite, State Bar President, might create a new committee or add an in-house counsel to this Committee to address this matter. Paula Frederick will provide an update at the next meeting.

Report:

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

The meeting adjourned at 3:25 p.m.

Rule 3.4 (f)

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

- (1) the person is a relative or an employee or other agent of a client; ~~or~~and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; ~~and~~
- ~~(2) the information is not otherwise subject to the assertion of a privilege by the client.~~

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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

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

- f. A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
- g. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- h. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- i. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - 1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; ~~or~~
 - 2. a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client; ~~or~~
 - 3 a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization or a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses. The lawyer:

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

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

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

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

j. 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.

k. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyers disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.

- l. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- m. A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.
- n. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 1. acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and
 2. contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

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

Comment

Transactions Between Client and Lawyer

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

-

Use of Information to the Disadvantage of the Client

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

conditional, the duty is on the attorney to comply with the condition.

Gifts from Clients

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

Literary Rights

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

Financial Assistance to Clients

[4] Paragraph (e) eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer. ~~It further limits permitted assistance to court costs and expenses directly related to litigation. Accordingly, permitted expenses would include~~

~~expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses other than those listed above.~~

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

[6] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[7] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

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

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

[59] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that

there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Settlement of Aggregated Claims

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

Agreements to Limit Liability

[711] A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.

[8

[12] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability

partnership, professional association, limited liability company, or professional corporation.

Family Relationships Between Lawyers

[~~9~~13] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

Acquisition of Interest in Litigation

[~~10~~14] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in the common law prohibition of champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for lawyer's fees and for certain advances of costs of litigation set forth in paragraph (e).

RULE 1.5 FEES

- a. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
 1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 2. the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
 3. the fee customarily charged in the locality for similar legal services;
 4. the amount involved and the results obtained;
 5. the time limitations imposed by the client or by the circumstances;
 6. the nature and length of the professional relationship with the client;
 7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 8. whether the fee is fixed or contingent.
- b. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate

of the fee or expenses shall also be communicated to the client. To the extent that agreements to arbitrate disputes over fees or expenses are enforceable, a lawyer may enter into such an agreement with a client or prospective client if the client or prospective client gives informed consent.

c.

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

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

i. the outcome of the matter; and,

ii. if there is a recovery showing:

A. the remittance to the client;

B. the method of its determination;

41 C. the amount of the attorney fee; and

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

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

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

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

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

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

61 Comment

62
63 Reasonableness of Fee and Expenses

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

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

78
79 Basis or Rate of Fee

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

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

Terms of Payment

101

102 [4] A lawyer may require advance payment of a fee, but is obliged to return any
103 unearned portion. See Rule 1.16 (d). A lawyer may accept property in payment for
104 services, such as an ownership interest in an enterprise, providing this does not
105 involve acquisition of a proprietary interest in the cause of action or subject matter
106 of the litigation contrary to Rule 1.8 (j). However, a fee paid in property instead of
107 money may be subject to the requirements of Rule 1.8 (a) because such fees often
108 have the essential qualities of a business transaction with the client.

109

110 [5] An agreement may not be made, the terms of which might induce the lawyer
111 improperly to curtail services for the client or perform them in a way contrary to
112 the client's interest. For example, a lawyer should not enter into an agreement
113 whereby services are to be provided only up to a stated amount when it is
114 foreseeable that more extensive services probably will be required, unless the
115 situation is adequately explained to the client. Otherwise, the client might have to
116 bargain for further assistance in the midst of a proceeding or transaction. However,
117 it is proper to define the extent of services in light of the client's ability to pay. A
118 lawyer should not exploit a fee arrangement based primarily on hourly charges by
119 using wasteful procedures.

120

Arbitration

[5A] Paragraph (b) requires informed consent to an agreement to arbitrate disputes over fees and expenses. See Rule 1.0(1). In obtaining such informed consent, the lawyer should reveal to the client or prospective client that in arbitration: (1) the client or prospective client waives the right to a jury trial, because the dispute will be resolved by an individual arbitrator or a panel of arbitrators; (2) generally there is no right to an appeal from an arbitration decision; (3) arbitration may not permit the broad discovery that would be available in civil litigation; and (4) the costs of arbitration may exceed the costs of litigation in a public court. The lawyer should also inform the client or prospective client regarding the existence and operation of the State Bar of Georgia's Attorney Fee Arbitration Program, regardless of whether the attorney seeks an agreement to submit any future fee disputes to that program. The lawyer should also inform the client or prospective client that an agreement to arbitrate a dispute over fees and expenses is not a waiver of the right to make a disciplinary complaint regarding the lawyer.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic

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

Division of Fee

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

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

Disputes over Fees

161 [9] If a procedure has been established for resolution of fee disputes, such as an
162 arbitration or mediation procedure established by the State Bar of Georgia, the
163 lawyer should conscientiously consider submitting to it. Law may prescribe a
164 procedure for determining a lawyer's fee, for example, in representation of an
165 executor or administrator, a class or a person entitled to a reasonable fee as part of
166 the measure of damages. The lawyer entitled to such a fee and a lawyer
167 representing another party concerned with the fee should comply with the
168 prescribed procedure.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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

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

- b. A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
- c. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- d. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- e. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
 - or
 2. a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client.
- f. A lawyer shall not accept compensation for representing a client from one other than the client unless:

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

g. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client.

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

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

- i. A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.
- j. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
1. acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and
 2. contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

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

Comment

Transactions Between Client and Lawyer

78

79 [1A] As a general principle, all transactions between client and lawyer should be
80 fair and reasonable to the client. The client should be fully informed of the true
81 nature of the lawyer's interest or lack of interest in all aspects of the transaction. In
82 such transactions a review by independent counsel on behalf of the client is often
83 advisable. Furthermore, a lawyer may not exploit information relating to the
84 representation to the client's disadvantage. For example, a lawyer who has learned
85 that the client is investing in specific real estate may not, without the client's
86 informed consent, seek to acquire nearby property where doing so would adversely
87 affect the client's plan for investment. Paragraph (a) does not, however, apply to
88 standard commercial transactions between the lawyer and the client for products or
89 services that the client generally markets to others, for example, banking or
90 brokerage services, medical services, products manufactured or distributed by the
91 client, and utilities' services. In such transactions, the lawyer has no advantage in
92 dealing with the client, and the restrictions in paragraph (a) are unnecessary and
93 impracticable.

94

95 Use of Information to the Disadvantage of the Client

96

97 [1B] It is a general rule that an attorney will not be permitted to make use of

knowledge, or information, acquired by the attorney through the professional relationship with the client, or in the conduct of the client's business, to the disadvantage of the client. Paragraph (b) follows this general rule and provides that the client may waive this prohibition. However, if the waiver is conditional, the duty is on the attorney to comply with the condition.

Gifts from Clients

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

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the subject of the representation creates a conflict between the interest of the client

and the personal interest of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j) of this rule.

Financial Assistance to Clients

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

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

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

Settlement of Aggregated Claims

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

Agreements to Limit Liability

[7] A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.

[8] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.

Arbitration

[8A] Paragraph (h) requires informed consent to an agreement to arbitrate malpractice claims. See Rule 1.0(1). In obtaining such informed consent, the lawyer should reveal to the client or prospective client that in arbitration: (1) the client or prospective client waives the right to a jury trial, because the dispute will be resolved by an individual arbitrator or a panel of arbitrators; (2) generally there is

no right to an appeal from an arbitration decision; (3) arbitration may not permit the broad discovery that would be available in civil litigation; and (4) the costs of arbitration may exceed the costs of litigation in a public court. The lawyer should also inform the client or prospective client that an agreement to arbitrate a dispute over fees and expenses is not a waiver of the right to make a disciplinary complaint regarding the lawyer.

Family Relationships Between Lawyers

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

Acquisition of Interest in Litigation

[10] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in the common law prohibition of champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the

197 exception for lawyer's fees and for certain advances of costs of litigation set forth
198 in paragraph (e).

199

200



SUPREME COURT OF GEORGIA

FILED

Administrative Minutes

January 28, 2022

Thérèse S. Barnes

Clerk/Court Executive

SUPREME COURT OF GEORGIA

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

The Court having considered the 2021-4 Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia, it is ordered that Part I – Creation and Organization, Chapter 5, Rule 1-506 (Clients’ Security Fund Assessment); Part VI – Arbitration of Fee Disputes, Preamble; Chapter 1, Rule 6-104 (Powers and Duties of Committee); Chapter 2, Rule 6-201 (Petition), Rule 6-202 (Service of Petition), Rule 6-203 (Answer), Rule 6-204 (Accepting Jurisdiction), Rule 6-205 (Termination or Suspension of Proceedings), Rule 6-206 (Revocation), Chapter 3, Rule 6-303 (Selection of Arbitrators); Chapter 4, Rule 6-417 (Award), Chapter 5, Rule 6-501 (Confirmation of Award in Favor of Client), Rule 6-502 (Confirmation of Award in Favor of Lawyer), Rule 6-503 (Enforcement of Arbitration Awards), Chapter 6, Rule 6-601 (Confidentiality), Rule 6-603 (Immunity); and Part X – Clients’ Security Fund, Rule 10-103 (Funding), be amended, effective January 28, 2022, to read as follows:

PART I CREATION AND ORGANIZATION

...

CHAPTER 5 FINANCE

...

Rule 1-506. Clients’ Security Fund Assessment

(a) The State Bar of Georgia is authorized to assess each member an annual fee of \$15. This assessment shall be used only to

fund the Clients' Security Fund and shall be in addition to the annual license fee as provided in Bar Rule 1-501 through Bar Rule 1-502.

(b) The failure of a dues-paying member to pay the assessment shall subject the member to the same penalty provisions, including late fees and suspension of membership, as apply to the failure to pay the annual license fee as set forth in Bar Rules 1-501 and 1-501.1.

(c) A member who is admitted as a Foreign Law Consultant or who joins without taking the Georgia Bar Examination shall be responsible for the annual assessment upon registration with the State Bar of Georgia.

...

PART VI

ARBITRATION OF FEE DISPUTES

Preamble

The purpose of the State Bar of Georgia's program for the arbitration of fee disputes is to provide a convenient mechanism for the resolution of disputes (1) between lawyers and clients over fees; (2) between lawyers in connection with the dissolution of a practice or the withdrawal of a lawyer from a partnership or practice; or (3) between lawyers concerning the allocation of fees earned from joint services. If the parties to such a dispute have been unable to reach an agreement between or among themselves, either side may petition the State Bar Committee on the Arbitration of Attorney Fee Disputes ("Committee") to arbitrate the dispute pursuant to these rules.

Regardless of whether a lawyer or a client initiates the filing of petitions requesting arbitration of the dispute, by filing the petition, the petitioner shall be bound by the result of the arbitration. This is intended to discourage the filing of complaints that are frivolous or that seek to invoke the process simply to obtain an “advisory opinion.” If the respondent also agrees to be bound, the resulting arbitration award shall be enforceable under the Georgia Arbitration Code, OCGA § 9-9-1 et seq.

If a client initiates the arbitration process and the respondent lawyer refuses to be bound by any resulting award, the matter will not be accepted for arbitration.

If at any time during the process as set forth in these rules, based upon information received or a lack of information received, the Committee may make a referral to the Office of the General Counsel for consideration of an inquiry into a possible disciplinary action based on Georgia Rules of Professional Conduct including Rule 1.5 (unreasonable fees) and/or Rule 1.16 (d) (failure to return unearned fees) or other applicable rules.

CHAPTER 1

COMMITTEE ON ARBITRATION OF ATTORNEY FEE DISPUTES

. . .

Rule 6-104. Powers and Duties of Committee.

The Committee shall have the following powers and duties:

- (a) To determine whether to accept jurisdiction over a dispute;
- (b) To appoint and remove lawyer and nonlawyer arbitrators and panels of arbitrators;
- (c) To oversee the operation of the arbitration process;

- (d) To develop and implement fee arbitration procedures;
- (e) To interpret these rules and to decide any disputes regarding the interpretation and application of these rules;
- (f) To determine challenges to, and rule on, the neutrality of an arbitrator where the arbitrator does not voluntarily withdraw;
- (g) To maintain the records of the State Bar of Georgia's Fee Arbitration Program; and
- (h) To perform all other acts necessary for the effective operation of the Fee Arbitration Program.

...

CHAPTER 2

JURISDICTIONAL GUIDELINES

Rule 6-201. Petition.

A request for arbitration of a fee dispute is initiated by the filing of a petition with the Committee. Each petition shall be filed on the Fee Arbitration Petition Form supplied by Committee staff and shall contain the following elements:

- (a) A statement of the nature of the dispute and the petitioner's statement of facts, including relevant exhibits and dates. The statement must be double-spaced, typed in a 12-point font or handwritten and is limited to 50 pages, including exhibits. The page limit may be increased by the Fee Arbitration staff for good cause shown;
- (b) The names and addresses of the client(s) and the lawyer(s);

(c) A statement as to whether or not the petitioner has made a good faith effort to resolve the dispute;

(d) A statement that by filing the petition, the petitioner has agreed to be bound by the result of the arbitration;

(e) The date of the petition; and

(f) Each petitioner's signature.

Rule 6-202. Service of Petition.

If a petition has been properly completed and appears to have merit, Committee staff shall serve a copy of the petition, along with a Fee Arbitration Answer Form and an acknowledgment of service form, upon the respondent by first class mail addressed to such party's last known address. A signed acknowledgment of service form or a written answer from the respondent or respondent's counsel shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.

In the absence of an acknowledgment of service or a written response from the respondent or respondent's counsel, service shall be certified mail, return receipt requested, addressed to such party's last known address.

In unusual circumstances as determined by the Committee or its staff, when service has not been accomplished by other less costly measures, service may be accomplished by the Sheriff or a court-approved agent for service of process.

If service is not accomplished, the Committee shall not accept jurisdiction of the case.

Rule 6-203. Answer.

Each respondent shall have 20 calendar days after service of a petition to file an answer with the Committee. Staff, in its discretion, may grant appropriate extensions of time for the filing of an answer.

The answer shall be filed on or with the Fee Arbitration Answer Form supplied by Committee staff and shall contain the following elements:

(a) If the respondent is the client and/or payer, a statement as to whether the respondent agrees to be bound by the result of the arbitration;

(b) The respondent's statement of facts. The statement must be double-spaced, typed in a 12-point font or handwritten, and the submission is limited to 50 pages, including exhibits. The page limit may be increased by the Fee Arbitration staff for good cause shown;

(c) Any defenses the respondent intends to assert;

(d) The date of the answer; and

(e) Each respondent's signature.

Committee staff shall serve a copy of the answer upon each petitioner by first class mail, addressed to such party's last known address.

The failure to file an answer shall not deprive the Committee of jurisdiction and shall not result in a default judgment against the respondent.

Rule 6-204. Accepting Jurisdiction.

The Committee or its designee may accept jurisdiction over a fee dispute only if the following requirements are considered satisfied:

(a) The fee in question, whether paid or unpaid, was for legal services rendered by a lawyer who is, or was at the time the services were rendered, a member of the State Bar of Georgia or otherwise authorized to practice law in the State of Georgia.

(b) The legal services in question were performed:

(1) in the State of Georgia; or

(2) from an office located in the State of Georgia; or

(3) by a lawyer who is not admitted to the practice of law in any United States jurisdiction other than Georgia, and the circumstances are such that if the State Bar of Georgia does not accept jurisdiction, no other United States jurisdiction will be available to a client who has filed a petition under this program.

(c) The disputed fee exceeds \$1,000.

(d) The amount of the disputed fee is not governed by statute or other law, nor has any court fixed or approved the full amount or all terms of the disputed fee.

(e) The fee dispute is not the subject of litigation in court at the time the petition for arbitration is filed or when the Committee determines jurisdiction.

(f) The petition seeking arbitration of the fee dispute is filed with the Committee no more than two years following the date on which the controversy arose. If this date is disputed, it shall be determined in the same manner as the commencement of a cause of action on the underlying contract.

(g) In the case of disputes between lawyers and clients, a lawyer/client relationship existed between the petitioner and the respondent at the time the legal services in question were performed. A relative or other person paying the legal fees of the client may request arbitration of disputes over those fees, provided both the client and the other person payor join as co-petitioners or co-respondents and both agree to be bound by the result of the arbitration.

(h) The client, whether petitioner or respondent, agrees to be bound by the result of the arbitration. If the respondent lawyer does not agree to be bound by the result of the arbitration, the Committee will not accept the matter for arbitration.

(i) In disputes between lawyers, the lawyers who are parties to the dispute are all members of the State Bar of Georgia and have all agreed to arbitrate the dispute under this program and to be bound by the result of the arbitration.

(j) Where the parties to a fee dispute have signed a written agreement to submit fee disputes to binding arbitration with the State Bar of Georgia's Attorney Fee Arbitration Program, the Committee will consider the agreement enforceable if it is:

(1) set out in a separate paragraph;

(2) written in a font size at least as large as the rest of the contract; and

(3) separately initialed by the client and the lawyer.

(k) In deciding whether to accept jurisdiction, the Committee shall review available evidence, including the recommendations of the staff, and make a determination whether to accept or decline jurisdiction. The Committee's decisions on jurisdiction are final, except that such decisions are subject to reconsideration by the Committee upon the request of either party made within 30 days of the initial decision. Staff shall notify the parties of the Committee's decision on jurisdiction by first class mail.

Rule 6-205. Termination or Suspension of Proceedings.

The Committee may suspend or terminate arbitration proceedings or may decline or terminate jurisdiction if the client, in addition to pursuing arbitration of a fee dispute under these rules, asserts a claim against the lawyer in any court arising out of the same set of circumstances, including any claim of malpractice. Any claim or evidence of professional misconduct within the meaning of the Georgia Code of Professional Responsibility may be reported by the arbitrators or the Committee to the Office of the General Counsel for consideration under its normal procedures.

Rule 6-206. Revocation.

After jurisdiction has been accepted by the Committee, the submission to arbitration shall be irrevocable except by consent of all parties or by action of the Committee or the arbitration panel for good cause shown.

CHAPTER 3 SELECTION OF ARBITRATORS

. . .

Rule 6-303. Selection of Arbitrators.

The arbitration panel shall be selected by the Committee or its staff. Except as provided below the arbitration panel shall consist of two lawyer members who have practiced law actively for at least five years and one nonlawyer public member.

In cases involving disputed amounts not exceeding \$2,500, the Committee in its sole discretion may appoint an arbitration panel consisting of one lawyer who has practiced law actively for at least five years.

Petitioner and respondent by mutual agreement shall have the right to select the three arbitrators. They also may mutually agree to have the dispute determined by a sole arbitrator jointly selected by them, provided any such sole arbitrator shall be one of the persons on the roster of arbitrators or shall have been approved in advance by the Committee upon the joint request of petitioner and respondent.

. . .

CHAPTER 4 RULES OF PROCEDURE

. . .

Rule 6-417. Award.

The award of the arbitrators is final and binding upon the parties.

. . .

CHAPTER 5

POST-AWARD PROCEEDINGS

Rule 6-501. Confirmation of Award in Favor of Client.

In cases where an award in favor of a client has not been satisfied within three months after it was served upon the parties, the client may apply to the appropriate Georgia superior court for confirmation of the award in accordance with the Georgia Arbitration Code, OCGA § 9-9-1 et seq.

Upon the written request of a client, the Committee may provide a lawyer to represent the client in post-award proceedings at no cost to the client other than court filing fees and litigation expenses. Alternatively, the Office of the General Counsel of the State Bar of Georgia may represent, assist, or advise a client in post-award proceedings, provided the client shall be responsible for all court filing fees and litigation expenses.

Rule 6-502. Confirmation of Award in Favor of Lawyer.

In cases where an award has been issued in favor of a lawyer, the lawyer may apply to the appropriate Georgia superior court for confirmation of the award in accordance with the Georgia Arbitration Code, OCGA § 9-9-1 et seq.

The State Bar will not represent, assist, or advise the lawyer except to provide copies of any necessary papers from the fee arbitration file pursuant to State Bar policies.

Rule 6-503. Enforcement of Arbitration Awards.

All arbitration awards under these rules are enforceable under the Georgia Arbitration Code, OCGA § 9-9-1 et seq.

Upon the written request of a client, the Committee may provide a lawyer to represent the client in post-award proceedings at no cost to the client other than court filing fees and litigation

expenses. Alternatively, the Office of the General Counsel of the State Bar of Georgia may represent, assist, or advise a client in post-award proceedings, provided the client shall be responsible for all court filing fees and litigation expenses.

CHAPTER 6

CONFIDENTIALITY, RECORD RETENTION, AND IMMUNITY

Rule 6-601. Confidentiality.

All records, documents, files, proceedings, and hearings pertaining to the arbitration of a fee dispute under this program are the property of the State Bar of Georgia and, except for the award itself, shall be deemed confidential and shall not be made public by the State Bar of Georgia.

A person who was not a party to the dispute shall not be allowed access to such materials unless all parties to the arbitration consent in writing or a court of competent jurisdiction orders such access. However, the Committee, its staff, or representative may reveal confidential information in those circumstances in which the Office of the General Counsel is authorized by Bar Rule 4-221.1 to do so.

. . .

Rule 6-603. Immunity.

The Supreme Court of Georgia recognizes the Fee Arbitration Program of the State Bar of Georgia to be judicial and quasi-judicial in nature and within the Court's regulatory function, and in connection with such arbitration proceedings, members of the Fee Arbitration Committee, volunteer arbitrators, appointed voluntary counsel assisting the program and State Bar of Georgia Fee Arbitration staff are entitled to those immunities customarily

afforded to persons so participating in judicial and quasi-judicial proceedings or engaged in such arbitration activities.

. . .

PART X CLIENTS' SECURITY FUND

. . .

Rule 10-103. Funding.

(a) The State Bar of Georgia shall provide funding for the payment of claims and the costs of administering the Fund. Funding shall be through an annual assessment of \$15 per dues-paying lawyer. The Trustees shall not spend more than received through the annual assessment in a single year. The Board of Governors may from time to time adjust the Fund's maximum annual assessment to advance the purposes of the Fund or to preserve the fiscal integrity of the Fund.

(b) All monies or other assets of the Fund shall constitute a trust and shall be held in the name of the Fund, subject to the direction of the Board.

(c) Only the Board of Trustees may authorize the payment of money from the Fund.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

 , Clerk

From: Betty Derrickson

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

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

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

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

Good afternoon Board members:

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

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

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

Thank you.

David Lefkowitz, Chair

In the Supreme Court of Georgia

Decided: September 8, 2020

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

NAHMIAS, Presiding Justice.

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

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

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

judgment of the Court of Appeals.¹

1. *Facts and procedural history.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to answer the second question and decide this case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

disagree.

