



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

August 16, 2022

Atlanta, GA

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 - B. Report on status of ITILS meeting regarding revised version of Rule 1.2
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2022-2023

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	2025
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Vice Chairperson

R. Gary Spencer	2023
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Members

Hon. J. Antonio DelCampo	2023
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Erin H. Gerstenzang	2023
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Mazie Lynn Guertin	2023
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John G. Haubenreich	2023
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Patrick H. Head	2023
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R. Javoyne Hicks	2023
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William Dixon James	2023
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Seth David Kirschenbaum	2023
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Catherine Koura	2024
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Edward B. Krugman	2023
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David Neal Lefkowitz	2023
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Patrick E. Longan	2023
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David O'Neal	2023
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Jabu Mariette Sengova	2023
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H. Craig Stafford	2023
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William Hickerson Thomas, Jr.	2023
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Julayaun Maria Waters	2025
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Peter Werdesheim	2024
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Patrick John Wheale	2024
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Hon. Paige Reese Whitaker	2023
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Executive Committee Liaison

David S. Lipscomb	2023
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Staff Liaison

Paula J. Frederick	2023
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Disciplinary Rules and Procedures Committee
Meeting of June 3, 2022
Hybrid meeting

MINUTES

Chair Michael Bagley called the meeting to order at 2:00 p.m.

Attendance:

Committee members: Michael Bagley, R. Gary Spencer, Erin H. Gerstenzang (virtual), Mazie Lynn Guertin, John G. Haubenreich, Patrick H. Head (virtual), Seth D. Kirschenbaum (virtual), Catherin Koura (virtual), Edward B. Krugman, David N. Lefkowitz (virtual), David S. Lipscomb, Patrick E. Longan (virtual), David O’Neal (virtual), Jabu M. Sengova (virtual), Patrick Wheale (virtual), and Hon. Paige Reese Whitaker.

Staff: Paula J. Frederick, Jenny K. Mittelman (virtual), William D. NeSmith, III, Mercedes Ball, Billy Hearnburg, and Kathya S. Jackson (virtual)

Guests: Supreme Court Justice Peterson

Approval of Minutes:

The Committee approved the Minutes from the April 1, 2022 meeting. Once the OGC receives the draft of ABA Rule 8.4(g) from the group of lawyers requesting the changes it will be included in the agenda.

Action Items:

Formal Advisory Opinion Board request:

By unanimous vote, the Committee voted to adopt the proposed changes to Rules 1.5 and 1.8 to address the propriety of entering an agreement with a client requiring arbitration of fee disputes and/or malpractice claims. A copy of the Rules as adopted appears at the end of these minutes.

Rule 1.8

The Committee reviewed the previously approved (at its 1/7/22 meeting) draft of Rule 1.8 along with the proposed revisions by the FAOB. The Committee voted to revise e(3) to read: “a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization pro bono, or a lawyer representing an indigent client 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 Committee voted to revise comment 6 to read: “Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts...”

Garry Spencer opposed.

A copy of the Rule as revised (previously approved changes in green, approved FAOB changes in red, and current changes in blue) appear at the end of these minutes.

ITILS/Rule 1.2 Comment 9

David Lipscomb raised concerns about the proposed comment and the use of the words “knowledge” and “wilful blindness.” After discussion, the motion to adopt ITILS’s revised draft failed.

Justice Peterson suggested that Patrick Longan and David Lipscomb meet with ITILS members to draft a revised version of Rule 1.2. They will report at the Committee’s next meeting.

Discussion Item:

Proposed changes to Part VII

The Committee discussed comments received from the Georgia Association of Criminal Defense Lawyers. The Committee decided to review the comments again (including Justice Peterson’s comment and supporting case) and vote on the proposed revisions at its next meeting.

Informational Item:

Report:

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

The next meeting will be in August at Bar Headquarters.

The meeting adjourned at 3:21 p.m.