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

⁵ OCGA § 13-8-2 (a) says in full:

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

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

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

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

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

As both parties in this case recognize, binding arbitration agreements generally are not in contravention of the public policy of this State. To the contrary, “[i]n enacting the [Georgia Arbitration Code], the General Assembly established ‘a clear public policy in favor of arbitration.’” *Order Homes, LLC v. Iverson*, 300 Ga. App. 332, 334-335 (685 SE2d 304) (2009) (citation omitted). There is nothing about attorney-client contracts in general that takes them outside this policy and makes mandatory arbitration of disputes arising under them illegal. In fact, the State Bar, with the approval of this Court, long ago established a program for the arbitration of fee disputes between attorneys and clients. See Georgia Bar Rules, Part VI. See also GRPC Rule 1.5, Comment [9] (“If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the State Bar of Georgia, the lawyer should conscientiously consider submitting to it.”).

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

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

⁶ As explained in ABA Formal Opinion 02-425:

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

position.

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

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

(Footnote omitted.)

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

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

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

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

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

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

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

unconscionable.

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

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

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

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

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

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

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

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

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

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

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

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

Judgment affirmed. All the Justices concur.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 02-425

February 20, 2002

Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims

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

Overview

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

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

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

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

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

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

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

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

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

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

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

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

6. Powers, *id.* at 646.

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

Prospective Agreements to Limit the Lawyer's Liability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

ABA Rule 1.8 Current Clients: Specific Rules

...

Comments

...

Limiting Liability and Settling Malpractice Claims

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

Rule 4-203.1. Uniform Service Rule

a. Lawyers shall inform the Membership Department of the State Bar of Georgia, in writing, of their current name, official address and telephone number. The Supreme Court of Georgia and the State Bar of Georgia may rely on the official address on file with the Membership Department in all efforts to contact, communicate with, and perfect service upon a lawyer. The choice of a lawyer to provide only a post office box or commercial equivalent address to the Membership Department of the State Bar of Georgia shall constitute an election to waive personal service. Notification of a change of address given to any department of the State Bar of Georgia other than the Membership Department shall not satisfy the requirement herein.

b. In all matters requiring personal service under Part IV of the Bar Rules, service may be perfected in the following manner:

1. Acknowledgment of Service: An acknowledgment of service from the respondent shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.

2. Written Response from Respondent: A written response from the respondent or respondent's counsel shall constitute conclusive proof

of service and shall eliminate the need to utilize any other form of service.

3. In the absence of an acknowledgment of service or a written response from the respondent or respondent's counsel, and subject to the provisions of subparagraph (b) (4) below, the respondent shall be served in the following manner:

- i. Personal Service: Service may be accomplished by the Sheriff or any other person authorized to serve a summons under the provisions of the Georgia Civil Practice Act, as approved by the Chair of the State Disciplinary Board or the Chair's designee. Receipt of a Return of Service Non Est Inventus shall constitute conclusive proof that service cannot be perfected by personal service.

- ii. Service by Publication: If personal service cannot be perfected, or when the respondent has only provided a post office box or commercial equivalent address to the Membership Department and the respondent has not acknowledged service within 10 days of a mailing to respondent's post office box or commercial equivalent address, service may be accomplished by publication

once a week for two weeks in the legal organ of the county of respondent's address, as shown on the records of the Membership Department of the State Bar of Georgia, and, contemporaneously with the publication, mailing a copy of the service documents by first class mail to respondent's address as shown on the records of the Membership Department of the State Bar of Georgia.

4. When it appears from an affidavit made by the Office of the General Counsel that the respondent has departed from the State, or cannot, after due diligence, be found within the State, or seeks to avoid the service, the Chair of the State Disciplinary Board, or the Chair's designee, may authorize service by publication without the necessity of first attempting personal service. The affidavit made by the Office of the General Counsel must demonstrate recent unsuccessful attempts at personal service upon the respondent regarding other or related disciplinary matters and that such personal service was attempted at respondent's address as shown on the records of the Membership Department of the State Bar of Georgia.

c. Whenever service of pleadings or other documents subsequent to the original complaint is required or permitted to be made upon a respondent

60 represented by a lawyer, the service shall be made upon the respondent's
61 lawyer. Service upon the respondent's lawyer or upon an unrepresented
62 respondent shall be made by hand-delivery or by delivering a copy or
63 mailing a copy to the respondent's lawyer or to the respondent's official
64 address on file with the Membership Department, unless the respondent's
65 lawyer specifies a different address for the lawyer in a filed pleading. As
66 used in this Rule, the term "delivering a copy" means handing it to the
67 respondent's lawyer or to the respondent, or leaving it at the lawyer's or
68 respondent's office with a person of suitable age or, if the office is closed or
69 the person to be served has no office, leaving it at the person's dwelling
70 house or usual place of abode with some person of suitable age and
71 discretion. Service by mail is complete upon mailing and includes
72 transmission by U.S. Mail, or by a third-party commercial carrier for
73 delivery within three business days, shown by the official postmark or by the
74 commercial carrier's transmittal form. Proof of service may be made by
75 certificate of a lawyer or of his employee, written admission, affidavit, or
76 other satisfactory proof. Failure to make proof of service shall not affect the
77 validity of service.

1 Executive Committee considered on 11/21/19 and made two small changes: suggested I add a
2 one-time registration fee of ~\$500 and take out the building assessment—we don't charge it any
3 more. (line fka 29).

4

5 Registration of In-House Counsel

6 A. A Domestic or Foreign Lawyer who is employed as a lawyer by an
7 organization, the business of which is lawful and consists of activities other than
8 the practice of law or the provision of legal services, and who has a systematic and
9 continuous presence in this jurisdiction as permitted pursuant to Rule 5.5(d)(1) or
10 5.5(f)(1) of the Georgia Rules of Professional Conduct, shall register as in-house
11 counsel within [180 days] of the commencement of employment as a lawyer or if
12 currently so employed then within [180 days] of the effective date of this Rule, by
13 submitting to the Membership Department of the State Bar of Georgia the
14 following:

15 1) A completed application in the form prescribed by the State Bar of
16 Georgia, which includes a sworn statement that the applicant has read and
17 will comply with Georgia Rule of Professional Conduct Rule 5.5;

18 2) A fee in the amount determined by the State Bar of Georgia and
19 approved by the Supreme Court of Georgia;

20 3) Documents proving admission to practice law and current good
21 standing in all jurisdictions, U.S. and foreign, in which the lawyer is
22 admitted to practice law. The applicant must be on active status in at least
23 one jurisdiction.

24 4) If the jurisdiction is foreign and the documents are not in English,
25 the lawyer shall submit an English translation and satisfactory proof of the
26 accuracy of the translation; and

27 5) An affidavit from an officer, director, or general counsel of the
28 employing entity attesting to the lawyer's employment by the entity and the
29 capacity in which the lawyer is so employed, and stating that the

30 B. A lawyer registered under this Rule shall:

31 1. Pay an annual fee equal to the amount of dues required of active
32 members of the State Bar of Georgia;

33 2. Pay the Clients' Security Fund and Building Assessments required
34 of members of the State Bar of Georgia;

35 3. Fulfill the Continuing Legal Education requirements that are
36 required of active members of the bar in the jurisdiction where the lawyer is
37 an active member;

38 4. Report the following to the Membership Department of the State
39 Bar of Georgia within [____] days:

40 a. Termination of the lawyer's employment as described in
41 paragraph A.5;

42 b. Whether or not public, any change in the lawyer's license
43 status in another jurisdiction, whether U.S. or foreign, including by
44 the lawyer's resignation;

45 c. Whether or not public, any disciplinary charge, finding, or
46 sanction concerning the lawyer by any disciplinary authority, court, or
47 other tribunal in any jurisdiction, U.S. or foreign.

48 C. A registered lawyer under this Rule shall be subject to the Georgia Rules
49 of Professional Conduct and all other laws and rules governing lawyers admitted to
50 the active practice of law in Georgia.

51 D. A registered lawyer's rights and privileges under this Rule automatically
52 terminate when:

53 1. The lawyer's employment terminates;

2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction or any court or agency before which the lawyer is admitted, U.S. or foreign; or

3. The lawyer fails to maintain active status in at least one jurisdiction,
U.S. or foreign.

E. A registered lawyer whose registration is terminated under paragraph D.1. above, may be reinstated within [____] months of termination upon submission to the Membership Department, State Bar of Georgia, of the following:

1. An application for reinstatement in a form prescribed by the State Bar of Georgia;

2. A reinstatement fee in the amount of \$_____;

3. An affidavit from the current employing entity as prescribed in paragraph A.5.

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

2 *Client-Lawyer Relationship*

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

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

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

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

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

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

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

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

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

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

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law

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

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

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

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

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

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

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

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

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

Comment

Business Transactions between Client and Lawyer

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

lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

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

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

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

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

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

Use of Information Related to Representation

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

147 Gifts to Lawyers

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

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

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

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

171 Literary Rights

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

180 Financial Assistance

181 [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on
182 behalf of their clients, including making or guaranteeing loans to their clients for
183 living expenses, because to do so would encourage clients to pursue lawsuits that

might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite

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

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

218 Person Paying for a Lawyer's Services

219 [14] Lawyers are frequently asked to represent a client under circumstances in
220 which a third person will compensate the lawyer, in whole or in part. The third
221 person might be a relative or friend, an indemnitor (such as a liability insurance

company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

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

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

243 Aggregate Settlements

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

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

261 Limiting Liability and Settling Malpractice Claims

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

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

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

286 Acquiring Proprietary Interest in Litigation

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

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

Client-Lawyer Sexual Relationships

[20] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal

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,

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

335 Imputation of Prohibitions

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

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

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

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

18 b. A lawyer shall not use information gained in the professional relationship
19 with a client to the disadvantage of the client unless the client gives
20 informed consent, except as permitted or required by these rules.

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

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

- g. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyers disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.
- h. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- i. A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.

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

1. acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and
2. contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

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

Comment

Transactions Between Client and Lawyer

[1A] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. The client should be fully informed of the true nature of the lawyer's interest or lack of interest in all aspects of the transaction. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's

informed consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Use of Information to the Disadvantage of the Client

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

Gifts from Clients

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

the client should have the objective advice that another lawyer can provide.

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

Literary Rights

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

Financial Assistance to Clients

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

121 listed above.

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

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

135 Settlement of Aggregated Claims

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

138 Agreements to Limit Liability

139 [7] A lawyer may not condition an agreement to withdraw or the return of a client's
140 documents on the client's release of claims. However, this paragraph is not

intended to apply to customary qualifications and limitations in opinions and memoranda.

[8] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.

Family Relationships Between Lawyers

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

Acquisition of Interest in Litigation

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

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

2 **Rule 1.8: Current Clients: Specific Rules**

3 *Client-Lawyer Relationship*

4 ~~a.~~ (a) A lawyer shall ~~neither~~not enter into a business transaction with a client ~~if~~
5 ~~the client expects the lawyer to exercise the lawyer's professional judgment therein~~
6 ~~for the protection of the client, nor shall the lawyer~~or knowingly acquire an
7 ownership, possessory, security or other pecuniary interest adverse to a client
8 unless:

9 ~~1.~~ (1) the transaction and terms on which the lawyer acquires the interest are
10 fair and reasonable to the client and are fully disclosed and transmitted in writing
11 ~~to the client~~ in a manner ~~which~~that can be reasonably understood by the client;

12 ~~2.~~ (2) the client is advised in writing of the desirability of seeking and is given
13 a reasonable opportunity to seek the advice of independent legal counsel ~~in~~on the
14 transaction; and

15 ~~3.~~ (3) the client gives informed consent, in a writing signed by the client, to the
16 essential terms of the transaction and the lawyer's role in the transaction, including
17 whether the lawyer is representing the client in the transaction.

~~b.~~ (b) A lawyer shall not use information ~~gained in the professional~~
~~relationship with~~relating to representation of a client to the disadvantage of the
client unless the client gives informed consent, except as permitted or required by
these ~~rules~~Rules.

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

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

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

36 ~~1.~~ (1) a lawyer may advance court costs and expenses of litigation, the
37 repayment of which may be contingent on the outcome of the matter; ~~or~~

38 ~~2.~~ (2) a lawyer representing ~~a~~an indigent client ~~unable to~~may pay court costs
39 and expenses of litigation ~~may pay those costs and expenses~~ on behalf of the
40 client; and

41 (3) a lawyer representing an indigent client pro bono, a lawyer representing an
42 indigent client pro bono through a nonprofit legal services or public interest
43 organization and a lawyer representing an indigent client pro bono through a law
44 school clinical or pro bono program may provide modest gifts to the client for
45 food, rent, transportation, medicine and other basic living expenses. The lawyer:
46 (i) may not promise, assure or imply the availability of such gifts prior to retention
47 or as an inducement to continue the client-lawyer relationship after retention;
48 (ii) may not seek or accept reimbursement from the client, a relative of the client
49 or anyone affiliated with the client; and
50 (iii) may not publicize or advertise a willingness to provide such gifts to
51 prospective clients.

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

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

56 ~~1.~~ (1) the client gives informed consent;

57 ~~2.~~ (2) there is no interference with the lawyer's independence of professional
58 judgment or with the client-lawyer relationship; and

59 ~~3.~~ (3) information relating to representation of a client is protected as required
60 by Rule 1.6.

61 ~~g.~~ (g) A lawyer who represents two or more clients shall not participate in
62 making an aggregate settlement of the claims ~~for or~~ or against the clients, ~~nor or~~ in a
63 criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless
64 each client gives informed consent, in a writing signed by the client. The
65 ~~lawyers~~lawyer's disclosure shall include the existence and nature of all the claims
66 or pleas involved and of the participation of each person in the settlement.

67 (h) A lawyer shall not:

68 (1) make an agreement prospectively limiting the lawyer's liability to a client for
69 malpractice unless ~~permitted by law and~~ the client is independently represented in
70 making the agreement; ~~or~~

h. (2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~without first advising unless~~ that person is advised in writing ~~that of the desirability of seeking and is given a reasonable opportunity to seek the~~ advice of independent ~~representation is appropriate~~ legal counsel in connection therewith.

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

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

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

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

A

~~Transactions Between Client and Lawyer~~

~~[1A] As a general principle, all transactions between client and lawyer should be fair and reasonable to shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client. The client should be fully informed of the true nature of the lawyer's interest or lack of interest in all aspects of the transaction. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer relationship commenced.~~

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

~~Comment may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's informed consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however,~~

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

147 materially limited by the lawyer's financial interest in the transaction. Here the
148 lawyer's role requires that the lawyer must comply, not only with the requirements
149 of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the
150 lawyer must disclose the risks associated with the lawyer's dual role as both legal
151 adviser and participant in the transaction, such as the risk that the lawyer will
152 structure the transaction or give legal advice in a way that favors the lawyer's
153 interests at the expense of the client. Moreover, the lawyer must obtain the client's
154 informed consent. In some cases, the lawyer's interest may be such that Rule 1.7
155 will preclude the lawyer from seeking the client's consent to the transaction.

156 [4] If the client is independently represented in the transaction, paragraph (a)(2) of
157 this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is
158 satisfied either by a written disclosure by the lawyer involved in the transaction or
159 by the client's independent counsel. The fact that the client was independently
160 represented in the transaction is relevant in determining whether the agreement was
161 fair and reasonable to the client as paragraph (a)(1) further requires.

162 Use of Information ~~to the Disadvantage of the Client~~

163 ~~[1B] It is a general rule that an attorney will not be permitted to make use of~~
164 ~~knowledge, or~~ Related to Representation

[5] Use of information, acquired by the attorney through the professional relationship with the client, or in the conduct of the client's business, relating to the representation to the disadvantage of the client; violates the lawyer's duty of loyalty. Paragraph (b) ~~follows this general rule and provides that the client may waive this prohibition. However, if the waiver is conditional, the duty is on the attorney to comply with the condition.~~ 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.

184 Gifts ~~from Clients~~

185 ~~[2]~~to Lawyers

186 [6] A lawyer may accept a gift from a client, if the transaction meets general
187 standards of fairness. For example, a simple gift such as a present given at a
188 holiday or as a token of appreciation is permitted. If a client offers the lawyer a
189 more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it,
190 although such a gift may be voidable by the client under the doctrine of undue
191 influence, which treats client gifts as presumptively fraudulent. In any event, due to
192 concerns about overreaching and imposition on clients, a lawyer may not suggest
193 that a substantial gift be made to the lawyer or for the lawyer's benefit, except
194 where the lawyer is related to the client as set forth in paragraph (c).

195 [7] If effectuation of a substantial gift requires preparing a legal instrument such
196 as a will or conveyance, ~~however,~~ the client should have the ~~objective~~detached
197 advice that another lawyer can provide. ~~Paragraph (c) recognizes an~~ The sole
198 exception to this Rule is where the client is a relative of the donee ~~or the gift is.~~

199 [8] This Rule does not ~~substantial.~~
200 prohibit a lawyer from seeking to have the lawyer or a partner or associate of the
201 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

[3]

[9] An agreement by which a lawyer acquires literary or media rights concerning the ~~subject~~conduct of the representation creates a conflict between the ~~interest~~interests of the client and the personal ~~interest~~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 ~~paragraph (j) of this rule.~~ 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 Clients
[4] Paragraph (e) eliminates the former requirement their clients for living expenses, because to do so would encourage clients to pursue lawsuits that the client remain ultimately liable for financial might not otherwise be brought and because such assistance provided by the gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer. It further limits permitted assistance to lending a client court costs and expenses directly related to litigation. Accordingly, permitted expenses would include, including the expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, examination and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses, 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.

239 [11] Paragraph (e)(3) provides another exception. A lawyer representing an
240 indigent client without fee, a lawyer representing an indigent client pro bono
241 through a nonprofit legal services or public interest organization and a lawyer
242 representing an indigent client pro bono through a law school clinical or pro bono
243 program may give the client modest gifts. Gifts permitted under paragraph (e)(3)
244 include modest contributions for food, rent, transportation, medicine and similar
245 basic necessities of life. If the gift may have consequences for the client, including,
246 e.g., for receipt of government benefits, social services, or tax liability, the lawyer
247 should consult with the client about these. See Rule 1.4.

248 [12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in
249 specific circumstances where it is unlikely to create conflicts of interest or invite
250 abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or
251 implying the availability of financial assistance prior to retention or as an
252 inducement to continue the client-lawyer relationship after retention; (ii) seeking or
253 accepting reimbursement from the client, a relative of the client or anyone
254 affiliated with the client; and (iii) publicizing or advertising a willingness to
255 provide gifts to prospective to clients beyond court costs and expenses of litigation
256 in connection with contemplated or pending litigation or administrative
257 proceedings.

258 [13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may
259 be provided even if the representation is eligible for fees under a fee-shifting
260 statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in
261 other ~~than those listed above.~~

262 Payment contemplated or pending litigation in which the lawyer may eventually
263 recover a fee, such as contingent-fee personal injury cases or cases in which fees
264 may be available under a contractual fee-shifting provision, even if the lawyer does
265 not eventually receive a fee.

266 Person Paying for a Lawyer's Services ~~from One Other Than The Client~~

267 ~~[5]~~

268 [14] Lawyers are frequently asked to represent a client under circumstances in
269 which a third person will compensate the lawyer, in whole or in part. The third
270 person might be a relative or friend, an indemnitor (such as a liability insurance
271 company) or a co-client (such as a corporation sued along with one or more of its
272 employees). Because third-party payers frequently have interests that differ from
273 those of the client, including interests in minimizing the amount spent on the
274 representation and in learning how the representation is progressing, lawyers are
275 prohibited from accepting or continuing such representations unless the lawyer
276 determines that there will be no interference with the lawyer's independent

professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

~~Settlement of Aggregated Claims~~

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

~~Agreements to Limit Liability~~

~~[7] A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.~~

~~[8] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.~~

~~Family Relationships Between Lawyers~~

~~[9] Paragraph (i) applies to related lawyers who are in different firms. Related~~

lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

Acquisition of Interest in Litigation

[10] Paragraph (j)

[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

315 Rule 1.7, this is one of the risks that should be discussed before undertaking the
316 representation, as part of the process of obtaining the clients' informed consent. In
317 addition, Rule 1.2(a) protects each client's right to have the final say in deciding
318 whether to accept or reject an offer of settlement and in deciding whether to enter a
319 guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph
320 is a corollary of both these Rules and provides that, before any settlement offer or
321 plea bargain is made or accepted on behalf of multiple clients, the lawyer must
322 inform each of them about all the material terms of the settlement, including what
323 the other clients will receive or pay if the settlement or plea offer is accepted. See
324 also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of
325 plaintiffs or defendants, or those proceeding derivatively, may not have a full
326 client-lawyer relationship with each member of the class; nevertheless, such
327 lawyers must comply with applicable rules regulating notification of class
328 members and other procedural requirements designed to ensure adequate
329 protection of the entire class.

330 Limiting Liability and Settling Malpractice Claims

331 [17] Agreements prospectively limiting a lawyer's liability for malpractice are
332 prohibited unless the client is independently represented in making the agreement
333 because they are likely to undermine competent and diligent representation. Also,

334 many clients are unable to evaluate the desirability of making such an agreement
335 before a dispute has arisen, particularly if they are then represented by the lawyer
336 seeking the agreement. This paragraph does not, however, prohibit a lawyer from
337 entering into an agreement with the client to arbitrate legal malpractice claims,
338 provided such agreements are enforceable and the client is fully informed of the
339 scope and effect of the agreement. Nor does this paragraph limit the ability of
340 lawyers to practice in the form of a limited-liability entity, where permitted by law,
341 provided that each lawyer remains personally liable to the client for his or her own
342 conduct and the firm complies with any conditions required by law, such as
343 provisions requiring client notification or maintenance of adequate liability
344 insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that
345 defines the scope of the representation, although a definition of scope that makes
346 the obligations of representation illusory will amount to an attempt to limit
347 liability.

348 [18] Agreements settling a claim or a potential claim for malpractice are not
349 prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take
350 unfair advantage of an unrepresented client or former client, the lawyer must first
351 advise such a person in writing of the appropriateness of independent
352 representation in connection with such a settlement. In addition, the lawyer must

353 give the client or former client a reasonable opportunity to find and consult
354 independent counsel.

355 Acquiring Proprietary Interest in Litigation

356 [19] Paragraph (i) states the traditional general rule that lawyers are prohibited
357 from acquiring a proprietary interest in litigation. ~~This~~ Like paragraph (e), the
358 general rule, ~~which~~ has its basis in ~~the~~ common law ~~prohibition of~~ champerty and
359 maintenance, ~~and is designed to avoid giving the lawyer too great an interest in the~~
360 representation. In addition, when the lawyer acquires an ownership interest in the
361 subject of the representation, it will be more difficult for a client to discharge the
362 lawyer if the client so desires. The Rule is subject to specific exceptions developed
363 in decisional law and continued in these ~~rules, such as the exception for reasonable~~
364 ~~contingent fees set forth in Rule 1.5 and the Rules. The~~ exception for lawyer's fees
365 ~~and for~~ certain advances of the costs of litigation is set forth in paragraph (e). In
366 addition, paragraph (i) sets forth exceptions for liens authorized by law to secure
367 the lawyer's fees or expenses and contracts for reasonable contingent fees. The law
368 of each jurisdiction determines which liens are authorized by law. These may
369 include liens granted by statute, liens originating in common law and liens
370 acquired by contract with the client. When a lawyer acquires by contract a security
371 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

391 having sexual relations with a client regardless of whether the relationship is
392 consensual and regardless of the absence of prejudice to the client.

393 [21] Sexual relationships that predate the client-lawyer relationship are not
394 prohibited. Issues relating to the exploitation of the fiduciary relationship and
395 client dependency are diminished when the sexual relationship existed prior to the
396 commencement of the client-lawyer relationship. However, before proceeding with
397 the representation in these circumstances, the lawyer should consider whether the
398 lawyer's ability to represent the client will be materially limited by the relationship.
399 See Rule 1.7(a)(2).

400 [22] When the client is an organization, paragraph (j) of this Rule prohibits a
401 lawyer for the organization (whether inside counsel or outside counsel) from
402 having a sexual relationship with a constituent of the organization who supervises,
403 directs or regularly consults with that lawyer concerning the organization's legal
404 matters.

405 Imputation of Prohibitions

406 [23] Under paragraph (k), a prohibition on conduct by an individual lawyer in
407 paragraphs (a) through (i) also applies to all lawyers associated in a firm with the
408 personally prohibited lawyer. For example, one lawyer in a firm may not enter into

409 a business transaction with a client of another member of the firm without
410 complying with paragraph (a), even if the first lawyer is not personally involved in
411 the representation of the client. The prohibition set forth in paragraph ~~(e)~~.j) is
412 personal and is not applied to associated lawyers.

Rule 1.8: Current Clients: Specific Rules

Client-Lawyer Relationship

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

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

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

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

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

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

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

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

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

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

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest

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

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

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

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

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

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

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

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

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

Comment

Business Transactions between Client and Lawyer

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

See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

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

both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives 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.

146

147 Gifts to Lawyers

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

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

161 [8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a
162 partner or associate of the lawyer named as executor of the client's estate or to
163 another potentially lucrative fiduciary position. Nevertheless, such appointments

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,

199 e.g., for receipt of government benefits, social services, or tax liability, the lawyer
200 should consult with the client about these. See Rule 1.4.

201 [12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in
202 specific circumstances where it is unlikely to create conflicts of interest or invite
203 abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or
204 implying the availability of financial assistance prior to retention or as an
205 inducement to continue the client-lawyer relationship after retention; (ii) seeking or
206 accepting reimbursement from the client, a relative of the client or anyone
207 affiliated with the client; and (iii) publicizing or advertising a willingness to
208 provide gifts to prospective clients beyond court costs and expenses of litigation
209 in connection with contemplated or pending litigation or administrative
210 proceedings.

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

218 Person Paying for a Lawyer's Services

219 [14] Lawyers are frequently asked to represent a client under circumstances in
220 which a third person will compensate the lawyer, in whole or in part. The third
221 person might be a relative or friend, an indemnitor (such as a liability insurance
222 company) or a co-client (such as a corporation sued along with one or more of its
223 employees). Because third-party payers frequently have interests that differ from
224 those of the client, including interests in minimizing the amount spent on the
225 representation and in learning how the representation is progressing, lawyers are
226 prohibited from accepting or continuing such representations unless the lawyer
227 determines that there will be no interference with the lawyer's independent
228 professional judgment and there is informed consent from the client. See also Rule
229 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who
230 recommends, employs or pays the lawyer to render legal services for another).

231 [15] Sometimes, it will be sufficient for the lawyer to obtain the client's informed
232 consent regarding the fact of the payment and the identity of the third-party payer.
233 If, however, the fee arrangement creates a conflict of interest for the lawyer, then
234 the lawyer must comply with Rule 1.7. The lawyer must also conform to the
235 requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict
236 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

275 insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that
276 defines the scope of the representation, although a definition of scope that makes
277 the obligations of representation illusory will amount to an attempt to limit
278 liability.

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

286 Acquiring Proprietary Interest in Litigation

287 [19] Paragraph (i) states the traditional general rule that lawyers are prohibited
288 from acquiring a proprietary interest in litigation. Like paragraph (e), the general
289 rule has its basis in common law champerty and maintenance and is designed to
290 avoid giving the lawyer too great an interest in the representation. In addition,
291 when the lawyer acquires an ownership interest in the subject of the representation,
292 it will be more difficult for a client to discharge the lawyer if the client so desires.

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,

312 because of the lawyer's emotional involvement, the lawyer will be unable to
313 represent the client without impairment of the exercise of independent professional
314 judgment. Moreover, a blurred line between the professional and personal
315 relationships may make it difficult to predict to what extent client confidences will
316 be protected by the attorney-client evidentiary privilege, since client confidences
317 are protected by privilege only when they are imparted in the context of the client-
318 lawyer relationship. Because of the significant danger of harm to client interests
319 and because the client's own emotional involvement renders it unlikely that the
320 client could give adequate informed consent, this Rule prohibits the lawyer from
321 having sexual relations with a client regardless of whether the relationship is
322 consensual and regardless of the absence of prejudice to the client.

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

[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.

1 **Special General Counsel**

2

3 **Kansas Rule 205(g): Special Prosecutor.** If the disciplinary administrator has a
4 conflict in performing a duty listed in subsection (f), the disciplinary administrator
5 must request that the Supreme Court appoint a special prosecutor.

6

7 **Hawaii Rule 9. Abstention; Recusal; and Ex Parte Communications.** If
8 Counsel determines that the ODC should abstain from a particular matter, Counsel
9 shall inform the Board Chairperson, who shall appoint Special Assistant
10 Disciplinary Counsel to discharge the powers and duties of Counsel.

11

12 **4-217: Special General Counsel**

13 If the Office of the General Counsel has a conflict in performing duties listed in
14 Part IV of these rules, the General Counsel must notify the Supreme Court and ask
15 the Court to appoint Special General Counsel to perform those duties.

1 **ABA Rule 8.4: Misconduct**

2 It is professional misconduct for a lawyer to:

3 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly

4 assist or induce another to do so, or do so through the acts of another;

5 (b) commit a criminal act that reflects adversely on the lawyer's honesty,

6 trustworthiness or fitness as a lawyer in other respects;

7 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

8 (d) engage in conduct that is prejudicial to the administration of justice;

9 (e) state or imply an ability to influence improperly a government agency or

10 official or to achieve results by means that violate the Rules of Professional

11 Conduct or other law;

12 (f) knowingly assist a judge or judicial officer in conduct that is a violation of

13 applicable rules of judicial conduct or other law; or

14 (g) engage in conduct that the lawyer knows or reasonably should know is

15 harassment or discrimination on the basis of race, sex, religion, national origin,

16 ethnicity, disability, age, sexual orientation, gender identity, marital status or

17 socioeconomic status in conduct related to the practice of law. This paragraph does

18 not limit the ability of a lawyer to accept, decline or withdraw from a

representation in accordance with Rule 1.16. This paragraph does not preclude
legitimate advice or advocacy consistent with these Rules.

Comment

Maintaining The Integrity of The Profession

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving

violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at

recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill

74 the professional role of lawyers. The same is true of abuse of positions of private
75 trust such as trustee, executor, administrator, guardian, agent and officer, director or
76 manager of a corporation or other organization.

RULE 8.4 MISCONDUCT

a. It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to:

1. violate or knowingly attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
2. be convicted of a felony;
3. be convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer's fitness to practice law;
4. engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;
5. fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him or her as a lawyer within ten days after the time appointed in the order or judgment;
6.
 - i. state an ability to influence improperly a government agency or official by means that violate the Georgia Rules of Professional Conduct or other law;
 - ii. state an ability to achieve results by means that violate the Georgia Rules of Professional Conduct or other law;

21 iii. achieve results by means that violate the Georgia Rules of
22 Professional Conduct or other law;

23 7. knowingly assist a judge or judicial officer in conduct that is a
24 violation of applicable rules of judicial conduct or other law; or

25 8. commit a criminal act that relates to the lawyer's fitness to practice
26 law or reflects adversely on the lawyer's honesty, trustworthiness or
27 fitness as a lawyer, where the lawyer has admitted in judicio, the
28 commission of such act.

29 b.

30 1. For purposes of this Rule, conviction shall include any of the
31 following accepted by a court, whether or not a sentence has been
32 imposed:

33 i. a guilty plea;

34 ii. a plea of nolo contendere;

35 iii. a verdict of guilty; or

36 iv. a verdict of guilty but mentally ill.

37 2. The record of a conviction or disposition in any jurisdiction based
38 upon a guilty plea, a plea of nolo contendere, a verdict of guilty or a
39 verdict of guilty but mentally ill, or upon the imposition of first
40 offender probation shall be conclusive evidence of such conviction or

disposition and shall be admissible in proceedings under these
disciplinary rules.

c. This Rule shall not be construed to cause any infringement of the existing
inherent right of Georgia Superior Courts to suspend and disbar lawyers
from practice based upon a conviction of a crime as specified in paragraphs
(a) (1), (a) (2) and (a) (3) above.

d. Rule 8.4 (a) (1) does not apply to any of the Georgia Rules of Professional
Conduct for which there is no disciplinary penalty.

The maximum penalty for a violation of Rule 8.4 (a) (1) is the maximum penalty
for the specific Rule violated. The maximum penalty for a violation of Rule 8.4 (a)
(2) through (c) is disbarment.

Comment

[1] The prohibitions of this Rule as well as the prohibitions of Bar Rule 4-102
prevents a lawyer from attempting to violate the Georgia Rules of Professional
Conduct or from knowingly aiding or abetting, or providing direct or indirect
assistance or inducement to another person who violates or attempts to violate a
rule of professional conduct. A lawyer may not avoid a violation of the rules by
instructing a nonlawyer, who is not subject to the rules, to act where the lawyer can
not.

[2] This Rule, as its predecessor, is drawn in terms of acts involving "moral turpitude" with, however, a recognition that some such offenses concern matters of personal morality and have no specific connection to fitness for the practice of law. Here the concern is limited to those matters which fall under both the rubric of "moral turpitude" and involve underlying conduct relating to the fitness of the lawyer to practice law.

[3] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[4] Reserved.

80 [5] A lawyer may refuse to comply with an obligation imposed by law upon a good
81 faith belief that no valid obligation exists. The provisions of Rule 1.2(d)
82 concerning a good faith challenge to the validity, scope, meaning or application of
83 the law apply to challenges of legal regulation of the practice of law.

84 [6] Persons holding public office assume responsibilities going beyond those of
85 other citizens. A lawyer's abuse of public office can suggest an inability to fulfill
86 the professional role of lawyers. The same is true of abuse of positions of private
87 trust such as trustee, executor, administrator, guardian, agent and officer, director
88 or manager of a corporation or other organization.

Judge blocks attorney anti-bias rule, finding free speech threat

By: David Thomas/reuters.com

(Reuters) - A federal judge in Pennsylvania on Thursday again blocked the state's adoption of an anti-harassment and discrimination professional rule for lawyers that was backed by the American Bar Association, ruling it threatens attorneys' free speech rights.

In a [78-page ruling](#), U.S. District Judge Chad Kenney in Philadelphia said a version of an ABA rule adopted last year by the Pennsylvania Supreme Court is overbroad and conflicts with the First Amendment.

This is the second time Kenney has struck down Pennsylvania's adoption of Rule 8.4(g), which says lawyers must not "knowingly engage in conduct constituting harassment or discrimination" on several grounds, including race, sex and religion.

The rule was [first challenged](#) in August 2020 by Zachary Greenberg, a program officer for the non-profit Foundation for Individual Rights in Education. Greenberg is represented by the Hamilton Lincoln Law Institute.

"We hope this deters other states from trying to unconstitutionally chill the speech of attorneys," Ted Frank, director of litigation at the institute, said in a statement.

Greenberg has asserted he is at risk of violating the discrimination rule because of presentations he gives about offensive and derogatory language, including racial and homophobic slurs.

Kenney [blocked](#) an earlier version of the rule in December 2020, saying it "promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends."

The Pennsylvania Supreme Court's disciplinary board and its prosecutorial arm, the Office of Disciplinary Counsel, [appealed](#) Kenney's ruling to the 3rd U.S. Circuit Court of Appeals but [dropped](#) its appeal in March 2021.

In July, the state supreme court amended the rule, but Greenberg [asserted](#) he would still have to censor himself out of fear that he might offend someone who might file a complaint against him.

Kenney held that a lawyer risked facing discipline for speech made outside of the context of a courtroom. Because the rule prohibits discrimination on socioeconomic status, "an attorney showing aversion to another person wearing cheap suits or worn-out shoes at a bench bar conference could be subject to discipline," Kenney wrote.

A spokesperson for the Pennsylvania Supreme Court's administrative arm declined to comment.

The case is Greenberg v. Haggerty, et al, U.S. District Court for the Eastern District of Pennsylvania, No. 20-cv-03822.

For Greenberg: Adam Schulman of Hamilton Lincoln Law Institute

For defendants: Michael Daley and Megan L. Davis of Administrative Office of Pennsylvania Courts

Read More:

[Pa. attorney sues to stop resurrected anti-discrimination rule](#)

[Pa. drops appeal over attorney conduct rule that drew free speech activists' ire](#)

[Pennsylvania turns to 3rd Circuit in fight over ABA-backed professional rule](#)

[Judge blocks anti-harassment rule for Pa. lawyers, citing its 'constant threat' to free speech](#)

[Pennsylvania lawsuit sets up fight over anti-harassment rule for lawyers](#)

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ZACHARY GREENBERG,
Plaintiff,

V.

JOHN P. GOODRICH,
in his official capacity as Board Chair
of The Disciplinary Board of the
Supreme Court of Pennsylvania, *et al.*,
Defendants.

: CIVIL ACTION

:

:

:

:

:

:

:

:

:

No. 20-03822

OPINION

KENNEY, J.

March 24, 2022

This Court fully commends and supports the aims and intentions of the American Bar Association (“ABA”) in its creation of the ABA Model Rule 8.4(g) as a statement of an ideal and as a written conviction that we must be constantly vigilant and work towards eliminating discrimination and harassment in the practice of law. If the ABA were to apply the Model Rule as a standard to maintain good standing for its voluntary members, it would indeed be the gold standard. It is a measure that most members of the ABA would aspire to, as would the vast number of those in the profession not represented by the ABA.¹ When, however, the ABA standard is adopted by government regulators and applied to all Pennsylvania licensed lawyers, as in this instance by the Disciplinary Board of the Supreme Court of Pennsylvania (the “Board”), it must pass constitutional analysis and muster. The ABA’s power over its voluntary membership is of an immensely different kind, quality, and force than that of the government over its constituents. The government cannot approach free speech in the same manner in which

¹ The ABA is a nationwide professional legal association. Pennsylvania currently has nearly 70 independent, state and county bar associations.

the ABA may choose to do so with its voluntary membership. Here, the Board adopted its own version of the ABA Model Rule and Plaintiff Zachary Greenberg challenges the Rule on the basis that it violates his individual right to free speech. Plaintiff argues that the Board should not have the power to investigate, interrogate, and discipline attorneys based on this Rule, and the regulation is otherwise too vague to equitably enforce.

Before the Court are Defendants' Motion for Summary Judgment (ECF No. 61) and Plaintiff's Motion for Summary Judgment (ECF No. 65).

I. BACKGROUND

Plaintiff Mr. Greenberg is a licensed attorney in Pennsylvania and was admitted to the Pennsylvania Bar in May 2019. ECF No. 53 ¶¶ 3–4.² Mr. Greenberg is employed as a Senior Program Officer at the Foundation for Individual Rights in Education and speaks and writes on several topics, including freedom of speech, freedom of association, due process, legal equality, and religious liberty. *Id.* ¶¶ 6–7. Mr. Greenberg is also National Secretary and a member of the First Amendment Lawyers Association, which conducts continuing legal education (“CLE”) events for its members. *Id.* ¶¶ 8–9. For both affiliations, Plaintiff speaks at CLE and non-CLE events on a variety of “controversial” issues. *Id.* ¶¶ 10–18. Mr. Greenberg has written and spoken against banning hate speech on university campuses and campaign finance speech restrictions. *Id.* ¶ 10. For example, Mr. Greenberg spoke at a CLE in Pennsylvania on his interpretation of the legal limits of a university's power to punish students for online expression deemed offensive or prejudiced. *Id.* ¶ 14. Mr. Greenberg expects to continue speaking on issues such as Title IX's

² The facts included here were all alleged in the Amended Complaint (ECF No. 49) and/or stipulated in the Stipulated List of Facts for Purposes of Summary Judgment Motions (ECF No. 53). While the Court considered all allegations in the Amended Complaint for purposes of both parties' Cross-Motions for Summary Judgment, the Court found these facts pertinent to its analysis and conclusion.

effect on due process rights of individuals accused of sexual assault, university policies on misconduct, professional academic freedom, religious freedom on campuses, and others. *Id.* ¶ 18. Mr. Greenberg considers these topics to be “polarizing” and “fears that in today’s climate he could be subject to professional disciplinary processes or sanction if his speech is perceived to violate the [Rule].” ECF No. 65–1 at 3.

Mr. Greenberg supports his concerns that his speech will be either chilled or subject to Rule 8.4(g)’s disciplinary process with numerous examples of public outcry and investigation after speakers in similar situations expressed information related to controversial topics. ECF No. 49 ¶¶ 113–114; ECF No. 54. For example, in 2013, Judge Edith Jones of the Fifth Circuit spoke at the University of Pennsylvania Law School and stated that members of certain racial groups commit crimes at rates disproportionate to their population, to which an attorney, among others, filed an ethics complaint alleging racial bias that resulted in a nearly two-year process of investigation. ECF No. 54 ¶¶ 44–45. In 2020, Professor Helen Alvare of George Mason University School of Law was accused of homophobic bias by Duke University School of Law students after supporting religious freedom accommodation laws and writing amicus briefs opposing gay marriage, in an effort by the law students to disinvite the speaker from coming to their university. *Id.* ¶ 50. Mr. Greenberg intends to continue speaking at CLE presentations and fears that his own discussion of “controversial” subjects will expose him to such investigation or discipline. ECF No. 53 ¶¶ 62–65.

The Board first considered adopting a version of the ABA Model Rule of Professional Conduct 8.4(g) in Pennsylvania in 2016.³ ECF *Id.* ¶ 42; ECF No. 61 at 8. After an iterative

³ The ABA Model Rule is available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/ (accessed Feb. 2, 2022); *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). ABA’s Model Rule 8.4 states, in relevant part, “It is professional misconduct for

process of notice and comment between December 2016 and June 2020, the Supreme Court of Pennsylvania approved the recommendation of the Board⁴ and ordered that Pennsylvania Rule of Professional Conduct (“Pa.R.P.C”) 8.4 be amended to include the below Rule 8.4(g) (the “Old Rule”) along with two comments, (3) and (4), (together, the “Old Amendments”). ECF No. 53 ¶¶ 43–45, 47.

The Old Amendments state:

It is professional misconduct for a lawyer to:

* * *

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Comment:

* * *

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to

a lawyer to: [...] (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.” The Model Rule includes two relevant comments, as follows: “[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). [4] [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations”

⁴ Justice Mundy dissented. ECF No. 53 ¶ 48.

practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

ECF No. 1 ¶ 40 (quoting Pa.R.P.C. 8.4).

The Old Amendments were scheduled to take effect on December 8, 2020. ECF No. 53 ¶ 47. On August 6, 2020, Plaintiff filed a complaint in this Court alleging that the Old Amendments consist of content-based and viewpoint-based discrimination and are overbroad in violation of the First Amendment (Count 1) and that the Old Amendments are unconstitutionally vague in violation of the Fourteenth Amendment (Count 2). ECF No. 1. On October 16, 2020, Defendants filed a Motion to Dismiss (ECF No. 15), and Plaintiff filed a Motion for Preliminary Injunction (ECF No. 16). This Court held oral argument on November 13, 2020, addressing both parties' motions. ECF No. 26. On December 8, 2020, this Court entered an Order denying Defendants' Motion to Dismiss (ECF No. 30) and an Order granting Plaintiff's Motion for Preliminary Injunction (ECF No. 31). This Court found that Mr. Greenberg's allegation that the Old Amendments will have a chilling effect on his speech sufficient to satisfy the injury-in-fact requirement of standing because it was objectively reasonable that his speeches are considered prejudiced or offensive by some members of the audience.⁵ *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 18–23 (E.D. Pa. 2020); ECF No. 29 at 18–23 (hereinafter the "Dec. 2020 Opinion"). Plaintiff's claims were further supported by his examples of speakers who had disciplinary complaints filed against them when discussing similar topics. Dec. 2020 Opinion at 19. Such examples also supported Plaintiff's claim of a credible threat of prosecution because complaints

⁵ Plaintiff believed then, and continues to believe now, that any one of his speaking engagements related to First Amendment issues and jurisprudence carry the risk of an audience member filing a disciplinary complaint because the speech may be perceived as prejudiced or offensive. Dec. 2020 Opinion at 12.

have been filed against speakers under similar circumstances. *Id.* at 21. The Court ultimately held that the Old Amendments constitute viewpoint-based discrimination in violation of the First Amendment because it favored a subset of messages by permitting the government to determine what speech is biased or prejudiced based on whether the viewpoint is socially or politically acceptable at the time. *Id.* at 35.

Defendants filed an appeal of these Orders to the Third Circuit and the case was stayed pending resolution of the appeal. ECF Nos. 32–35. Defendants voluntarily dismissed without prejudice their appeal of the Orders on March 17, 2021 (ECF No. 37; ECF No. 53 ¶ 50) and the case was removed from stay on August 10, 2021 (ECF No. 48).

During this time, the Supreme Court of Pennsylvania revised the Old Amendments by Order on July 26, 2021.⁶ *See* ECF No. 61 at 5; *see also* 51 Pa.B. 5190 (Aug. 21, 2021).⁷ The Board did not follow the process of public notice and comment that it employed for the Old Amendments. ECF No. 53 ¶ 54. The revised Rule 8.4(g) (hereinafter the “Rule”) and its revised Comments (together, “the Amendments”) state:

It is professional misconduct for a lawyer to:

* * *

(g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

ECF No. 53 ¶ 57 (quoting Pa.R.P.C. 8.4). Comments Three through Five pertain to section (g):

⁶ The parties stipulated facts state the date of the Order is July 26, 2021. ECF No. 53 ¶ 52. Defendants mistakenly identify July 25, 2021 as the date of the Order in their Motion for Summary Judgment. ECF No. 61 at 9. A quick check revealed the correct date is July 26. <https://www.padisciplinaryboard.org/news-media/news-article/1439/supreme-court-amends-harassment-provisions-of-rule-84>.

⁷ Again, Justice Mundy dissented to the adoption of the Amendments. ECF No. 53 ¶ 53.

[3] For the purposes of paragraph (g), conduct in the practice of law includes (1) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (2) operating or managing a law firm or law practice; or (3) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term “the practice of law” does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (1)- (3).