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 in a writing signed by the client or prospective client. The agreement to arbitrate and the attorney's disclosures regarding arbitration must be set out in a separate paragraph, written in a font size at least as large as the rest of the contract, and separately initialed by the client and the lawyer.

(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;

(C) the amount of the attorney fee; and

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

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

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

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

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

Comment

Reasonableness of Fee and Expenses

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

[1A] A fee can also be unreasonable if it is illegal. Examples of illegal fees are those taken without required court approval, those that

88 exceed the amount allowed by court order or statute, or those where
89 acceptance of the fee would be unlawful, e.g., accepting controlled
90 substances or sexual favors as payment.

91 Basis or Rate of Fee

92 [2] When the lawyer has regularly represented a client, they ordinarily
93 will have evolved an understanding concerning the basis or rate of the
94 fee. In a new client-lawyer relationship, however, an understanding as
95 to the fee should be promptly established. It is not necessary to recite
96 all the factors that underlie the basis of the fee, but only those that are
97 directly involved in its computation. It is sufficient, for example, to state
98 that the basic rate is an hourly charge or a fixed amount or an
99 estimated amount, or to identify the factors that may be taken into
100 account in finally fixing the fee. When developments occur during the
101 representation that render an earlier estimate substantially inaccurate,
102 a revised estimate should be provided to the client. A written
103 statement concerning the fee reduces the possibility of
104 misunderstanding. Furnishing the client with a simple memorandum or
105 a copy of the lawyer's customary fee schedule is sufficient if the basis or
106 rate of the fee is set forth.

107 [3] Contingent fees, like any other fees, are subject to the
108 reasonableness standard of paragraph (a) of this rule. In determining
109 whether a particular contingent fee is reasonable, or whether it is

reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

Terms of Payment

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

[5] An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability

131 to pay. A lawyer should not exploit a fee arrangement based primarily
132 on hourly charges by using wasteful procedures.

133 [5A] Paragraph (b) requires informed consent to an agreement to
134 arbitrate disputes over fees and expenses. See Rule 1.0(l). In obtaining
135 such informed consent, the lawyer should reveal to the client or
136 prospective client the following: (1) in an arbitration, the client or
137 prospective client waives the right to a jury trial because the dispute
138 will be resolved by an individual arbitrator or a panel of arbitrators; (2)
139 generally, there is no right to an appeal from an arbitration decision; (3)
140 arbitration may not permit the broad discovery that would be available
141 in civil litigation; (4) how the costs of arbitration compare to the costs
142 of litigation in a public court, including the requirement that the
143 arbitrator or arbitrators be compensated; and (5) who will bear the
144 costs of arbitration. The lawyer should also inform the client or
145 prospective client regarding the existence and operation of the State
146 Bar of Georgia's Fee Arbitration Program, regardless of whether the
147 attorney seeks an agreement to submit any future fee disputes to that
148 program. The lawyer should also inform the client or prospective client
149 that an agreement to arbitrate a dispute over fees and expenses is not
150 a waiver of the right to make a disciplinary complaint regarding the
151 lawyer.

152 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

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the State

175 Bar of Georgia, the lawyer should conscientiously consider submitting
176 to it. Law may prescribe a procedure for determining a lawyer's fee, for
177 example, in representation of an executor or administrator, a class or a
178 person entitled to a reasonable fee as part of the measure of damages.
179 The lawyer entitled to such a fee and a lawyer representing another
180 party concerned with the fee should comply with the prescribed
181 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;
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 pro bono, 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.

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

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

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

65 h. A lawyer shall not make an agreement prospectively limiting the lawyer's
66 liability to a client for malpractice unless permitted by law and the client is
67 independently represented by counsel in making the agreement, or settle a
68 claim for such liability with an unrepresented client or former client without
69 first advising that person in writing that independent representation is
70 appropriate in connection therewith. To the extent that agreements to
71 arbitrate disputes over a lawyer's liability for malpractice are enforceable, a
72 lawyer may enter into such an agreement with a client or a prospective client
73 if the client or prospective client gives informed consent in a writing signed
74 by the client or prospective client. The agreement to arbitrate and the
75 attorney's disclosures regarding arbitration must be set out in a separate
76 paragraph, written in a font size at least as large as the rest of the contract,
77 and separately initialed by the client and the lawyer.