[4] “Harassment” means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g). “Harassment” includes sexual harassment, which includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome.

[5] “Discrimination” means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

ECF No. 53 ¶ 58 (quoting Pa.R.P.C. 8.4, cmts).⁸

Enforcement of the Amendments follows the same procedure as the Old Amendments.

The Office of Disciplinary Counsel (“ODC”) is charged with investigating complaints against Pennsylvania-licensed attorneys for violation of the Pennsylvania Rules of Professional Conduct and, if necessary, charging, and prosecuting attorneys under the Pennsylvania Rules of Disciplinary Enforcement. *See* Pa.R.D.E. 205–208; Pa.D.Bd.R. §§ 93.21, 93.61; ECF No. 53 ¶ 24. First, a complaint is submitted to ODC alleging an attorney violated the Pennsylvania Rules of Professional Conduct. ODC then investigates the complaint and decides whether to issue a DB-7 letter. ECF No. 53 ¶¶ 28–29. If ODC issues a DB-7 letter, the attorney has thirty days to respond to that letter. *Id.* ¶ 30. If, after investigation and a DB-7 letter response, ODC determines

⁸ Rule 8.4(g) was set to take effect on August 25, 2021. ECF No. 53 ¶ 55. Defendants agreed to forebear enforcing Rule 8.4(g) pending this Court’s disposition of cross-motions for summary judgment. ECF No. 46.

that a form of discipline is appropriate, ODC recommends either private discipline, public reprimand, or the filing of a petition for discipline to the Board. *Id.* ¶ 36. After further rounds of review and recommendation, along with additional steps, the case may proceed to a hearing before a hearing committee and *de novo* review by the Board and the Supreme Court of Pennsylvania. *Id.* ¶¶ 36, 38–41.

Following publication of the Amendments, on August 19, 2020, Plaintiff filed an Amended Complaint alleging that the Amendments consist of content-based and viewpoint-based discrimination and are overbroad in violation of the First Amendment (Count 1) and the Amendments are unconstitutionally vague in violation of the Fourteenth Amendment (Count 2).⁹ ECF No. 49. On October 1, 2021, Thomas J. Farrell, the Chief Disciplinary Counsel of ODC, filed a declaration stating, among other things, that “ODC does not interpret Rule 8.4(g) as prohibiting general discussions of case law or ‘controversial’ positions or ideas” and that “ODC would not pursue discipline on this basis.” ECF No. 56 ¶¶ 7, 10–14 (hereinafter the “Farrell Declaration”).

On November 16, 2021, Defendants filed a Motion for Summary Judgment (ECF No 61), and Plaintiff filed a response in opposition (ECF No. 70). On November 16, 2021, Plaintiff also filed a Motion for Summary Judgment (ECF No. 65), and Defendants filed a response in opposition (ECF No. 71).¹⁰ The Court held oral argument on January 20, 2022, addressing both Plaintiff and Defendants’ Motions for Summary Judgment. ECF No. 73.

⁹ All Defendants are sued in their official capacities only. ECF No. 49 ¶ 3. “State officers sued for damages in their official capacity are not ‘person’ for purposes of the suit because they assume the identity of the government that employs them.” *Hafer v. Melo*, 502 U.S. 21, 27 (1991). In this case, Defendants are members of either the Board or ODC.

¹⁰ On November 16, 2021, the Court granted Motions for Leave to File Amicus Brief (ECF No. 63; ECF No. 66), which were filed on the same day by the National Legal Foundation, Pacific Justice Institute, and Justice & Freedom Law Center (ECF No. 64) and the Christian Legal Society (ECF No. 67), both in support of Plaintiff.

Before the Court are Defendants’ Motion for Summary Judgment (ECF No. 61) and Plaintiff’s Motion for Summary Judgment (ECF No. 65).

II. STANDARD OF REVIEW

Summary judgment is granted where the moving party has established “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported summary judgment motion; the requirement is that there must be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A material fact is one that “might affect the outcome of the suit under governing law[.]” *Id.* at 248.

When ruling on a summary judgment motion, the court will consider the facts in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party’s favor. *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 538 (3d Cir. 2006). The judge’s role is not to weigh the disputed evidence and determine the truth of the matter, or to make credibility determinations; rather the court must determine whether there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 249.

When both parties move for summary judgment, the standard of review is the same. *Green Party of Pennsylvania v. Aichele*, 103 F. Supp. 3d 681, 687 (E.D. Pa. 2015). “Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and

determination whether genuine issues of material fact exist.” *Rains v. Cascade Industries, Inc.*, 402 F.2d 241, 245 (3d Cir. 1968).

III. DISCUSSION

A. *Jurisdictional Issues*

The Court must first address the issues of standing and mootness. While Defendants attempt to conflate the issues, standing and mootness are two distinct justiciability doctrines. Standing ensures that each plaintiff has the “requisite personal interest [...] at the commencement of the litigation[.]” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (internal quotation marks omitted). Mootness “ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit.” *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993). This Court will briefly address standing, an issue which was already adjudicated, and then will evaluate mootness, which is the justiciability doctrine applicable at this stage of the litigation.

1. Standing

This Court previously analyzed Defendants’ allegations against standing and determined that Plaintiff has standing to bring this pre-enforcement challenge to the constitutionality of Rule 8.4(g) and its Comments. Dec. 2020 Opinion at 18–25. This Court found that the Old Amendments will have a chilling effect on Mr. Greenberg’s speech sufficient to satisfy the injury-in-fact requirement of standing because it was objectively reasonable that his speeches are considered prejudiced or offensive by some members of the audience.¹¹ *Id.* at 18–23. Plaintiff’s claims were further supported by his examples of speakers who had disciplinary complaints filed

¹¹ Plaintiff believed then, and continues to believe now, that any one of his speaking engagements related to First Amendment issues and jurisprudence carry the risk of an audience member filing a disciplinary complaint because the speech may be perceived as prejudiced or offensive. Dec. 2020 Opinion at 12.

against them when discussing similar topics. *Id.* at 19. Such examples also supported Plaintiff’s claim of a credible threat of prosecution because complaints have been filed against speakers under similar circumstances. *Id.* at 21. Due to its own decision to appeal, voluntarily dismiss its appeal, revise the Amendments, and then continue with this proceeding, the Board now believes it can re-litigate the standing issue. ECF No. 61 at 17–26. The Court disagrees with Defendants and finds Plaintiff is correct that the relevant inquiry is mootness.

At the “commencement of the litigation,” plaintiff has the burden of demonstrating that the standing requirements are met. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). The evaluation of standing remains squarely focused on the circumstances existing at the start of the litigation, not at any point in the future chosen self-servingly by the defendant. *See Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (“While the proof required to establish standing increases as the suit proceeds [...] the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.”) (internal citations omitted); *see also Freedom from Religion Found, Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 481 (3d Cir. 2016) (remanding to district court to determine if plaintiff was a member of an organization “at the time the complaint was filed” to establish organizational standing); *Sims v. State of Fla., Dep’t of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1458 (11th Cir. 1989) (“We must determine standing at the time a plaintiff files suit.”) (internal citation omitted).

“[O]nce the plaintiff shows standing at the outset, [t]he need not keep doing so throughout the lawsuit.” *Hartnett v. Pennsylvania State Educ. Ass’n*, 963 F.3d 301, 305 (3d Cir. 2020); *see also Am. Immigr. Laws. Ass’n v. Exec. Off. for Immigr. Rev.*, 2020 WL 6111020, at *5 (D.N.J. Oct. 16, 2020) (finding plaintiff had “an appropriate interest to initiate a case” and “had standing

to assert their claims when the Complaint was filed.” The fact that related hearings were adjourned since that time did not mean plaintiffs “lacked standing when the Complaint was first filed.”).

Here, Defendants reiterate their prior assertion that Plaintiff’s claimed risk is based on speculative guesses regarding “the unknowable actions of unknown parties.” ECF No. 61 at 19; *see also* ECF No. 15 at 11. However, this Court found in favor of the Plaintiff on this issue. This Court found that “Defendants’ contention that Plaintiff’s injury ‘depends on an indefinite risk of future harms inflicted by unknown third parties’ is not persuasive.” Dec. 2020 Opinion at 21 (internal citation omitted). Plaintiff alleged specific examples of similarly situated individuals facing disciplinary and Title IX complaints for speeches on similar topics. *Id.* at 21. “It can hardly be doubted there will be those offended by the speech, or the written materials accompanying the speech[.]” *Id.* at 23. Plaintiff also sufficiently argued to the Court that, should the Rule remain in place, there would be a chilling effect on his speech and Mr. Greenberg would be forced to self-censor. *Id.* at 22. Defendants do not present any compelling reasons to reconsider our conclusion on this assertion.

Second, Defendants assert that Plaintiff cannot establish a credible threat of prosecution for four reasons: (1) there is no history of past enforcement as the Amendments have yet to go into effect (ECF No. 61 at 23); (2) Plaintiff’s conduct falls outside of the scope of the Amendments and, even if a complaint were filed, “there is no reason to believe” that Plaintiff would need to respond or that ODC would bring charges (ECF No. 61 at 23); (3) Plaintiff’s speech is protected from prosecution under both the plain language of the Rule and “safe harbor” for advocacy (ECF No. 61 at 25); and (4) ODC has “disavowed any intention” of enforcing the

Amendments against Plaintiff's described conduct through the Farrell Declaration and such complaints would be dismissed as "frivolous" (ECF No. 61 at 22).¹²

Most of those assertions were adequately addressed by Plaintiff in its prior Response in Opposition to the Defendants' Motion to Dismiss (ECF No. 25 at 3–12) and again in his Response in Opposition to the Defendants' Motion for Summary Judgment (ECF No. 70). Plaintiff contended, and this Court agreed, that the "chilling effect" on Mr. Greenberg's speech was sufficient to show an injury in fact and justified a pre-enforcement challenge to the Amendments. ECF No. 70 at 2–3 (citing the Dec. 2020 Opinion at 23–25). This chilling effect shows a "threat of specific future harm." Dec. 2020 Opinion at 18 (quoting *Sherwin-Williams Co. v Cty. of Delaware, Pennsylvania*, 968 F.3d 264, 269–70 (3d Cir. 2020), *cert. denied sub nom.* 141 S. Ct. 2565 (2021)). It continues to be evident to this Court that Plaintiff's alleged fear of disciplinary complaint and investigation is objectively reasonable based on the assertion that Plaintiff speaks on "controversial" issues that may be deemed offensive and hateful by others, as shown through the Plaintiff's lengthy list of similar presentations that faced significant public outcry. Dec. 2020 Opinion at 18; ECF No. 49 ¶ 113. "Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing [...] would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law[.]" Dec. 2020 Opinion at 23. "The government, as a result, de facto regulates speech by threat, thereby chilling speech." *Id.* at 23. Not only is there an objectively reasonable chilling effect on Plaintiff's speech, but Plaintiff has also shown he will

¹² Defendants contend that Chief Counsel Farrell's Declaration is binding and estops ODC from arguing otherwise should an attorney rely on it. ECF No. 61 at 22. This contention is addressed in *supra* pp. 21–28.

self-censor in response. *Id.* at 19 (quoting *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020)).

According to Plaintiff, there are only two authorities cited in Defendants' Motion for Summary Judgment that were not cited in its previously-ruled-upon Motion to Dismiss on the issue of standing: *Republican Party of Minn v. Klobuchar*, 381 F.3d 785 (8th Cir. 2004), and *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018). ECF No. 70 at 3. Plaintiff points out that neither of these cases represent or consider Supreme Court or Third Circuit precedent. In fact, Plaintiff asserts that those cases ignore Third Circuit precedent to "freely grant standing to raise" First Amendment facial overbreadth claims. *Id.* at 3 (citing *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 238 (3d Cir. 2010)). Even so, Plaintiff contends that those cases differ because they found neither of the challenged statute/policy affected the plaintiff's anticipated conduct or speech, unlike in this case where the Court found Plaintiff's speech is chilled. *Id.* at 9.

Regardless of the two new cases cited, the Court previously analyzed the first three arguments presented by Defendants above and Plaintiff's response and found that Plaintiff had standing to bring this pre-enforcement challenge based on the facts as they existed at the commencement of the litigation. Defendants again attempt to "sidestep a direct constitutional challenge by claiming no final discipline will ever be rendered" but that argument continues to fail as it pertains to standing. Dec. 2020 Opinion at 23.

Ultimately, this Court does not find any compelling reason to revoke its prior ruling on standing at this stage of the litigation. After the Court made its ruling on standing in December of 2020, Defendants chose to appeal the ruling and then subsequently chose to voluntarily dismiss that appeal. That chain of events does not affect the Court's prior decision on standing in the least. *See Am. Immigr. Laws. Ass'n*, 2020 WL 6111020, at *5 (concluding intervening events did

not negate plaintiff's standing at the time complaint was filed). After dismissing its appeal, Defendants chose to proceed on the same docket, continuing the pre-existing proceeding. It would certainly not be equitable, nor efficient, for the Court to allow the Defendants to file an appeal, voluntarily dismiss it, and then turn back the clock to the commencement of the case. This Court's procedural posture does not revert back merely because the Defendants wish it.

On Defendants' final assertion against a credible threat of prosecution, the parties disagree as to whether the Defendants' alleged "disavowal" shows lack of standing or mootness at this point in the litigation. Plaintiff points out that since the Old Amendments were revised in 2021 and the Farrell Declaration was prepared and submitted to the Court in 2021 as well, they postdate the inception of this action and are an issue of mootness not standing. ECF No. 70 at 11. Defendants contend that Plaintiff's assertion is "unavailing" because courts "regularly hold that standing is lacking where, during litigation, a defendant disavows an intention to prosecute the plaintiff." ECF No. 71 at 5. Defendants cite to only one case within the Third Circuit purportedly standing for the proposition that the disavowal should be evaluated as to standing. In that case, the court dismissed a single defendant who guaranteed to refrain from enforcement "pending review of its constitutionality[.]" *Jamal v. Kane*, 96 F. Supp. 3d 447, 454 (M.D. Pa. 2015). The court did not find the plaintiffs lacked standing to bring suit entirely. Further, that court was entertaining arguments of standing for the first time. This Court evaluated standing under similar procedural posture over a year ago and found Plaintiff has standing. Dec. 2020 Opinion at 23. A disavowal in the defendants first substantive response to the complaint is distinct from a disavowal here, years into the proceeding.

Defendants cite other authorities that can be similarly distinguished. In a Tenth Circuit case affirming no standing, the District Attorney filed an affidavit with the motion to dismiss

stating that enforcement of the statute is doubtful against *anyone* due to a court opinion in another circuit and would not be enforced against any of the plaintiffs for any act that might violate it. *Winsness v. Yocom*, 433 F.3d 727, 733 (10th Cir. 2006). Here, the Defendants continue to assert that the Rule is constitutional and will be enforced, but potentially not in the narrow circumstances listed in the Farrell Declaration, including discussing and citing case law or controversial positions. ECF No. 56. The disavowal does not end the material dispute of whether Plaintiff's conduct could fall within the scope of the Amendments or whether the Declaration estops ODC and/or the Board from enforcing the Rule against such speech in the future. In a Sixth Circuit case, the court found that the defendants had no authority to enforce the challenged order, and in fact were instructed not to enforce it against *anyone*. *McKay v. Federspiel*, 823 F.3d 862, 870 (6th Cir. 2016). Again, in the Eighth Circuit case cited by Defendants, the defendant admitted that plaintiffs' conduct never fell within the scope of the regulation but standing likely would have been affirmed if the court found "continuing, present adverse effects," which we find here in the chilling effect of the complaint and investigation process. *Harmon v. City of Kansas City*, 197 F.3d 321, 327 (8th Cir. 1999) (internal citations omitted).¹³

Therefore, the Court agrees with Plaintiff that any revisions to the Old Amendments in forming the current Rule and changes in posture due to the Farrell Declaration should be evaluated under the doctrine of mootness. Here, the "heavy burden of persua[ding] the court" shifts to the defendants to prove that such development has mooted the case. *Friends of the*

¹³ Finally, in the above case and all cases cited by Defendants in support of its proposition that there is no standing after a disavowal, the plaintiffs were promised that they would not be prosecuted under the entire statute, not a narrow carve out based on their past activity. Here, ODC is not saying they will never prosecute Plaintiff for any reason under the statute, and Defendants cannot prevent a complaint and investigation from occurring with their disavowal. Thus, Plaintiff is still at risk under the Amendments despite the narrowly tailored disavowal.

Earth, 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

2. Mootness

Under Article III’s requirement for a case or controversy, a case is moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal citation and quotation marks omitted); *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980).

Throughout the life of a lawsuit, the parties must have a personal stake in the outcome of the litigation. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 303 (3d Cir. 2016). “The central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.” *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007) (internal citation and quotation omitted). Even if the alleged injury changes during the course of the lawsuit yet “secondary” or “collateral” injuries survive, a court “will not dismiss the case as moot[.]” *Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 384 (3d Cir. 2001).¹⁴

Though Defendants state their arguments under the doctrine of standing, the Court will consider them as to mootness as this Court has concluded that mootness is the relevant inquiry at this stage in the litigation. According to Defendants, through the Farrell Declaration “ODC has declared that [Plaintiff’s] conduct does not violate the Amendments.” ECF No. 61 at 19. Mr. Farrell, the Chief Disciplinary Counsel of ODC since January 2020, submitted the Farrell Declaration to clarify ODC’s position in this case. ECF No. 56. According to Mr. Farrell, all

¹⁴ *See also Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (“[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.”) (internal citations omitted).

recommendations to ODC to pursue disciplinary charges under Rule 8.4(g) require his review and express approval. *Id.* ¶ 5. Mr. Farrell also claims to have “authority to direct how ODC interprets the Rules of Professional Conduct, as well as determining [] ODC’s policy on handling complaints, including those raising First Amendment issues.” *Id.* ¶ 6. Based on this authority, Mr. Farrell informed the Court that he does not interpret Rule 8.4(g) as “prohibiting general discussions of case law or ‘controversial’ positions or ideas.” *Id.* ¶7. The Farrell Declaration further lists the instances raised specifically by Plaintiff in which Plaintiff believes his speech may be chilled by the Amendments and Mr. Farrell states that “ODC would not pursue discipline on this basis.” *Id.* ¶¶ 10–14. Defendants are emphatic that “ODC has disavowed any intention to [charge Plaintiff with violating the Amendments].” ECF No. 61 at 22. They claim this disavowal is “binding” and estops ODC from arguing otherwise should an attorney rely on it. *Id.*

Defendants assert that, “[u]nder the principles of official estoppel, the Farrell Declaration is binding upon Respondent and his future official actions, other employees at ODC, and potential successors to his position as Chief Disciplinary Counsel.” ECF No. 62 at 8.

Plaintiff counters that the Farrell Declaration does not “undermine the justiciability” of his claims. ECF No. 65-1 at 35. Plaintiff disagrees that the promises made in the Farrell Declaration are permanent and binding. ECF No. 70 at 11. Plaintiff points out Mr. Farrell’s interrogatory response, which admits that there is “no set process for amending, revising, or withdrawing the positions taken in the Farrell Declaration.” ECF No. 62 at 8. Yet Mr. Farrell could be replaced at his position at any time. ECF No. 65-1 at 37. In addition, Plaintiff contends that no form of estoppel prevents enforcement of Rule 8.4(g) against Mr. Greenberg as the Defendants provided “no legal support for this theory of so-called ‘official estoppel’ and they are not bound by views asserted in this litigation. ECF No. 70 at 11; ECF No. 65–1 at 37. Even if the

Board could at some point develop an applicable estoppel theory against ODC, Plaintiff adds that this is too uncertain to render his Complaint moot. ECF No. 70 at 12; ECF No. 65–1 at 36.

Further, there is disagreement among the parties on whether this disavowal moots the case against all Defendants or only ODC. Plaintiff contends that even if the Court finds ODC is estopped from enforcing the Rule against Mr. Greenberg, “the case remains live with respect to the Board Defendants.” ECF No. 70 at 6. The Farrell Declaration never asserts that the speech concerns raised by Plaintiff would be “outside the jurisdiction of the Board[.]” *Id.* at 13. The Defendants contend that ODC “is the only entity that can investigate and seek disciplinary action [and] has disavowed enforcement of the Amendments for Plaintiff’s conduct.” ECF No. 61 at 23; ECF No. 71 at 8. Defendants further assert that the Board is merely an adjudicatory body for disciplinary cases “that come before it” but “the Board does not enforce the Amendments, conduct investigations, or propose discipline.” ECF No. 71 at 8. If ODC dismisses a complaint, according to Mr. Farrell, the Board cannot review it or otherwise adjudicate it. *Id.* at 9 (citing ECF No. 62, Exh. B). Defendants do admit that the Farrell Declaration is not binding on the Board or its members, “although the Board would have to consider the Declaration should an attorney rely on it and argue estoppel or detrimental reliance.” ECF No. 62 at 8; *see also* ECF No. 70 at 12 (the Board is “admittedly not bound by it”). The Court will evaluate all of these arguments in turn.

As Defendants voluntarily declared through the Farrell Declaration that they would not enforce the Amendments against Plaintiff under the circumstances Mr. Greenberg described and also revised the Amendments to conform with this Court’s previous ruling, the Court now considers whether an exception to mootness from the voluntary cessation doctrine is

applicable.¹⁵ Voluntary cessation occurs when the defendant alleges mootness because of its own unilateral action taken after the litigation began. *See Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020). This situation “will moot a case only if it is ‘absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur.’” *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).¹⁶ The voluntary cessation doctrine exemplifies “the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.” *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (internal citation omitted).

“Voluntary cessation cases highlight the important difference between standing (at the start of a suit) and mootness (mid-suit).” *Hartnett*, 963 F.3d at 306. “[T]he prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.” *Friends of the Earth*, 528 U.S. at 190. If the voluntary cessation doctrine applies, then a case is not moot.

“The burden always lies on the party claiming mootness[.]” *Hartnett*, 963 F.3d at 307 (internal citation omitted); *see also, Friends of the Earth*, 528 U.S. at 189 (the defendant has the “heavy burden of persuading the court.”) (internal citation and marks omitted); *Already, LLC*, 568 U.S. at 91 (explaining that a party's burden to avoid the voluntary cessation doctrine is formidable). “Nevertheless, voluntary cessation of illegal conduct does render a challenge to that

¹⁵ It is “well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

¹⁶ “If it is absolutely clear that the allegedly wrongful behavior will not recur after the court dismisses the case, then a case can become moot notwithstanding a party's voluntary cessation of that unlawful behavior. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (internal citation omitted). “Voluntary cessation of challenged conduct moots a case, however, only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal citation and quotation marks omitted).

conduct moot where (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Louisiana Counseling & Fam. Servs., Inc. v. Makrygialos, LLC*, 543 F. Supp. 2d 359, 366 (D.N.J. 2008) (citing *Friends of the Earth*, 528 U.S. at 189). To determine whether a defendant meets this heavy burden, courts analyze multiple factors including, timing of the voluntary cessation, defense of past policies, and permanence of the shift in policy. *See, e.g., United States v. Gov’t of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004); *Knights of Columbus Star of Sea Council 7297 v. City of Rehoboth Beach*, 506 F. Supp. 3d 229, 235 (D. Del. 2020).

The timing of the Farrell Declaration and the revised Rule certainly favor an exception to mootness under the voluntary cessation doctrine. Following the Court’s ruling against Defendants on both standing and the merits of the constitutionality challenge, Defendants submitted the Farrell Declaration to the Court. Defendants also bypassed the notice and comment period employed in the creation of the Old Amendments in its revisions of the Amendments likely to quickly remove problematic phrasing and submit its current version of the Amendments to the Court prior to summary judgment motions. *See, e.g., Hartnett*, 963 F.3d at 306 (“A party’s unilateral cessation in response to litigation will weigh against a finding of mootness.”); *DeJohn v. Temple Univ.*, 537 F.3d 301, 311 (3d Cir. 2008) (finding that Temple’s timing of the policy change was a factor against mootness and did not meet the “formidable” burden of proving there was “no reasonable expectation” it could reimplement its former policy); *Gov’t of Virgin Islands*, 363 F.3d at 285 (“the timing of the contract termination ... strongly suggests that the impending litigation was the cause of the termination” and such timing weighs against mootness); *Knights of Columbus*, 506 F. Supp. 3d at 235 (finding proposed policy change was on the city’s agenda

before plaintiff filed its motion, thus the policy was not adopted in response to litigation and can moot the case); *ACLU of Mass. v. U.S. Conf. Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) (“[t]he voluntary cessation doctrine does not apply [as an exception to mootness] when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation.”) (internal citation omitted).

The Third Circuit has found that a defendant’s defense of past policy could suggest the possibility of reinstating the policy in the future. *See, e.g., Hartnett*, 963 F.3d at 305–07 (“Under this well-recognized exception, courts are reluctant to declare a case moot when the defendant voluntarily ceases the challenged conduct after litigation begins but still maintains the lawfulness of its past conduct.”) (internal citation and quotation marks omitted); *Parents Involved in Cmty. Schs.*, 551 U.S. at 719 (finding voluntary cessation did not moot case where defendant “vigorously defend[ed] the constitutionality of its race-based program”). While Defendants have consistently asserted that Plaintiff’s conduct falls outside the scope of the Amendments, they also defend the constitutionality of the Old Rule and the Rule and vigorously assert the compelling need to regulate attorneys in the practice of law, even if there are incidental impacts on speech. In their Motion for Summary Judgment, Defendants continue to assert that the Supreme Court of Pennsylvania has a compelling need to regulate the conduct of attorneys, ECF No. 61 at 6, and that the state has “broad powers to regulate attorneys[.]” *Id.* at 28; *see also id.* at 30 (“Pennsylvania’s interest in regulating attorneys and the practice of law is compelling, and its power to do so is broad.”). Specifically for the Amendments, Defendants continue to assert its unfocused “compelling interest in eradicating” discrimination and harassment. *Id.* at 30. Due to that alleged broad power and compelling need for regulation, the Defendants continue to assert that an “incidental[.]” burden on speech is permissible because the Amendments regulate

professional conduct. *Id.* at 31. This evidences at least some gap between Defendants position that they will not aggressively enforce the Amendments against purportedly offensive language and their stated aim and need to police all licensed attorneys in activities related to the practice of law. *See DeJohn*, 537 F.3d at 310 (finding voluntary cessation exception to mootness applied where defendant “defended and continue[d] to defend not only the constitutionality of its prior sexual harassment policy, but also the *need* for the former policy”) (emphasis added).

During oral argument on these cross-motions, Defendants reiterate that “Pennsylvania certainly has a compelling interest in eradicating harassment and discrimination from the practice of law” and the Rule need not be a “perfect fit” to serve this interest. ECF No. 74 at 13. Even though the Court concluded that Plaintiff’s First Amendment protected speech at CLE presentations was likely to be impacted by the Old Rule (Dec. 2020 Opinion), Defendants continue to insist that “[e]ven under the [O]ld [R]ule, our position was that Mr. Greenberg’s activities didn’t come within the rule. And the fact that it’s [sic] been changed, we haven’t changed our position.” *Id.* at 9. Defendants continue to assert that, despite the phrasing “manifesting bias and prejudice” from the Old Rule being deemed by the Court to include offensive language, “[t]hat’s not what the rule is directed towards.” *Id.* at 12. While Defendants acknowledge that the language which “troubled” the Court last year was not included in the revised Amendments, there was little to no appreciation shown of the unconstitutionality of the Old Rule. *Id.* at 6.

Making a concession to appease the Court in this litigation does not create confidence that Defendants truly understand the constitutional limitations of their allegedly broad power to regulate attorneys. *See Hartnett*, 963 F.3d at 306 (“[D]efendant’s reason for changing its behavior is often probative of whether it is likely to change its behavior again. [The court will]

understandably be skeptical of a claim of mootness when a defendant yields in the face of a court order and assures us that the case is moot because the injury will not recur, yet maintains that its conduct was lawful all along.”); *DeJohn*, 537 F.3d at 310 (“there have been no subsequent events that make it absolutely clear that Temple will not reinstate the allegedly wrongful policy in the absence of the injunction”); *Fields*, 936 F.3d at 161 (finding it was not “absolutely clear” the government would not revert to its prior policy when it only changed in response to the litigation and the claim is not moot); *but see Knights of Columbus*, 506 F. Supp. 3d at 235 (finding no credible suspicions that defendant would revert to challenged practice after defendants quickly revised no-religious-displays policy to address plaintiff’s concerns).

Finally, courts are concerned with the permanence of the voluntary shift in policy in assessing mootness and the voluntary cessation exception. *See Hooker Chem. Co., Ruco Div. v. U.S. E.P.A., Region II*, 642 F.2d 48, 52 (3d Cir. 1981) (“A controversy still smoulders [sic] when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct.”); *see also Cottrell v. Good Wheels*, 2009 WL 3208299, at *5 (D.N.J. Sept. 28, 2009) (“[V]oluntary cessation will only render a case non-justiciable where it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation”).

Defendants describe the Farrell Declaration as a “binding” disavowal that estops ODC, the disciplinary enforcement authority, from arguing otherwise should an attorney rely on it. ECF No. 61 at 22. Defendants are emphatic that “ODC has disavowed any intention to [charge Plaintiff with violating the Amendments]” under the circumstances Mr. Greenberg outlined to the Court. *Id.* Defendants assert that, “[u]nder the principles of official estoppel, the Farrell

Declaration is binding upon Respondent and his future official actions, other employees at ODC, and potential successors to his position as Chief Disciplinary Counsel.” ECF No. 62 at 8.

Plaintiff disagrees that the promises made in the Farrell Declaration are permanent and binding. ECF No. 70 at 11.

The idea of “official estoppel” as presented by Defendants is not supported by case law and, in fact, Plaintiff points out that Defendants did not provide any legal support for this theory. ECF No. 70 at 11; ECF No. 65–1 at 37. Defendants cite to only one case from Pennsylvania state court where it states that if a defendant detrimentally relies on a disavowal then it *can* preclude prosecution – not that the government is *estopped* from bringing prosecution. ECF No. 71 at 9 (citing *Commonwealth v. Cosby*, 252 A.3d 1092, 1135–44 (Pa. 2021)).¹⁷ Defendants also concede that generally estoppel is applied differently to the government than private citizens but assert they cannot ignore promises upon which citizens detrimentally rely. *Id.* at 9.

This Court found almost no federal case law addressing the term of art “official estoppel” presented by Defendants. Only in *Conforti v. United States* is it even mentioned, where the Eighth Circuit found no authority to support the idea of official estoppel. 74 F.3d 838, 841 (8th Cir. 1996). That court went as far as to say that “the Supreme Court has repeatedly indicated that an estoppel will rarely work against the government.” *Id.*; see generally, *Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990); *Heckler v. Community Health Services*, 467 U.S. 51, 61 (1984). Even in the broader context of general estoppel, it is rare to apply

¹⁷ Defendants refer to *Commonwealth v. Cosby*, where the District Attorney made an individual evaluation not to prosecute in a criminal case. 252 A.3d 1092, 1135 (Pa. 2021), *cert. denied sub nom. Pennsylvania v. Cosby*, 2022 WL 660639 (U.S. Mar. 7, 2022). The Supreme Court of Pennsylvania determined that the decision not to prosecute was unconditional and presented as absolute and final and found the defendant’s detrimental reliance on the government’s assurances during the plea bargaining phase implicated due process rights. *Id.* However, the court added “[t]here is nothing from a reasonable observer’s perspective to suggest that the decision was anything but permanent.” *Id.* at 1137. That is not the case here. For a variety of reasons, the Court finds the promises made by one defendant in a civil rather than criminal case, who may or may not have the authority to make such promises binding, do not mirror the circumstances in *Cosby*.

equitable estoppel against state action as it is disfavored unless it is required by justice and fair play or to prevent manifest injustice. 31 C.J.S. Estoppel and Waiver § 256; *see Wayne Moving & Storage, Inc. v. Sch. Dist. of Phila.*, 625 F.3d 148 (3d Cir. 2010).

Regardless of the semantics over Defendants’ seemingly novel use of the term official estoppel, there is reason to be skeptical that the promises made in the Farrell Declaration are indeed binding on Defendants and moot Plaintiff’s First Amendment challenge. *See, e.g., Cottrell*, 2009 WL 3208299, at *5 (finding defendant’s promise on its own was not enough to show the clarity needed to render a claim moot because of its timing and that the defendant “could conceivably re-institute” the challenged policy). Similar to the current circumstances, in *Elim Romanian Pentecostal Church v. Pritzker*, the governor of Illinois placed an order restricting in-person religious services and later lifted the challenged parts of the restrictions after the case was filed. 962 F.3d 341, 342 (7th Cir. 2020). The Seventh Circuit concluded that the question of whether the revoked order violated the First Amendment was not moot because the governor could change the policy at will. *Id.* at 344–45.¹⁸ Defendants here admit that there is “no set process for amending, revising, or withdrawing the positions taken in the Farrell Declaration,” which prevents clarity on whether the disavowal could be changed at will or with the appointment of a new Chief Counsel for ODC and leads this Court away from a finding that this disavowal is binding and permanent. ECF No. 62 at 8.

In the alternative, Plaintiff contends that even if the Court finds the claim against ODC is moot, “the case remains live with respect to the Board Defendants.” ECF No. 70 at 6. Defendants do admit that the Farrell Declaration is not binding on the Board or its members, “although the

¹⁸ The court notes that the new order specifically reserved the right to change the policy at will. Here, Mr. Farrell claims his interpretation is binding for the foreseeable future. While that is a small distinction between the two cases, it still serves as persuasive support for Plaintiff’s assertion that such revisions and changes in position made during litigation is not binding against the government.

Board would have to consider the Declaration should an attorney rely on it and argue estoppel or detrimental reliance.” ECF No. 62 at 8; ECF No. 70 at 12 (the Board is “admittedly not bound by [the Farrell Declaration]”); *see also Hansen Found., Inc. v. City of Atl. City*, 504 F. Supp. 3d 327 (D.N.J. 2020) (finding “heavy burden” of mootness was not met where promise was made after litigation began and defendant made no claim that it was binding on the city). However, Defendants assert that ODC is the only entity that can investigate and seek disciplinary action for Rule 8.4(g) and that the Board does not enforce the Amendments, conduct investigations, or propose disciplines. According to Mr. Farrell, if ODC dismisses a complaint, the Board cannot review it or otherwise adjudicate it. ECF No. 71 at 9, n.5 (citing ECF No. 62, Exhs. A & B). Plaintiff adds, though, that the Board has the authority to replace Mr. Farrell at any time, indicating some control or authority over the author of the Farrell Declaration. ECF No. 70 at 12.

Most important here is that Defendants admit the Farrell Declaration is not binding on the Board so if there is any indication that the Board could review ODC’s decision to dismiss a complaint or otherwise be involved in the disciplinary process under Rule 8.4(g), the case cannot be moot against the Board. It is within the Board’s authority and in fact is their obligation to appoint the Chief Disciplinary Counsel, though that alone is not sufficient to show they are involved in the disciplinary procedures run by ODC. Pa. Disc. Bd. Rules § 93.23 (a)(2). The Board also assigns its hearing committee members “to review and approve of or modify recommendations” by ODC, including dismissals and informal admonitions. Pa. Disc. Bd. Rules § 93.23 (a)(7)(i). The Board can also assemble a panel of three members to review and approve or modify a determination by that hearing committee, including dismissal or informal admonitions. Pa. Disc. Bd. Rules § 93.23 (a)(8). These Board Rules appear to give the Board discretion to make a determination on attorney misconduct even if ODC has dismissed the

complaint following investigation. Finally, under Pa. Disc. Bd. Rules §87.1 (a), the Board, with consensus from at least five of its members, may direct ODC to undertake an investigation into attorney misconduct. Pa. Disc. Bd. Rules § 87.1 (a). It is unclear whether the Board can request this investigation after ODC has dismissed a complaint as frivolous, but, in any case, it does imply that ODC does not have sole authority over instigating investigations into attorney misconduct. While the Court finds the controversy remains live as to all Defendants, even if it were moot against ODC, there is sufficient evidence showing the Board has not met its heavy burden to show that the controversy between Plaintiff and the Board is moot.

Regardless, Plaintiff continues to assert that it is “the investigatory process itself that has a chilling effect.” ECF No. 70 at 13. Both parties stipulate that each complaint that ODC receives triggers an investigatory process. ECF No. 53 ¶ 28. And Mr. Farrell stated in response to requested Interrogatories that “intake counsel may contact the respondent in an effort to resolve the matter quickly” during that investigation. ECF No. 70 at 13 (quoting Farrell Interrog. Answers ¶ 18). If in fact ODC is estopped from enforcing Rule 8.4(g) against Mr. Greenberg in the context of his CLE presentations, there remains First Amendment concerns regarding the initial complaint and investigation process that keep the case and controversy live. *Id.* at 13. Therefore, the Farrell Declaration does not moot Mr. Greenberg’s claims.

While this Court does not find that the Farrell Declaration moots the case, Defendants also assert that even if the Old Amendments were applicable to Plaintiff’s described speech and conduct, such circumstances do “not come within the Amendments” as written today and that the case should be moot on that basis. ECF No. 61 at 24.¹⁹ Defendants allege that the plain language of Rule 8.4(g) no longer includes the phrasing prohibiting “words... manifest[ing] bias or

¹⁹ “[ODC, the Board, and the Supreme Court of Pennsylvania] stipulate that Plaintiff’s speech, which the Court rightly aimed to protect, is protected from prosecution.” ECF No. 61 at 25.

prejudice” that the Court found problematic in its prior decision. *Id.* at 34. Since the language the Court found “simply regulates speech” (Dec. 2020 Opinion at 32) is no longer included in the Rule, Defendants contend that the Rule is only directed towards conduct. Defendants further assert that “such conduct is not based on whether the listener perceives verbal conduct to be discriminatory or harassing, but whether the verbal conduct actually targets a person for discrimination or harassment.” ECF No. 62, Exh. A at 6–7. Since the Amendments now only implicate conduct, according to Defendants, Plaintiff’s described speech would not fall under the revised Rule and therefore there is no risk of injury, and no relief can be granted that has not already been achieved by changes from the Old Rule.

Plaintiff alleges that Rule 8.4(g) “threatens to harm” attorneys and himself in “the same way” as the Old Rule. ECF No. 70 at 11. Mr. Greenberg continues to assert that the fear of complaint and investigation under Rule 8.4(g) will chill his speech and cause him to self-censor. ECF No. 54 ¶¶ 31–42; ECF No. 65-1 at 35. Plaintiff points out that Comment [3] of the Amendments still includes CLE presentations, which is the primary forum in which his speech will be chilled by the Rule. ECF No. 65-1 at 34.

First, the revisions voluntarily taken to amend the Old Rule into the Rule now before the Court during the course of this litigation still fall prey to the analysis of the voluntary cessation doctrine. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *but see Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (finding case moot, where party substantially amended its regulations while the case was pending on appeal and without explicitly mentioning the voluntary cessation doctrine). In *City of Mesquite*, following the lower court’s determination that the language was unconstitutionally vague and while the case was pending appeal, the city repealed the challenged provisions of a municipal ordinance and revised

the ordinance to remove the vague language. 455 U.S. at 289. The Supreme Court found that the city's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision" if the judgment were vacated for mootness and finding the uncertainty enough to move ahead to the merits of the appeal. *Id.* *City of Mesquite* is applicable here, in part due to the similarity of the circumstances, where the Board removed the offending language pending their own appeal and now offer revised Amendments created through an expedited process. Without judgment, there is no certainty that Defendants will not modify the Rule in a way that incorporates the Old Rule's unconstitutional language.

Further, the Supreme Court elaborated in a later case that it is not merely the possibility of reenactment that prevents mootness, it is also that the defendant may replace the challenged rule with a new one that "differs only in some insignificant respect." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). The Third Circuit agrees that "an amendment does not moot the claim if the updated statute differs only insignificantly from the original." ECF No. 70 at 11 (quoting *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002)).

Without diving too deep into the merits at this threshold stage of our analysis, this Court finds the updated Amendments do not differ significantly enough from the Old Amendments to moot this case, particularly with respect to the likelihood for Mr. Greenberg's speech to be chilled under the Amendments as currently written. While ODC asserts that the Amendments only prohibit verbal conduct that *actually* targets an individual, not speech that is *perceived* to be discriminatory or harassing, this is nonsensical and subjective at best. It is nonsensical to say that an individual's perception is irrelevant where the Rule relies on complaints filed by the public to start an investigation into the attorney's conduct. It is also nonsensical to consider anything

under the umbrella of harassment to be devoid of perception. Whether an individual perceives another's conduct to be welcome or unwelcome is a basic premise for harassment. For example, if a person in a protected class hears an otherwise offensive joke from a friend at a Pennsylvania Bar event, it may not be considered by that person as discrimination or harassment, while the same exact joke made by a panelist at a CLE would more likely be deemed offensive. Plaintiff provides numerous examples of speakers in similar situations to Mr. Greenberg's being accused of this type of discrimination or harassment by simply endorsing certain views of case law or the Constitution. ECF No. 65–1 at 34. That individual's perception is exactly what compels them to file a complaint under Rule 8.4(g). Outside of the third party's perception, it is also the subjective assessment of ODC as to whether the verbal conduct is actual or perceived. The standards for that assessment are, at best, subjective, and, at worst, completely unknown to both Pennsylvania licensed attorneys like Mr. Greenberg and even ODC itself. Therefore, speech that would have been chilled due to the Old Rule will continue to be so affected under the revised Rule.

The revisions also do not address many of the concerns raised by the Court under the Old Amendments. It is still true that Rule 8.4(g) is not limited to the legal process and instead extends to “participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal credits are offered.” ECF No. 61 at 10 (citing Pa.R.P.C. 8.4 cmt. 3).²⁰ The following sentence adds, “[t]he term ‘the practice of law’ does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in [Comments] (1)- (3)[,],” which

²⁰ Mr. Daley, attorney for the Defendants, confirmed to the Court during oral argument that the Amendments extend beyond judicial proceedings and beyond representation of the client or anything that instructs their administration of law. ECF No. 74 at 30.

indicates, and defense counsel confirmed during oral argument,²¹ that any speeches, communications, debates, presentations, or publications given within the context defined above falls under the scope of the Rule. *See* Pa.R.P.C. 8.4 cmt. 3; *see also* ECF No. 74 at 30–37. This assures that attorney’s speech is targeted by the Rule and will continue to be broadly monitored and subject to government censure under this Rule. The Rule limits what a lawyer may say and it serves as a warning to Pennsylvania lawyers to self-censor during the course of their interactions that fall within the Board’s broad interpretation of the practice of law. There are other insignificant revisions made by Defendants that compel this Court to deny their claims of mootness – *e.g.* changing “manifest bias or prejudice” in the Rule to “manifests an intention: to treat a person as inferior [...]; to disregard relevant considerations [...]” in Comment [5]. ECF No. 61 at 10; Dec. 2020 Opinion at 38. The immediately apparent similarities between the Old Rule and the revised Rule evidences the need for an evaluation on the merits.

Based on the foregoing, the Court does not find that Defendants have met their formidable burden to prove that it is absolutely clear that there is no reasonable expectation Plaintiff could be affected by the Amendments and thus this Court continues to the merits of the constitutional challenge.

B. First Amendment Violation

Plaintiff’s Motion for Summary Judgment

In Plaintiff’s Motion for Summary Judgment, Mr. Greenberg contends that verbal or written communicative “conduct” constitutes pure expression, wholly apart from conduct

²¹ Mr. Daley, attorney for the Defendants, confirmed to the Court during oral argument that “speeches, communications, debates, presentations, or publications” made within the context described in (1) – (3) of Comment [3] are included in the scope of Rule 8.4(g). ECF No. 74 at 37. (“they could be, yes [...] if they’re, again, harassing and discriminatory.”).

involving incidental speech, and is fully protected by the First Amendment. ECF No. 65–1 at 21; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202–03 (3d Cir. 2001) (holding unconstitutional an anti-harassment policy that prohibited “any unwelcome verbal, written or physical conduct.”); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008) (holding unconstitutional an anti-harassment policy that prohibited “expressive, visual, or physical conduct of a sexual or gender-motivated nature”). Even so, Plaintiff asserts that the Third Circuit has consistently supported the principle that regulations of communicative conduct are indistinguishable from regulations of speech. ECF No. 65–1 at 23 (citing *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010)). Plaintiff relies heavily on the analysis found in *Saxe*, *DeJohn*, and *McCauley*.

Furthermore, the plain language of the regulation, according to Plaintiff, places restrictions on speech. Plaintiff contends that the First Amendment protects “statements that impugn another’s race or national origin or that denigrate religious beliefs.” *Id.* at 18 (quoting *Saxe*, 240 F.3d at 206). Clauses such as prohibiting denigration, showing hostility or aversion, and manifesting an intent to disregard relevant characteristics of merit “directly regulate communication, expression and even an attorney’s unpalatable thoughts.” *Id.* at 24. The Comment listing “speeches, communications, debates, presentations or publications” inside the contexts described in (1)–(3) (e.g., at CLEs, bench bar conferences, or bar association events offering legal education credits) do fall within the ambit of the Rule. *Id.* at 23. Plaintiff points out that due to the structure of Rule 8.4(g), “there can be no doubt” that speeches similar to those given by Mr. Greenberg at CLEs fall within the scope of the Amendments. *Id.* at 24.