78 i. A lawyer related to another lawyer as parent, grandparent, child, grandchild,
79 sibling or spouse shall not represent a client in a representation directly
80 adverse to a person whom the lawyer has actual knowledge is represented by

81 the other lawyer unless his or her client gives informed consent regarding
82 the relationship. The disqualification stated in this paragraph is personal and
83 is not imputed to members of firms with whom the lawyers are associated.

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

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

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

94
95 Comment

96 Transactions Between Client and Lawyer

97 [1A] As a general principle, all transactions between client and lawyer should be
98 fair and reasonable to the client. The client should be fully informed of the true
99 nature of the lawyer's interest or lack of interest in all aspects of the transaction. In
100 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~~

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

145 [5] Lawyers may not subsidize lawsuits or administrative proceedings brought on
146 behalf of their clients, including making or guaranteeing loans to their clients for
147 living expenses, because to do so would encourage clients to pursue lawsuits that
148 might not otherwise be brought and because such assistance gives lawyers too
149 great a financial stake in the litigation. These dangers do not warrant a prohibition
150 on a lawyer lending a client court costs and litigation expenses, including the
151 expenses of medical examination and the costs of obtaining and presenting
152 evidence, because these advances are virtually indistinguishable from contingent
153 fees and help ensure access to the courts. Similarly, an exception allowing lawyers
154 representing indigent clients to pay court costs and litigation expenses regardless of
155 whether these funds will be repaid is warranted.

156 [6] Paragraph (e)(3) provides another exception. A lawyer representing an
157 indigent client without fee, a lawyer representing an indigent client ~~pro bono~~
158 through a nonprofit legal services or public interest organization, and a lawyer
159 representing an indigent client ~~pro bono~~ through a law school clinical or pro bono
160 program may give the client modest gifts. Gifts permitted under paragraph (e)(3)

include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

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

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

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

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

[5 9] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Settlement of Aggregated Claims

[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

201 memoranda.

202 [812] A lawyer should not seek prospectively, by contract or other means, to limit
203 the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer
204 who handles the affairs of a client properly has no need to attempt to limit liability
205 for the lawyer's professional activities and one who does not handle the affairs of
206 clients properly should not be permitted to do so. A lawyer may, however, practice
207 law as a partner, member, or shareholder of a limited liability partnership,
208 professional association, limited liability company, or professional corporation.

209 Family Relationships Between Lawyers

210 Arbitration

211 [12A] Paragraph (h) requires informed consent to an agreement to arbitrate
212 malpractice claims. See Rule 1.0(l). In obtaining such informed consent, the
213 lawyer should reveal to the client or prospective client the following: (1) in an
214 arbitration the client or prospective client waives the right to a jury because the
215 dispute will be resolved by an individual arbitrator or a panel of arbitrators; (2)
216 generally, there is no right to an appeal from an arbitration decision; (3) arbitration
217 may not permit the broad discovery that would be available in civil litigation; (4)
218 how the costs of arbitration compare to the costs of litigation in a public court,
219 including the requirement that the arbitrator or arbitrators be compensated; and (5)
220 who will bear the costs of arbitration. 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.

[913] 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

[1014] 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 9.4: JURISDICTION AND RECIPROCAL DISCIPLINE**

2 (a) Jurisdiction. Any lawyer admitted to practice law in this jurisdiction, including any
3 formerly admitted lawyer with respect to acts committed prior to taking retired status,
4 resignation, suspension, disbarment, or removal from practice on any of the grounds
5 provided in Rule 4-104 of the State Bar of Georgia, or with respect to acts subsequent
6 thereto that amount to