Plaintiff then describes how the Amendments constitute content-based and viewpoint-based discrimination in violation of the First Amendment. *Id.* at 13. Plaintiff contends that the

Amendments are a form of impermissible viewpoint discrimination, and that viewpoint discrimination should be considered “in a broad sense.” *Id.* at 13 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017)). Plaintiff contends that Rule 8.4(g) prohibits preaching hate and denigration, which is protected expression under the First Amendment, even if the expression offends or angers listeners. *Id.* at 15, 19 (citing *Bible Believers v. Wayne County*, 805 F.3d 228, 234 (6th Cir. 2015) (en banc); *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021) (holding that restrictions on “antagonistic,” “abusive” and “personally directed” speech” are unconstitutionally viewpoint-based); *Saxe*, 240 F.3d at 206 (“[A] disparaging comment directed at an individual’s sex, race, or some other personal characteristic [...] and thus come within the ambit of anti-discrimination laws—precisely because of its sensitive subject matter and because of the odious viewpoint it expresses.”)). Despite Defendants assertion that discrimination and harassment statutes should be treated differently than other rules, Plaintiff asserts that “[t]here is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.” *Id.* at 25 (citing *Saxe*, 240 F.3d at 204; *DeJohn*, 537 F.3d at 316; *Rodriguez v. Maricopa Community College District*, 605 F.3d 703 (9th Cir. 2010)).

Plaintiff cites to *Matal v. Tam* where the Supreme Court assessed the constitutionality of a federal statute that prohibited the registration of trademarks that may “disparage or bring into contempt or disrepute” any “persons, living or dead” and found that the disparagement clause discriminates on the basis of viewpoint. *Id.* at 13 (quoting *Matal*, 137 S. Ct. at 1751, 1763). In that case, the Supreme Court stated that “[g]iving offense is a viewpoint.” *Id.* (quoting *Matal*, 137 S. Ct. at 1751). Plaintiff adds that the targeting requirement does not prevent viewpoint discrimination because “[a] mark that disparages a substantial percentage of the members of a

racial or ethnic group, necessarily disparages many ‘persons,’ namely, members of that group.” *Id.* (quoting *Matal*, 137 S. Ct. at 1756).

In this case specifically, Plaintiff shares his concerns that the “unfortunate modern reality” is that people consider defense of incendiary speakers to be “as incendiary as the underlying speech itself.” *Id.* at 15. Rule 8.4(g) could cause an attorney to be “embedded in an inquisition” and “an exploration of the attorney’s character and previously expressed viewpoints” before any misunderstanding could even begin to be cleared up. *Id.* at 16 (quoting Dec. 2020 Opinion at 28).

Furthermore, Plaintiff contends that Defendants’ declarations in this case are insufficient to avoid constitutional violation. *Id.* at 16 (“the litigation position of a single defendant, departing from the text of the Rule, offers [Mr.] Greenberg and other Pennsylvania attorneys little solace.”); *see also id.* (citing *Pa. Family Inst., Inc. v. Celluci*, 521 F. Supp. 2d 351, 365 & n.7 (E.D. Pa. 2007)). According to Plaintiff, “a promise by the government that it will interpret statutory language in a narrow, constitutional manner cannot, without more, save a potentially unconstitutionally overbroad statute.” *Id.* at 16 (quoting *Free Speech Coal., Inc. v. AG United States*, 787 F.3d 142, 164 (3d Cir. 2015) (internal quotation omitted)). Plaintiff contends that regardless of whether Defendants intend to use Rule 8.4(g) “responsibly,” the Court still may not uphold an unconstitutional rule. *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Even if the Court wants to adopt a narrowing construction for the regulation, Plaintiff urges that it must be “reasonable and readily apparent.” *Id.* at 17 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (internal citation omitted)).

Finally, Plaintiff’s Motion for Summary Judgment contends that the Amendments are overbroad because the restrictions apply outside the context of a legal representation or legal

proceeding and extend to situations where there can be no prejudice to the administration of justice. *Id.* at 18. “[O]verbroad harassment policies can suppress or even chill core protected speech.” *Id.* at 25 (quoting *DeJohn*, 537 F.3d at 314). Plaintiff also asserts that the emphasized targeting requirement does not sufficiently remedy the overbreadth issue. *Id.* at 18.

In Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment, they contend that the Amendments are directed towards discriminatory and harassing professional conduct that has detrimental effects on the judicial system. ECF No. 71 at 15. Thus, the Amendments may incidentally burden speech. *Id.* at 15 n. 11 (citing *Nat’l Inst. of Fam. & Life Advoc.v. Becerra*, 138 S.Ct. 2361, 2373 (2018) (hereinafter “*NIFLA*”) (“the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech,” and “professionals are no exception to this rule”)). Defendants also assert that Plaintiff’s references to *Saxe*, *DeJohn*, and *McCauley* are not persuasive because those cases involve much broader educational institution policies that included “offensive” speech, which is irrelevant under the Amendments. *Id.* at 17. The language in the Amendments is much narrower than in those cases, according to Defendants, and does not prohibit a “substantial amount of protected expression.” *Id.* at 18 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)).

In response to Plaintiff’s claim of viewpoint discrimination, Defendants assert that the Amendments do not distinguish between which views one may take on a particular subject. *Id.* at 11. The Amendments merely ask whether an attorney engaged in harassing or discriminatory conduct directed toward a specific individual. *Id.*

Defendants contend that *Matal v. Tam* does not compare to this case and that the examples provided by Plaintiff are too hypothetical for the Court to consider. *Id.* Defendants assert that *Matal* was an as-applied case that did not involve the state’s compelling interest of

addressing discrimination and harassment in the practice of law. *Id.* In *Matal*, according to Defendants, the court held that “[s]peech may not be banned on the ground that it expresses *ideas that offend*.” *Id.* at 12 (quoting *Matal*, 137 S.Ct. at 1755) (emphasis added). Defendants also assert that the government’s rejection of the trademark at issue in *Matal* relied on the “reaction of the applicant’s audience.” *Id.* (quoting *Matal*, 137 S. Ct. at 1766–67). Defendants insist that that case does not apply because the Amendments prohibit conduct and include no prohibition against offensive language, nor do the Amendments take into account the listener’s subjective views. *Id.* Defendants also promise, through the Farell Declaration, not to consider whether one is offended in investigating complaints under Rule 8.4(g). *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (court “must . . . consider any limiting construction that a state court or enforcement agency has proffered”)). Defendants assert that this case also differs from *Matal* because the Amendments have an explicit targeting requirement in Comment Three requiring harassment “toward a person” and Comment Four requiring discrimination in how one “treat[s] a person.” *Id.* at 13.

Finally, Defendants contend that the regulation is not overbroad because attorneys must obtain CLE credits to be in good standing and, therefore, rules of professional conduct may apply to functions where CLE credits are offered. *Id.* at 14. Defendants contend that Plaintiff fails to show the Amendments were enacted to oppress speech as opposed to harmful conduct. *Id.* at 14.

Defendants’ Motion for Summary Judgment

In Defendants’ Motion for Summary Judgment, they contend that a facial challenge to the constitutionality of a rule is “strong medicine” that must be used “sparingly and only as a last

resort.” ECF No. 61 at 27 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

Defendants assert that since Pennsylvania’s “disciplinary system has not yet applied the Amendments to ‘actual disputes,’ judicial restraint is called for.” *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987)). Defendants also assert that this Court must consider the limiting instructions “provided here through the ODC Declaration and discovery responses.” *Id.* at 27–28. Defendants offer the “elementary rule” that “every reasonable construction” must be considered to “save a statute from unconstitutionality.” *Id.* at 28 (quoting *Stretton v. Disciplinary Bd. of Supreme Ct. of Pa.*, 944 F.2d 137, 144 (3d Cir. 1991)).

Further, they contend that the Amendments regulate conduct and only incidentally affect speech. *Id.* at 31–32.²² Antidiscrimination laws like Rule 8.4(g), which aim to ensure equal access to society’s benefits serve goals “unrelated to the suppression of expression” and are neutral as to both content and viewpoint. *Id.* at 29 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984)). Therefore, it is permissible if such a rule may incidentally burden speech. *Id.* at 31 (citing *NIFLA*, 138 S. Ct. at 2373). Since this regulation addresses the conduct of a particular profession, Defendants assert incidental burdens on speech are treated differently by the Supreme Court than restrictions on speech. *Id.* (citing *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207–08 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 666 (2019)). Finally, Defendants contend that this regulation should be evaluated under intermediate scrutiny, which Rule 8.4(g) satisfies because the Amendments serve a compelling state interest, and the regulation is a reasonable fit to serve that need. *Id.* at 31–32.

Even if the Amendments do regulate speech, Defendants emphasize that a state’s “broad power to regulate the practice of professions within their boundaries” is “especially great” in

²² Defendants’ Reply in Opposition to Plaintiff’s Motion for Summary Judgment instructs the Court that their arguments are “detailed in Defendants’ Summary Judgment Brief.” ECF No. 71 at 15.

“regulating lawyers” because “lawyers are essential to the primary governmental function of administering justice, [sic] and have historically been officers of the courts.” *Id.* at 28 (quoting *In re Primus*, 436 U.S. 412, 422 (1978)). Defendants espouse Pennsylvania’s noble effort to ensure the efficient and law-based resolution of disputes and guarantee that its judicial system is equally accessible to all by regulating the conduct of its attorneys through Rule 8.4(g). *Id.* at 28–29.

Defendants emphasize the need to protect the integrity and fairness of Pennsylvania’s judicial system and protect the reputations of lawyers by preventing attorneys from engaging in anything “regarded as deplorable and beneath common decency.” *Id.* at 28–29 (citing *Fl. Bar v. Went For It*, 515 U.S. 618, 625 (1995) (quotations omitted); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)). Defendants also refer to Colorado’s Rule 8.4(g), where the court stated “[t]here is no question that a lawyer’s use of derogatory or discriminatory language that singles out individuals involved in the legal process damages the legal profession and erodes confidence in the justice system.” *Id.* at 30 (quoting *Matter of Abrams*, 488 P.3d 1043, 1053 (Colo. 2021) (rejecting a First Amendment challenge to Colorado’s Rule 8.4(g)).

Furthermore, Defendants assert that it is not viewpoint-based or content-based because the regulation asks whether an attorney engaged in harassing or discriminatory conduct, not what viewpoint the attorney takes on a particular issue, and the Amendments do not distinguish between favored or disfavored speech. *Id.* at 33, 35 (quoting *Christian Legal Society Chapter of the Univ. of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 695 (2010) (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”)). Defendants also assert that the regulation applies equally to all attorneys, regardless of their views. *Id.* at 33 (citing *Barr v. Lafon*, 538 F.3d 554, 572 (6th Cir. 2008)).

The targeting requirement in Rule 8.4(g), according to Defendants, additionally prevents any viewpoint discrimination. Defendants assert that the Amendments are not grounded on whether words may offend someone. *Id.* at 33. Defendants further provide limiting instructions within which ODC states it does not consider the Amendments to cover being offended or offensive language. *Id.* at 33–34; ECF No. 56 ¶ 16. Thus, this Court’s concern related to the Old Rule, that it was intended to regulate offensive speech based on “words manifesting bias or prejudice,” is absent in the Amendments. ECF No. 61 at 33–34 (quoting Dec. 2020 Opinion at 32).

Defendants also distinguish *Matal* from Rule 8.4(g) for a few reasons. First, Defendants assert that the government in *Matal* denied trademark protections to allegedly offensive terms based on whether the speech offended the listener. *Id.* at 34 (citing *Matal*, 137 S. Ct. at 1766). Here, according to Defendants, whether a listener is offended is irrelevant. *Id.* Second, Defendants reiterate that the Amendments regulate attorney conduct, specifically discrimination and harassment, while the activity in *Matal* involved pure speech. *Id.* (citing *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 32 (2d Cir. 2018) (recognizing that *Matal* does not affect the government’s ability to target ethnic slurs through anti-discriminatory regulations)).

Finally, Defendants assert that the Amendments are not overbroad and, even so, any concern regarding overbreadth should be evaluated on a case-by-case basis. *Id.* at 37–40. Defendants assert again that the Amendments apply only to conduct even if speech is involved in that conduct. They cite to the Supreme Court stating that “it has never been deemed an abridgment of freedom of speech” to make a “course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* at 37 (quoting *Rumsfeld v. F. for Acad. & Inst. Rights, Inc.*, 547 U.S. 47,

62 (2006)). Defendants emphasize that Plaintiff bears a “heavy burden” to establish that the Amendments are facially overbroad. *Id.* at 38 (quoting *Free Speech Coal., Inc. v. United States*, 974 F.3d 408, 429 (3d Cir. 2020)). Defendants assert that Plaintiff must show from “the text of [the Amendments] and from actual fact, that substantial overbreadth exists” yet Plaintiff fails to do so. *Id.* at 38 (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)).

In Plaintiff’s Response in Opposition to the Defendants’ Motion for Summary Judgment, Plaintiff asserts that the regulation directly restricts speech and is not merely an incidental burden on speech. Plaintiff cites frequently to *Saxe v. State Coll. Area Sch. Dist.*, where the Third Circuit found a First Amendment violation from a harassment policy that covered “unwelcome verbal, written, or physical conduct directed at the characteristics of a person’s [race/religion/national origin/sexual orientation/etc].” ECF No. 70 at 26 (citing 240 F.3d 200, 220 (3d Cir. 2001)). Plaintiffs urge that in cases like *Saxe*, *DeJohn*, and *McCauley*, where the threat of chilled speech was real, the Third Circuit entertained and credited facial overbreadth challenges, and this Court should follow suit. *Id.* at 27.

Plaintiff frequently cites to *NIFLA*, which this Court stated previously does not countenance such an unlimited scope of professional speech regulation. *Id.* at 27 (citing Dec. 2020 Opinion at 27) (discussing how, with two exceptions, *NIFLA* contemplates full First Amendment rights for professional speech)). Plaintiff contends that state bar authority generally ends where speech does not prejudice a legal proceeding or the administration of justice. *Id.* at 26 (citing *NIFLA*, 138 S. Ct. at 2372). Plaintiff further contends that if the Court were to allow the state to possess so much power over professional speech, there would be no limit to the control regulatory authorities would have over professionals’ lives. *Id.* at 22.

Plaintiff also contends that the general interest of the government in maintaining the “reputation of lawyers” and judicial integrity through Rule 8.4(g) “exceeds the scope” of *NIFLA*. *Id.* Plaintiff asserts that, for example, an attorney’s hostile remark at a bar association event or a denigrating CLE presentation bears no relationship to judicial integrity as it takes place well outside the context of the courtroom or representing a client. *Id.* Plaintiff cites to the Third Circuit, contending that the interest in “public confidence in the judiciary” is the sort of underdeveloped post-hoc government rationale rejected by the Third Circuit in the First Amendment context. *Id.* at 23.

In addition, Plaintiff contends that Rule 8.4(g) unconstitutionally discriminates against opposing viewpoints by prohibiting Pennsylvania attorneys from “denigrat[ing] or show[ing] hostility or aversion toward a person” on selected disfavored bases. *Id.* at 16 (quoting Comment [4] to Rule 8.4(g)). Plaintiff cites to this Court’s previous opinion to counter Defendants’ argument that Rule 8.4(g) applies equally to all attorneys and thus cannot be viewpoint discriminatory. *Id.* at 17 (quoting Dec. 2020 Opinion at 31 (“To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.”)).

Plaintiff again compares this case to *Matal*, asserting that “disparage,” a term used in the unconstitutional rule in that case, is a synonym of “denigrate,” a term used here in Rule 8.4(g). *Id.* at 16. Plaintiff also disagrees with Defendants’ reasoning to distinguish the two cases, contending that the statutory standard in *Matal* did not proscribe “offensive” terms; it proscribed “disparag[ing]” ones, just as Rule 8.4(g) proscribes “denigrat[ing]” ones. *Id.* at 16. In practice that reduces to “a subset of messages that [the Government] finds offensive.” *Id.* at 16 (quoting *Matal*, 137 S. Ct. at 1766). Plaintiff identifies the problem that 8.4(g) has defined “harass” in a manner that includes pure expression and turns on viewpoint, rather than simply on “non-

expressive, physically harassing conduct.” *Id.* at 18 (quoting *Saxe*, 240 F.3d at 206). By distinguishing between speech that is denigrating and speech that is not; speech that displays aversion and hostility and speech that does not, Plaintiff contends that Rule 8.4(g) engages in viewpoint discrimination, under the guise of regulating harassment. *Id.* Plaintiff refers to its Motion for Summary Judgment and claims that *Saxe* and *DeJohn* do not allow this. *Id.*; ECF No. 65–1 at 17.

Plaintiff refers to examples of laws in its Motion for Summary Judgment that prohibit actual harassment and discrimination but look nothing like Rule 8.4(g). ECF No. 70 at 18; ECF No. 65–1 at 19–20 (citing examples). Plaintiff also refutes the comparison of many of the cases cited by Defendants because those laws involved membership in an organization, employment, or public access regulations that did not on their face “target speech or discriminate on the basis of its content.” ECF No. 70 at 19 (quoting *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 801 (9th Cir. 2011)). Plaintiff asserts that these comparisons do not apply here because those laws do not discriminate based on speech, they are policies to monitor rejecting would-be group members. *Id.* (citing *Christian Legal Soc’y*, 561 U.S. at 696). Plaintiff points out another case Defendants cite, where the court found no unconstitutional viewpoint discrimination because the policy affected only government speech, which is not the case with Rule 8.4(g). *Id.* at 19 n.8 (citing *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 151 (2004)). Rule 8.4(g) differs significantly from the cases Defendants cite, according to Plaintiff, because the Amendments discriminate based on speech – speech that denigrates, speech that shows hostility or aversion, and speech that disregards considerations of relevant individual characteristics or merit. *Id.* at 19.

Finally, because Rule 8.4(g) is content-based regulation, Plaintiff urges that it must be subject to strict scrutiny, not intermediate scrutiny as Defendants propose. *Id.* at 25. Plaintiff

reiterates that Rule 8.4(g) is not narrowly tailored to prevent discrimination and harassment in the administration of justice. *Id.* at 24. Plaintiff contends that if the Amendments solely limited speech in the course of client representations and directed towards a specific person in the legal process, “we wouldn’t be here today.” *Id.* Plaintiff also points to Pennsylvania Rule of Professional Conduct 8.4(d), which already prohibits conduct prejudicial to the administration of justice, and Plaintiff asserts that harassment and discrimination in legal proceedings are currently sanctionable under this rule. *Id.* at 25 (citing Pa.R.P.C. 8.4(d)). Plaintiff contends that many of the cases cited by the Defendants in support of Rule 8.4(g) are in fact much more limited in scope than the proposed Rule. *Id.* at 24. Plaintiff also emphasizes that the Amendments fail to meet the “least restrictive alternative” requirement in “the third prong of the three-prong strict scrutiny test.” *Id.* at 25 (quoting *ACLU v. Mukasey*, 534 F.3d 181, 198 (3d Cir. 2008)). Even if this Court adopts the standard of intermediate scrutiny, Plaintiff contends that the Amendments still fail to pass the test. *Id.*

1. Amendments Regulate Speech Versus Conduct

The first point of contention between the parties is whether the Amendments regulate speech, as Plaintiff asserts, or conduct and potentially incidentally burden speech, as Defendants claim. The Court finds that the Amendments regulate speech, not merely conduct, and therefore the burden placed on freedom of expression is not incidental to the enforcement of Rule 8.4(g). Unfortunately for Defendants, “[t]he government cannot regulate speech by relabeling it as conduct.” *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020). Furthermore, “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.” *NAACP v. Button*, 371 U.S. 415, 439 (1963).

Defendants list numerous cases for the proposition that anti-discrimination laws or regulations of attorney conduct are unrelated to the suppression of expression or place permissible incidental burdens on speech. ECF No. 61 at 29–32. None of these cases offer a direct comparison to the Amendments at issue here. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) (evaluating a rule prohibiting women from membership in a local civic organization and stating that ensuring equal access is unrelated to suppression of expression); *NIFLA*, 138 S. Ct. 2361, 2373–74 (2018) (citing cases where burden on speech was incidental in the context of informed consent and notice laws in the medical profession and finding that the notice at issue, which applied to all interactions between a covered facility and its clients, with no tie to a medical procedure, “regulates speech as speech”); *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019) (finding state’s ban on practice of law by corporations, which was part of a licensing regime that restricted practice of law only to bar members, affected primarily who could conduct themselves as lawyers and did not focus on the communicative aspects of practicing law).

Plaintiff points the Court in the right direction by repeatedly referencing the Third Circuit decision in *Saxe*.²³ “When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.” 240 F.3d at 206. The anti-harassment policy in *Saxe* and the Amendments here both use versions of the same terms, “intimidate,” “denigrate,” and “hostile” in similar contexts, all of which necessitate the policing of expression. *Id.* at 202–03. The Third

²³ The Third Circuit in *Saxe* evaluated an anti-harassment policy in a school, which defined harassment, in part, as “verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.” 240 F.3d at 202. The policy goes on to state examples of harassment, including conduct that “offends, denigrates or belittles an individual because of any of the characteristics described above.” *Id.* at 203.

Circuit explicitly rejected the argument that anti-harassment statutes are categorically not subject to the First Amendment protections on free speech and further decided that the policy “prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law.” *Id.* at 204. The Court adopts similar reasoning here. Rule 8.4(g)’s prohibition on denigrating another a person, like the *Saxe* policy’s prohibition on disparaging speech directed at a person, causes this Court First Amendment concern. *Id.* at 210. The Amendments also lack the necessary protection of free speech identified by the Third Circuit in *DeJohn*. “Absent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual’s work—the policy provides no shelter for core protected speech.” *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008).

Furthermore, both the plain language of the Amendments and the statements made by Defendants during oral argument prove there is no genuine dispute that the regulation restricts speech on its face and not incidentally. Comment Three to Rule 8.4(g) states that “the practice of law does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described” earlier in the Comment. Pa.R.P.C. 8.4 cmt. 3. The Court interprets that plain language to mean all of those *are included* within the scope of Rule 8.4(g) if they occur within the listed contexts of a legal proceeding, representation of a client, operating or managing a law firm or practice, and various activities and conferences where CLE credits are offered. Thus, a plain reading of the Amendments restricts speeches, communications, debates and presentations – all of which obviously involve speech – at conferences, seminars, and other activities. Defendants, through counsel, confirmed to the Court during oral argument that “speeches, communications, debates, presentations, or publications” made within the contexts

described in (1) – (3) of Comment Three are included in the scope of Rule 8.4(g). ECF No. 74 at 37–38. (“they could be, yes [...] if they’re, again, harassing and discriminatory.”). This language and counsel’s statements convince the Court that attorneys’ speech is not incidentally burdened here, it is targeted by Rule 8.4(g) and will continue to be broadly monitored and subject to government censure under this Rule. *See* Pa.R.P.C. 8.4 cmt. 3; *see also* ECF No. 74 at 30–37. Comment Three to the ABA Model Rule 8.4(g) confirms the Court’s understanding, stating in relevant part that “[s]uch discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.” Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass’n). And even though the ABA in its Formal Opinion 493 on the Model Rule 8.4(g) describes the regulation as prohibiting conduct, it also concedes that speech is restricted by stating, “a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law.” ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). Therefore, there is no genuine dispute as to any material fact that the Rule limits what a lawyer may say and it serves as a warning to Pennsylvania lawyers to self-censor during the course of their interactions that fall within the Board’s broad interpretation of the practice of law.

2. Regulating Professional Speech

Even if the Amendments target speech directly, Defendants assert that the state has broad authority to regulate professional speech and thus Rule 8.4(g) should not be subject to strict constitutional evaluation. The Court disagrees yet again and finds no genuine dispute on this issue either. The Court noted when it granted the preliminary injunction against Old Rule 8.4(g) that Pennsylvania has an important interest in regulating licensed attorneys and their conduct

related to the fair administration of justice. Dec. 2020 Opinion at 27. That interest, however, does not give the government the authority to regulate attorneys' speech without limits.

The Supreme Court "has not recognized 'professional speech' as a separate category of speech." *NIFLA*, 138 S. Ct. at 2371 (finding petitioners were likely to succeed on merits of claim that act requiring clinics that primarily serve pregnant women to provide certain notices violated the First Amendment). While the Supreme Court has recognized that an attorney's speech while representing a client or appearing in the courtroom could be limited, Pennsylvania's Rule 8.4(g) expands far beyond regulation of speech within a judicial proceeding or representing a client. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071–72 (1991). It is by no means limited to the legal process, as the Amendments explicitly apply to activities such as seminars or conferences where legal education credits are offered. Pa.R.P.C. 8.4(g). Rule 8.4(g) seeks to limit attorney speech much more broadly than inside the courtroom or related to a pending case.

The Court stated previously, and repeats once again, that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA* 138 S. Ct. at 2371–72. There are only two circumstances in which professional speech is "afforded less protection" and the Amendments do not fit into either category. *Id.* at 2372. First, courts may apply "more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* This does not apply here as Rule 8.4(g) is not a regulation of commercial speech. Second, "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *Id.*; ECF No. 65–1 at 26. The Court determined above there is no genuine dispute that the Amendments do not merely regulate conduct, the Amendments directly restrict speech. While the drafters of Rule 8.4(g) attempted to remedy the apparent speech regulation by eliminating the offending language of

“words...manifest[ing] bias or prejudice” from Old Rule 8.4(g), the Amendments as revised continue to restrict speech outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of administration of justice. It is a stretch to consider statements made by attorneys outside of those situations to be considered professional speech merely because it is uttered by an attorney.

Even so, when considering such speech to constitute professional speech, it is still deserving of full First Amendment protection since the Amendments regulate speech directly. As detailed above, the Amendments do not restrict conduct that is merely carried out by means of language, despite Defendants’ contention that it is an incidental burden. The plain language of “speeches, communications, debates, [and] presentations,” which are all restricted within the contexts where the Rule applies, and the definition of harassment including the terms “denigrate or show hostility or aversion” all expressly restrict speech. Though other aspects of Rule 8.4(g) address conduct, the Rule on its face restricts speech. “Outside of the two contexts discussed above—disclosures under [attorney advertising] and professional conduct—[the Supreme] Court’s precedents have long protected the First Amendment rights of professionals.” *NIFLA*, 138 S. Ct. at 2374. “States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose ‘invidious discrimination of disfavored subjects.’” *Id.* at 2374. (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423–424 (1993)) (additional citations omitted). “Because of the danger of censorship through selective enforcement of broad prohibitions, and ‘[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity.’” *In re Primus*, 436 U.S. 412, 432–433 (1978) (quoting *Button*, 371 U.S. at 433) (alteration in original).

Furthermore, while the Court admires the ideal of high standards of professionalism and benevolence which the Rule would have Pennsylvania lawyers aspire to, the state simply does not have the authority to police professionals in their daily lives to root out speech the state deems to be below “common decency.” ECF No. 61 at 29. That nebulous notion of decency, combined with the exceptional authority the state would have if allowed to monitor attorneys outside of judicial proceedings and representation of a client and determine whether they are “decent” enough causes this Court grave concern. Even the ABA disagrees with such overzealous policing of attorneys. In Comment Two to its Model Rule 8.4, the ABA states in part that “a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.” Model Rules of Pro. Conduct r. 8.4 cmt. 2 (Am. Bar Ass’n.). Therefore, Rule 8.4(g) prohibits attorneys’ speech too broadly to fall within the acceptable circumstances of professional speech regulation and the Court will not provide the deferential review sought by Defendants. Instead, attorney speech under Rule 8.4(g) will be given the full protection of the First Amendment.

3. Viewpoint-Based Discrimination

“Viewpoint discrimination is an ‘egregious form of content discrimination.’” *Ne. Pennsylvania Freethought Soc’y v. Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). “[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Startzell v. City of Phila.*, 533 F.3d 183, 193 (3d Cir. 2008) (quoting *Turner Broadcasting*, 512 U.S. at 643) (alteration in original). It “targets ... particular

views taken by speakers[,]” which “violates the First Amendment’s most basic promise.”

Freethought Soc’y, 938 F.3d at 432 (internal citations omitted). It is a “core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys.” *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (internal citation omitted).

“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Freethought Soc’y*, 938 F.3d at 432 (quoting *Rosenberger*, 515 U.S. at 829); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). According to Justice Kennedy, the essence of viewpoint discrimination is when the law “reflects the [g]overnment’s disapproval of a subset of messages it finds offensive.” *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Matal*, 137 S. Ct. at 1763. “At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.” *Matal*, 137 S. Ct. at 1766. Such restrictions on speech “are subject to the ‘most exacting scrutiny,’ ... because they ‘pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.’” *Startzell*, 533 F.3d at 193 (quoting *Turner Broadcasting*, 512 U.S. at 641-642); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) (“[C]ontent- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny.”).

Plaintiff relies on *Matal v. Tam*, in which the Supreme Court considered the constitutionality of a prohibition on the registration of trademarks that may “disparage” or bring “contemp[t] or disrepute any persons, living or dead.” 137 S. Ct. at 1751 (internal quotation marks omitted). The Court found that the provision violated the First Amendment because “[s]peech may not be banned on the ground that it expresses ideas that offend.” *Id.* The Supreme Court encouraged that viewpoint discrimination be considered in a broad sense and even if the provision “prohibits disparagement of all group[s],” it should still be seen as viewpoint discrimination because “[g]iving offense is a viewpoint.” *Id.* at 1763. Defendants assert that all attorneys are equally affected by Rule 8.4(g) thus it cannot be viewpoint discrimination, but Justice Kennedy specifically addresses this argument in *Matal*. Justice Kennedy adds, “[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.” *Id.* at 1766 (Kennedy, J., concurring) (internal citation omitted).

Similarly, the Amendments state that it is professional misconduct for an attorney to “knowingly engage in [...] harassment” that is “intended to denigrate or show hostility or aversion toward a person[.]” Just as the provision in *Matal* prohibited trademarks that disparage, or show contempt or disrepute towards a person, Rule 8.4(g) prohibits the denigration of or hostility or aversion to a person based on the provided list of categories: race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. Defendants have “singled out a subset of message,” namely language that knowingly engages in denigration or hostility or aversion of a person, “for disfavor based on the views expressed.” *Id.* at 1766 (Kennedy, J. concurring) (internal citation omitted).

Again here, *Saxe* is on point regarding whether Rule 8.4(g) prohibits offensive language. The Third Circuit found that the anti-harassment policy in *Saxe* focused too heavily on the purpose of the speech or conduct and ignored federal harassment law, which imposes liability when harassment has a profound effect on the institution. 240 F.3d at 210. Here, both the definitions of harassment and discrimination begin with the speaker's intentions – intended to intimidate and manifests an intention – thereby extending the regulation “to speech that merely has purpose of” harassing another. *Id.* By focusing on the speaker's intention, the regulation extends to simple offensive acts that are generally insufficient for federal anti-harassment liability. *Id.* at 211.

Defendants insist that the listener's subjective feelings of offense are irrelevant to Rule 8.4(g) but that seems impossible from both the plain language of the regulation and its administrative process. By using the terms “denigrate,” “hostility,” and “aversion,” as well as questioning when an attorney “manifests an intention: to treat a person as inferior,” the Amendments prohibit offensive language. The listener, regardless of whether that person is the person targeted by the derogatory remarks, subjectively determines if they are offended enough to file a complaint. It is nonsensical for Defendants to assert that an individual's perception is irrelevant where the Rule relies on complaints filed by the public and whether an individual perceives another's expression to be welcome or unwelcome is a basic premise of harassment. An individual's perception is exactly what compels them to file a complaint. Then it is the reviewing employee at ODC who determines whether the language is offensive enough to proceed towards discipline. Defendants promise, through the Farrell Declaration, not to consider whether one is offended in investigating complaints. ECF No. 71 at 12. That promise, however, is completely untenable. If the Amendments were tied to judicial proceedings or the

representation of a client, then ODC could evaluate more objectively the impact of an attorney's conduct on the proceeding or representation and whether it prevented equal access or the fair administration of justice. But without that sort of tethering, the Rule floats in the sea of whatever the majority finds offensive at the time. The standards for ODC's assessment are, at best, subjective, and, at worst, completely unknown to both Pennsylvania attorneys like Mr. Greenberg and even ODC itself. Mr. Greenberg cites to numerous instances where speakers or panelists at legal conferences and seminars made objectively benign, yet subjectively offensive to some, statements and the uproar against the speaker was significant. Indeed before its promulgation, Rule 8.4(g)'s stated government purposes included to "affirm[] that no lawyer is immune from the reach of law and ethics." ECF No. 61 at 23 (quoting 49 Pa.B. 4941). The inclusion of ethics in the public introduction of the Rule is very telling in how the Board imagined the regulation would be implemented and applied. This Court finds no genuine dispute that Rule 8.4(g) invites disciplinary action on the occasions where listeners are offended and appears to be a thinly veiled effort to police attorneys for having undesirable views and bad thoughts.

"[T]here is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." *Saxe*, 240 F.3d at 206 (internal citation omitted). Here, the Court agrees with Mr. Greenberg that Rule 8.4(g) ultimately turns on the perceptions of the public to Plaintiff's speech and then the judgment of the government agents to investigate the incident or administer some form of discipline. Therefore, the Court finds that the Amendments, including Rule 8.4(g) and Comments [3] and [4], constitute viewpoint-based discrimination in violation of the First Amendment.

4. Content-Based Discrimination

Now that the Court has determined that the Amendments constitute viewpoint-based discrimination, there is no need to analyze the Amendments under either strict scrutiny or intermediate scrutiny. The Amendments are unconstitutional under the First Amendment as viewpoint-based discrimination. However, in the alternative, the Court elects to determine whether the Amendments constitute content-based discrimination, which is subject to strict scrutiny analysis.

There is a distinction “between content-based and content-neutral regulations of speech.” *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Id.* Laws are also considered content-based if they were adopted by the government “because of disagreement with the message convey[ed].” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Such content-based regulations are subject to strict scrutiny. The Supreme Court has a long history of applying strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers. *See e.g., Reed*, 576 U.S. at 2228; *In re Primus*, 436 U.S. 412, 432 (1978); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988).

“Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral[.]” *Reed*, 576 U.S. at 166. The Court finds the

Amendments are both content based on their face and that the purpose for the law is content based (though the Court need not find both to be content based), requiring the Court to evaluate Rule 8.4(g) under strict scrutiny.

First, the restrictions in Rule 8.4(g) apply to any attorney at any event even tangentially related to the practice of law and thus depend entirely on the communicative content of the attorney's speech. While Defendants espouse admirable views justifying the enactment of Rule 8.4(g), "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 576 U.S. at 166. It is easy to consider, for example, that an ODC official who disliked religious teachings against abortion would investigate a CLE presenter advocating for restrictive abortion laws on those grounds because ODC official perceives that such teachings intend to treat women as inferior based on their sex. Any listener at the CLE presentation could feel targeted by this presentation and thus it is up to ODC to determine if the content of that presentation is discriminatory or not.

At its foundation, Rule 8.4(g) was adopted by the government for the Board to express disapproval with the message an attorney conveys in their speech. Defendants also offer limiting instructions through the Farrell Declaration in an effort to promise that the Rule will not be used in the manner Mr. Greenberg fears. The Court determined already that this promise is not binding on the Board or ODC. *See supra* pp. 21–28. Further, "future government officials may one day wield such statutes to suppress disfavored speech" even if the Defendants in power today do not plan to do so. *Reed*, 576 U.S. at 167. It is not enough for the Defendants to claim the regulation intends to "insure high professional standards and not to curtail free expression." *NAACP v. Button*, 371 U.S. 415, 439 (1963).

Defendants concerns for the reputation of lawyers focuses the Amendments not on how the attorney's speech affects the practice of law but how it affects the perception of lawyers by the public, which is content-based discrimination. *See e.g., United States v. Playboy Ent. Grp.*, 529 U.S. 803, 811 (2000) ("The overriding justification for the regulation is concern for the effect of the subject matter on [listeners].... This is the essence of content-based regulation."). Defendants even justify the existence of Rule 8.4(g) for "maintaining the public confidence in legal system's impartiality, and its trust in the legal profession as a whole," making it apparent that public perception is a critical motivation in enacting this regulation. ECF No. 61 at 36.

The Court finds that Rule 8.4(g) regulates speech based on the message a speaker conveys and is, therefore, subject to strict scrutiny. "To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008).

i. Compelling Interest

According to Defendants, Pennsylvania has a compelling interest in "eradicating discrimination and harassment, ensuring that the legal profession functions for all participants, maintaining the public confidence in the legal system's impartiality, and its trust in the legal profession as a whole." ECF No. 61 at 36.²⁴ Rule 8.4(g) was thus created to allow Pennsylvania to regulate the attorneys it licenses to ensure "the efficient and law-based resolution of disputes and guaranteeing that its judicial system is equally accessible to all." *Id.* at 2. Defendants also

²⁴ Before its promulgation, Rule 8.4(g)'s stated government purpose was to "promote[] the profession's goal of eliminating intentional harassment and discrimination, assure[] that the legal profession functions for all participants, and affirm[] that no lawyer is immune from the reach of law and ethics." ECF No. 61 at 9 (quoting 49 Pa.B. 4941).

aim to “protect the integrity and fairness of [Pennsylvania’s] judicial system[.]” *Id.* at 29 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)). Defendants go further to state Pennsylvania must protect the reputations of its lawyers by preventing them from engaging in something “deplorable and beneath common decency[.]” ECF No. 61 at 29 (quoting *Fl. Bar v. Went For It*, 515 U.S. 618, 625 (1995) (internal quotations omitted)).

While Defendants justifications are aspirational, they are also largely unfocused. Within one regulation, the Board would like to improve the reputation of all Pennsylvania licensed attorneys, confirm the impartiality of the legal system, promote efficiency in dispute resolution, guarantee equal access to the judicial system, and so on. It is difficult for the Court to credit Defendants for presenting a compelling government interest when they have instead provided amorphous justifications untethered to attorneys or Pennsylvania or any of the contexts listed in the Amendments. There may also be a concern regarding public distrust and unequal access in the medical profession, but surely that is not a compelling reason to regulate doctors to never make offensive statements in a forum tangentially related to the practice of medicine just so public perception of doctors will improve. There is public distrust in large banks but surely that is not a compelling reason to regulate bankers to never make offensive statements. This notion of public distrust used as an anchor for government regulation could conceivably extend to every industry in which the state has licensing authority and serve as an invitation to those regulatory agencies to engage in censoring unfavorable speech, deemed subjectively unworthy of those in their industry. Such broad strokes have a corrosive effect on the ability of the Constitution to protect individual rights and hold back the of-the-moment popular movements that seek to limit those rights. It is a concerning slippery slope for government to involve itself in the manner and direction of public discourse that cannot be overstated.

The main issue here is that Pennsylvania has espoused this global need to make lawyers better people and improve public confidence in the judicial system without really presenting a compelling interest specifically related to Pennsylvania-licensed attorneys or discrimination and harassment's effect on the practice of law in Pennsylvania. Aside from stating these lofty goals, Defendants provide no evidence whatsoever that harassment and discrimination among attorneys in Pennsylvania is a rampant issue requiring government interference. While the Court does not doubt that such problems exist, Defendants make no attempt to prove that harassment or discrimination is in any way related to public trust in the legal system or efficiency in dispute resolution or access to justice, etcetera. Indeed, the instances of harassment and discrimination that have been cited by the government occurred nationwide and were handled swiftly and with alacrity by the judges managing those cases using the procedural and disciplinary rules already at their disposal. Those judges should be examples for others to follow in managing attorneys and encouraging quick and decisive responses to any kind of abusive, demeaning, or belittling treatment affecting the administration of justice. However, the government cannot make general pronouncements and use those aspirations to restrict free speech without any evidence that the proposed regulation serves a particular compelling interest.²⁵

The Board's regulations are not the type to come under close public scrutiny, particularly here where there was no public process of notice and comment. Such regulations, largely operating without public oversight, advancing into this area of individual rights is something protectors of the Constitution must be mindful of. Ironically here, it is the protectors themselves

²⁵ Defendants were given ample opportunity to provide examples or data related to their compelling interests both in their briefing and at oral argument and they could not come up with any specific support for Pennsylvania's need being addressed by this Rule. ECF No. 74 at 25–26. Counsel for Defendants stated, "I don't know that [Pennsylvania Supreme Court] need[s] to wait [...] we're not going to do anything until we have a specific incident. And I'm not saying there haven't been specific incidents, Your Honor. I mean certainly there's no evidence before the Court in this case of that." *Id.* at 27.

that have introduced this corrosive catalyst, albeit for a good cause. Yet when protected individual rights are in play, the government's adopting of a good cause with the ends justifying the means is not the test.

In addition, Rule 8.4(g) is remarkably both over-inclusive and under-inclusive in achieving those lofty goals. It is over-inclusive, as this Court has explained on multiple occasions, by reaching beyond the bounds of the administration of justice to any activity in which CLE credits are offered. It strains the Court to figure out how a participant at a bench bar conference showing aversion to a fundamentalist religious advocate would prevent the fundamentalist religious individual from accessing the judicial system because Defendants do not elaborate on how the regulation affects the state's purported interests. Yet it is also under-inclusive to achieve many of those extensive interests. Impartiality and efficiency often rely on judges or mediators or arbitrators, who would only be covered under this Rule if they are in fact Pennsylvania-licensed attorneys, though many of those roles do not require an active license to practice law. It is entirely unclear what, if any, impact Rule 8.4(g) would have on the efficiency of the dispute resolution process.

Further, it is not the role of the government to ensure that all lawyers are noble guardians of the profession or well-liked by the public. That is equivalent to requiring that all public school teachers love children or insisting all doctors develop a good bedside manner. Would we prefer that in an ideal world? Sure. But it is not for the government to enact regulations that monitor the type of people who work in a particular profession. Ultimately, Defendants want the Court to blindly accept anti-harassment and anti-discrimination policy as an overwhelming good that is justified in and of itself, and the Court cannot do so without more focus in the state's interests for

enacting this particular rule. This nebulous good is insufficient to serve as a compelling interest to restrict freedom of speech and expression.

Even so, for the sake of the government at this procedural stage in summary judgment, the Court will evaluate the rest of the test assuming the government has a compelling interest in regulating attorneys through Rule 8.4(g).

ii. Narrowly Tailored

As discussed at length throughout this opinion, the Amendments are not narrowly tailored.²⁶ Defendants assert that the Amendments are narrowly tailored because they only apply to activities that are required to practice law, but the Court disagrees with this conclusion. ECF No. 61 at 36–37. The regulation must be narrowly tailored to the compelling interest stated by the government. However, Rule 8.4(g) permits the government to restrict speech outside of the courtroom, outside of the context of a pending case, and outside of the administration of justice. The government does not provide any indication or evidence that individuals are being harassed, discriminated against, or excluded specifically at events offering CLE credits. Defendants never make the contention that there is a problem in Pennsylvania where attorneys in the listed protected categories are unable to access bench bar conferences or bar association activities due to attorney misconduct of this nature. Defendants do not provide a single example of a panelist at a CLE seminar harassing or discriminating against an individual in a manner that impeded that

²⁶ Even under intermediate scrutiny, the Amendments would not survive as they are not “narrowly tailored to serve a significant governmental interest” for much of the same reasons. *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2356 (2020) (Sotomayor, J. concurring) (internal citation omitted). Defendants have failed to prove that Rule 8.4(g) does not “burden substantially more speech than necessary.” *Turco v. City of Englewood*, 935 F.3d 155, 162 (3d Cir. 2019). Defendants have also failed to show that “more targeted tools” for achieving their compelling interest were “seriously considered” in the process of creating Rule 8.4(g). *Drummond v. Robinson Twp.*, 9 F.4th 217, 232 (3d Cir. 2021). Thus, for many of the same reasons why Rule 8.4(g) is not narrowly tailored in a strict scrutiny analysis, the regulation also does not pass intermediate scrutiny.

individual's ability to maintain good standing as an attorney or otherwise participate in the practice of law. These examples, or lack thereof, illustrate how broadly Rule 8.4(g) applies in response to the government's provided compelling interest, which generically emphasizes the need for judicial integrity and fair and equal administration of justice.

While Pennsylvania should be commended for its attempts to eradicate harassment and discrimination in the practice of law, the broad-reaching and generic interests justifying Rule 8.4(g) do not comport with the actual applications of the Amendments. Even the compelling interest identified by Defendants, to eliminate harassment and discrimination in the judicial system, is rooted in either judicial proceedings or representation of a client, which is much more limited than the overarching scope of Rule 8.4(g). Defendants themselves refer to attorneys as "officer[s] of the court" who must "conduct themselves in a manner compatible with the role of courts in the administration of justice." ECF No. 61 at 29 (quoting *In re Snyder*, 472 U.S. 634, 644–45 (1985)). Yet they propose Amendments that reach well beyond the scope of the administration of justice or anything remotely involving the courts.

Defendants themselves cite to cases limited in scope to judicial proceedings or representation of a client. Defendants assert "[m]any courts have spoken to the corrosive and negative effect that discrimination and harassment cause to the legal system" and list cases well within the acceptable scope of attorney regulation. ECF No. 61 at 7 n.3. In *Principe v. Assay Partners*, an attorney was sanctioned for making abusive and offensive comments *during a deposition*. 586 N.Y.S.2d 182, 185 (N.Y. Sup. Ct. 1992) (emphasis added). Again, in *Cruz-Aponte v. Caribbean Petroleum Corp.*, a female attorney sought sanctions against a male opposing counsel for joking that she had menopause *during a deposition*. 123 F. Supp. 3d 276, 280 (D.P.R. 2015) (emphasis added). Defendants also cite to two state court cases where an

attorney was punished for using race to either imply a person of color was dangerous or to exclude that person from participating in a legal proceeding – both involved race-based comments made in petitions filed in court. *See In re Charges of Unprofessional Conduct*, 597 N.W.2d 563, 568 (Minn. 1999); *see also In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005). With the abundance of case law cited by Defendants involving attorney discipline during legal proceedings, it is incredible for the Court to be expected to find these as persuasive examples to prove that Rule 8.4(g)'s much broader scope is narrowly tailored to serve the government's interest.

iii. Least Restrictive Means of Advancing the Interest

The Court employs similar reasoning for why there exists no genuine dispute that the Amendments are not the least restrictive means of advancing the government's interest. There is no doubt that the government is acting with admirable intentions to root out bias in practicing attorneys. But that lofty goal has enabled the government to create a rule that promotes a government-favored method of controlling disfavored speech and is so broad as to be able to police attorneys whenever the government deems their speech to be offensive. Constitutional limitations on government regulation were created for this exact purpose, to protect an individual's right to speak freely, even when that individual expresses ideas or statements that society detests.

Plaintiff points out numerous examples of other regulations focused on attorneys that prove that Rule 8.4(g) has not been drafted in the least restrictive means of advancing the government's interest in maintaining equal access to and the fair administration of justice. *See e.g.*, Code. Jud. Cond. 2.3(C) (tasking judges with "requir[ing] lawyers in proceedings before the

court to refrain from manifesting bias or prejudice, or engaging in harassment”); 204 Pa. Code § 99.3(7) (exhorting attorneys to, among other things, “refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.”); Pa.R.P.C. 4.4(a) (prohibiting lawyers “in representing a client” from mistreating third parties or violating their legal rights); Pa.R.P.C. 8.4(d) (proscribing conduct prejudicial to the administration of justice); ECF No. 65–1 at 28.

Tellingly, Plaintiff highlights an existing Pennsylvania Rule of Professional Conduct, which already prohibits conduct prejudicial to the administration of justice, and harassment and discrimination in legal proceedings are both sanctionable under the current rule. ECF No. 70 at 25; Pa.R.P.C. 8.4(d). That would seem to encompass the least restrictive means of advancing the government interest of preventing harassment and discrimination in the practice of law. Defendants would need to adequately argue that there is a compelling need not being addressed by the current rules, necessitating regulation of attorney speech outside of the administration of justice, and that Rule 8.4(g) is the least restrictive method of addressing that need. The Court does not find such assertions anywhere in Defendants’ arguments.

For all these reasons, the Court finds that Rule 8.4(g) does not pass the strict scrutiny test for constitutionality.

5. Overbroad

While the Court’s determination that the Amendments constitute content-based and viewpoint-based discrimination in violation of the First Amendment could end the discussion, the Court is concerned with the Defendants’ potential to partially modify and attempt to re-implement the regulation as it did with Old Rule 8.4(g). Since Rule 8.4(g) presents the Court

with significant concerns regarding the overreach of state authority on speech that happens to be expressed by professionals, the Court will also undertake an analysis of whether the Amendments are facially overbroad.

“The First Amendment overbreadth doctrine states that: A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad—that is, if it reaches too much expression that is protected by the Constitution. [A] policy can be found unconstitutionally overbroad if there is a likelihood that the statute's very existence will inhibit free expression to a substantial extent.” *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 258 (3d Cir. 2002) (internal quotation marks omitted); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (“A regulation is unconstitutional on its face on overbreadth grounds where there is a likelihood that the statute's very existence will inhibit free expression by inhibiting the speech of third parties who are not before the Court.”) (internal citation and quotation marks omitted). “To render a law unconstitutional, the overbreadth must be ‘not only real but substantial in relation to the statute's plainly legitimate sweep.’” *Saxe*, 240 F.3d at 214 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

The Court indeed recognizes that the “overbreadth doctrine is not casually employed.” *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999). In addition, the Court must consider whether the Amendments are amenable to a reasonable limiting construction. “[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania*, 944 F.2d 137, 144 (3d Cir. 1991) (internal citations omitted); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n. 4 (1982) (“In evaluating a facial

challenge to a state law, a federal court must, of course, consider any limiting construction.”). Here, the Court agrees with Plaintiff that the Amendments extend far beyond situations that would necessarily affect the administration of justice and that the targeting requirement does not remedy the prohibitions on protected speech. The Defendants’ proffered limitations on the enforcement of Rule 8.4(g) do not prevent the overbreadth of its construction.

First, the Amendments are allegedly confined to harassment or discrimination that prevents the administration of justice. Yet the plain language of the regulation applies to any speech that is intended to or manifests an intention to behave in a laundry list of offensive ways. These phrases necessarily require an inquiry into the motivation of the speaker. *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008). The Court finds no provision in the plain language of the Amendments that limits the regulation only to speech that actually causes disruption to the administration of justice. *Id.* at 319. Instead, it covers speech where an attorney intends to or manifests an intention to harass or discriminate even without any impact on the administration of justice or access to the judicial system.

In addition, the protected categories include marital status or socioeconomic status; categories not often included in federal anti-harassment or anti-discrimination laws of this type. This means an attorney could show aversion to their colleagues’ marriage at a bench bar conference or a partner could exclude a single associate from an invitation for couples to participate in a bar association activity and, incredibly, Rule 8.4(g) would allow for discipline against those attorneys. Even more ridiculous, an attorney showing aversion to another person wearing cheap suits or worn-out shoes at a bench bar conference could be subject to discipline by the Board under Rule 8.4(g). The scope here is quite broad and could easily prohibit speech that

is, at best, tangentially related to the administration of justice and, at worse, completely irrelevant to it.

Second, the Amendments do not contain reasonable contextual limitations. Rule 8.4(g) applies to “participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal credits are offered.” Pa.R.P.C. 8.4 cmt. 3. While Defendants believe that anything where CLE credits are offered are related to the administration of justice and practice of law because CLE credits are required to be an attorney of good standing in Pennsylvania, this justification strains credulity. Permitting the Board to hold panelists and audience members alike accountable under Rule 8.4(g) at any event that offers CLE credits would greatly inhibit freedom of expression. That means an audience member at a conference or seminar where legal credits are offered can face discipline under Rule 8.4(g) for making statements towards a person under an extensive number of categories. While these comments may be denigrating, deplorable and offensive, such statements made outside of the workplace and outside of the administration of justice are protected speech.²⁷

Even narrowly read to apply only to an attorney specifically targeting a person in a flagrant manner, the Amendments still prohibit a substantial amount of protected speech. Defendants do not describe with certainty to the Court how this targeting requirement operates except that the speech must be directed towards a person, per the language of the Amendments. There is some direction provided by the ABA on what is considered targeting under the ABA Model Rule 8.4(g). In a hypothetical situation where a partner at a firm remarks in a meeting to “never trust a Muslim lawyer” and “never represent a Muslim client[,]” the ABA would find that

²⁷ Comments made in the work environment certainly form a foundation for office discipline and a federal employment action.

Model Rule 8.4(g) applies even if the associate hearing those remarks was not Muslim because the offense is “targeted towards someone who falls within a protected category.” ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). That guidance from the ABA does not solve the problem of overbreadth. Thus, the targeting requirement does not remedy the overbreadth issue wherein Rule 8.4(g) applies outside the context of legal representation or proceedings.

Finally, considering limiting constructions offered by ODC does not solve the problem of overbreadth. ODC may promise not to enforce Rule 8.4(g) in the way its plain language suggests, yet the investigatory process itself has a chilling effect on Mr. Greenberg’s speech and will cause him, and likely other attorneys, to self-censor. There is no dispute that each complaint ODC receives triggers an investigatory process and that ODC may contact an attorney during that investigation. ECF No. 53 ¶ 28; ECF No. 70 at 13. Even if ODC promises not to enforce the Rule against attorneys in situations like Mr. Greenberg’s, there are still First Amendment concerns regarding the initial complaint and investigation process that ODC’s promises do not resolve. Therefore, even after considering a limiting construction, the Amendments still prohibit a substantial amount of protected speech and are unconstitutionally overbroad.

C. Fourteenth Amendment Void-for-Vagueness

Plaintiff’s Motion for Summary Judgment

In their Motion for Summary Judgment, Plaintiff claims certain terminology in the Amendments should be void for vagueness under the Fourteenth Amendment because there is insufficient fair notice and guidance as to what the regulation prohibits. ECF No. 65–1 at 27, 30–31. Plaintiff contends that if a rule either fails to provide fair notice to “people of ordinary intelligence” or “authorizes or even encourages arbitrary and discriminatory enforcement,” it is

void for vagueness. ECF No. 65–1 at 30–31 (citing *United States v. Stevens*, 533 F.3d 218, 249 (3d Cir. 2008); *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012); *Gentile v. State Bar Nev.*, 501 U.S. 1030, 1051 (1991)).

Specifically looking at the Amendments, Plaintiff contends that nothing in the “sea of case law, statutes, regulations and other provisions that utilize [the terms ‘harassment’ and ‘discrimination’]” uses that terminology in a way that is remotely similar to Comments [4] and [5] to Rule 8.4(g). ECF No. 65–1 at 27 (citing Pa.R.P.C. 8.4(g) cmts. 4, 5). In addition, Plaintiff points out differences in the definition of harassment in the Amendments and Pennsylvania’s criminal code. In the criminal code, the law prohibits the offense of “harassment” but, unlike in Rule 8.4(g), the criminal code delineates specific acts that constitute the offense. *Id.* at 26; 18 Pa. C. S. § 2709. Plaintiff adds that the criminal statute requires repeated communications before it applies to expression. ECF No. 65–1 at 27. By contrast, Rule 8.4(g) does not require repetition or severity, and, on its face, it arrests core protected speech. *Id.*

Plaintiff identifies two phrases that are too vague to satisfy the Fourteenth Amendment. First, Rule 8.4(g)’s “conduct that is intended to intimidate, denigrate, or show hostility or aversion” standard is vague. *Id.* at 31. Plaintiff likens this rule prohibiting denigrating or hostility or aversion to the “hopelessly ambiguous and subjective” ban on “offensive” signs in *McCauley*. *Id.* (citing *McCauley*, 618 F.3d at 250; *Dambrot, v. Cent. Michigan Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (policy unconstitutionally vague where it turned on the “subjective reference” whether speech was “negative” or “offensive”); *Monroe v. Houston Indep. Sch. Dist.*, 419 F. Supp. 3d 1000, 1008 (S.D. Tex. 2019) (restriction on “name-calling” and “offensive or derogatory remarks” is unconstitutionally vague)).

Second, Rule 8.4(g)'s "conduct" that "manifests an intention" "to treat a person as inferior" or "to disregard relevant considerations of individual characteristics or merit" standard is vague. *Id.* In the Amendments, discrimination is defined to include manifestations of an intent to treat a person as "inferior" or an intent "to disregard relevant considerations of individual characteristics or merit." *Id.* Plaintiff interprets this definition as vague "free floating intentions to treat someone as 'inferior' and free-floating intentions to 'disregard relevant considerations of individual characteristics or merit.'" *Id.* Plaintiff contends that what constitutes "inferior" treatment or "relevant considerations" is so imprecise that their application to an attorney will necessarily be left to those enforcing the rule. *Id.* Plaintiff is concerned that "arbitrary and discriminatory enforcement 'is a real possibility' because inferiority and relevant considerations are 'both classic terms of degree.'" *Id.* (quoting *Gentile*, 501 U.S. at 1048–49, 1051). Plaintiffs further assert that terms of degree "vest[] virtually complete discretion in the hands of the [enforcement official]." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). For all these reasons, Plaintiff urges the Court to find the Amendments unconstitutionally vague under the Fourteenth Amendment.

In Defendants Response in Opposition to Plaintiff's Motion for Summary Judgment, Defendants contend that the Amendments use familiar, well-known terms that an objective attorney would understand and thus provide fair warning of prohibited conduct. ECF No. 71 at 18. These terms meet the standard that "the ordinary person exercising ordinary common sense can sufficiently understand and comply with[.]" *Id.* at 19 (quoting *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992); *In re Snyder*, 472 U.S. at 645 ("case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct[,]" guide attorneys)).

First, Defendants refute Plaintiff's claim that "conduct that is intended to intimidate, denigrate, or show hostility or aversion" is vague. *Id.* Defendants instruct the Court that "perfect clarity and precise guidance have never been required[.]" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). And that the Amendments must be read as a whole, not as terms out of context. *Id.* at 20 (citing *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (stating that the meaning of words depends on their statutory context)). Since harassment is a familiar term, the other terms must be taken in the context of an objective attorney's knowledge of what constitutes harassment)).

Second, Defendants refute Plaintiff's claim that the definition of discrimination in the Amendments is vague. *Id.* at 21. Defendants reiterate that advocating for ideas or expressing opinions does not fall within the Amendments. *Id.* at 22. Defendants ask the Court not to consider speculation about possible vagueness in hypothetical situations, which cannot support a facial challenge to the Amendments. *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 733 (2000)).

Defendants' Motion for Summary Judgment

In their Motion for Summary Judgment, Defendants contend that this Court must decide if they are "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." ECF No. 61 at 41 (citing *San Filippo*, 961 F.2d at 1136).²⁸ Defendants also claim that imprecision should be tolerated under these circumstances because no criminal punishment can be applied under the regulation. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982);

²⁸ Defendants list a number of cases supporting the same premise. See, e.g., *Villeneuve v. Connecticut*, 2010 WL 4976001, at *3 (D. Conn. Dec. 2, 2010) (provisions addressing conduct involving "dishonesty, fraud, deceit or misrepresentation," and conduct "prejudicial to the administration of justice" not vague); *Howell*, 843 F.2d at 206 ("prejudicial to the administration of justice" not vague).

ECF No. 61 at 41. Further, Defendants assert that “harassment” and “discrimination” are well-known terms to attorneys. ECF No. 61 at 43. Finally, Defendants conclude that the Amendments provide sufficient notice to attorneys, and that they also guide ODC in deciding whether to enforce the Amendments, thereby ensuring that ODC is aware of the Amendments’ boundaries. ECF No. 61 at 44.

Plaintiff responds by reiterating the ways in which Rule 8.4(g) is unduly vague as outlined in Plaintiff’s Motion for Summary Judgment, particularly the definitions of harassment and discrimination. ECF No. 70 at 29. In contrast to Defendants’ suggested tolerance of imprecision, Plaintiff contends that any law that interferes with the right of free speech should be evaluated under a “more stringent vagueness test.” ECF No. 70 at 30 (quoting *Hoffman Estates*, 455 U.S. at 499).

Discussion

The Fourteenth Amendment’s Due Process clause allows courts to find regulations unconstitutional due to vagueness. *See J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011); *see also Marshall v. Amuso*, 2021 WL 5359020, at *6 (E.D. Pa. Nov. 17, 2021). The Supreme Court has explained that the “void for vagueness doctrine [is] applicable to civil as well as criminal actions.” *Mateo v. Att’y Gen. U.S.*, 870 F.3d 228, 232 (3d Cir. 2017) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)). However, Defendants are correct that civil rules need not be as precise as criminal statutes. *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 167 (3d Cir. 2008). A facial challenge to vagueness will be upheld if “the enactment is impermissibly vague in all of its applications.” *Hoffman Estates*, 455 U.S. at 495. “If, for example, the law interferes with the right of free speech or of association, a more stringent

vagueness test should apply.” *Id.* at 499. “When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012).

There are two concerns related to vague laws: (1) fair notice and (2) arbitrary enforcement. First, the Court must ensure that those affected, i.e., Pennsylvania attorneys, are provided “fair warning of prohibited conduct” under Rule 8.4(g). *San Filippo*, 961 F.2d at 1135 (internal citation omitted). “Thus, a statute is unconstitutionally vague when [persons] of common intelligence must necessarily guess at its meaning.” *Borden*, 523 F.3d at 167 (internal citations and quotation marks omitted). The ABA noted in its Formal Opinion 493 regarding Model Rule 8.4(g) that an important constitutional principle that guides and constrains its application is “an ethical duty that can result in discipline must be sufficiently clear to give notice of the conduct that is required or forbidden.” ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). The Court finds that the Amendments fail on both counts – they do not provide fair notice of the prohibited conduct to Pennsylvania attorneys, and they invite imprecise enforcement from ODC and the Board.

On the first ground for vagueness, the Amendments include made-up definitions that do not comport with the definitions of similar terms in similar contexts.²⁹ That is to say – ODC makes up its own definitions for the purpose of this rule alone. Starting with harassment, Comment Four to Rule 8.4(g) defines it broadly as “conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph

²⁹ Aside from the definitions crafted for the purpose of this regulation, the ABA confirmed that its Model Rule 8.4(g) was fashioned to capture incidents that federal law normally does not find objectively hostile or abusive enough to include. For example, Model Rule 8.4(g) was in fact designed to capture isolated circumstances not severe or pervasive enough to create a hostile environment or cause liability under Title VII of the Civil Rights Act of 1964. Pennsylvania’s Rule 8.4(g) suffers from the same design wherein incidents that would normally be insufficient to cause liability under federal law may be subject to discipline under this regulation. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020).

(g).” Pa.R.P.C. 8.4(g) cmt. 4. This definition is unlike other definitions of harassment in similar contexts. For example, the Pennsylvania criminal statute defines harassment with very specific conduct, including kicking, stalking, or severe communications, including threatening or lewd communications to or about such other person, and repeated communications in an anonymous manner or at extremely inconvenient hours. 18 Pa.C.S. § 2709(a). That criminal statute “specifically defines and limits the offense of harassment in a manner to protect free speech.” *Haagensen v. Pa. State Police*, 2009 WL 3834007, at *9 (W.D. Pa. Oct. 22, 2009), *aff’d*, 490 F. App’x 447 (3d Cir. 2012). The Amendments’ definition of harassment bears little to no similarity to the criminal statute’s definition. While an ordinary attorney may understand the general notion of harassment, it is entirely unclear from the novel definition created by ODC what the scope of this regulation would be and whether there is any limitation based on repetition or severity or other factors. The ABA Formal Opinion 493 on their Model Rule 8.4(g) states that “it is not restricted to conduct that is severe or pervasive[,]” unlike the criminal statute. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). The terms “denigrate,” and “aversion” also leave the Court wondering what an attorney would consider as violating behavior or expression. What may be considered denigrating or showing aversion likely varies from speaker to speaker, and listener to listener. While Comment Four does list a few broad examples of sexual harassment under the Rule, there are no examples given of what constitutes other types of harassment within this definition.

The definition of discrimination provided in Comment Five is hardly an improvement. It is unclear to the Court how an attorney “manifests an intention” or “disregard[s] relevant characteristics” in violation of this Rule. The Amendments offer no clarification as to what those relevant characteristics may be and that prevents ordinary attorneys from understanding what

they must take into account in order to avoid any manifestation of discrimination. Both definitions, critical to the application of Rule 8.4(g) to attorneys, are unfamiliar and untenable. Since there is a significant risk that Rule 8.4(g) will inhibit free speech, its boundaries must be well-defined, yet there is minimal, if any, connection to the substantive law of discrimination and harassment statutes. There is additional reason to consider the “reputational injury” that may occur if an attorney is accused of discrimination or harassment under Rule 8.4(g), which the Court takes seriously when considering if fair notice is provided. *F.C.C.*, 567 U.S. at 255 (finding the standards unconstitutionally vague). An investigation into an attorney’s alleged discrimination or harassment could inhibit their ability to obtain clients, retain employment, be admitted in other jurisdictions, and the list goes on of potential reputational harm that this attorney could incur. While the Court takes any harassment or discrimination in the practice of law seriously, this does not excuse the Board from drafting such regulations that provide attorneys with fair notice.

Second, Supreme Court Justice Thomas explained in a concurring opinion that the Supreme Court has “become accustomed to using the Due Process Clauses to invalidate laws on the ground of ‘vagueness,’” because the vagueness doctrine “is quite sweeping” when a regulation ““authorizes or even encourages arbitrary and discriminatory enforcement.”” *Johnson v. United States*, 135 S. Ct. 2551, 2566 (2015) (Thomas, J., concurring in judgment) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). There is no genuine dispute that the Amendments as written invite arbitrary or discriminatory enforcement of Rule 8.4(g). The Court need not find that arbitrary enforcement will necessarily occur, “but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.” *Gentile*, 501 U.S. at 1051.

In the plain language of the Amendments, harassment is defined as “conduct that is intended to intimidate, denigrate, or show hostility or aversion” and by using the terms “denigrate” or “aversion,” among others, the Board is encouraging subjective interpretation and enforcement. What is considered to denigrate a person will necessarily vary depending on the member of ODC reviewing the complaint.³⁰ See e.g., *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 250 (3d Cir. 2010) (finding the ban on offensive signs “hopelessly ambiguous and subjective”); *Dambrot, v. Cent. Michigan Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (holding policy unconstitutionally vague where it turned on the “subjective reference” whether speech was “negative” or “offensive”). The definition of discrimination has similarly vague terms to require the attorney “manifest an intention” and “to disregard relevant considerations of individual characteristics or merit,” which will give ODC complete discretion to determine whether an attorney has manifested anything under the regulation or to determine what relevant characteristics should have been considered.

Furthermore, the Supreme Court has recognized that “the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).³¹ While the context in *Kolender* was a criminal statute, the Court agrees that there must be some guidance to ensure consistent application of the regulation, even in the civil context. Plaintiff is correct in pointing out that Defendants’

³⁰ During oral argument, counsel for Defendants himself seemed unclear on the scope of the Amendments. He stated, “you could technically under the rule you could harass somebody without using offensive language. [...] it’s vexing annoying conduct, you know, that doesn’t [sic] necessarily offensive but maybe, you know, if it’s repeated to the person could be something that could constitute harassment[.]” ECF No. 74 at 12 ¶¶ 21–25.

³¹ The Third Circuit has recognized that the “need for specificity is especially important where, as here, the regulation at issue is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (internal citation and quotation marks omitted).

discovery responses highlight the likely imprecision in choosing in which cases and what manner discipline will be applied under Rule 8.4(g). ECF No. 70 at 29; Farrell Interrog. Answers ¶¶ 2–6 (answering that ODC has never promulgated internal written policy guidance or training for 8.4(g), that the only verbal guidance or training was an instruction to report up any complaints alleging a violation of 8.4(g), and the only external policy guidance was a brief monthly newsletter in July 2020 describing Old 8.4(g)). The policy must be guided by “objective, workable standards” to prevent ODC from subjectively determining “what counts” as a violation. *Marshall v. Amuso*, 2021 WL 5359020, at *6 (E.D. Pa. Nov. 17, 2021) (quoting *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018)). When asked outright during oral argument what the objective reasonable standard is in determining misconduct under Rule 8.4(g), counsel for Defendants stated that “it would be the plain meaning of the words [...] as set forth in the comments to the rule[.]” ECF No. 74 at 22 ¶ 19–21. The Court finds there is insufficient guidance to implement Rule 8.4(g) in a precise, consistent manner. Therefore, the Amendments are void-for-vagueness under the Fourteenth Amendment.

IV. CONCLUSION

In conclusion, the Court finds that Rule 8.4(g) is an unconstitutional infringement of free speech according to the protections provided by the First Amendment. The Court also finds that Rule 8.4(g) is unconstitutionally vague under the Fourteenth Amendment. Therefore, the Court grants Plaintiff’s Motion for Summary Judgement and denies Defendants’ Motion for Summary Judgment.

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE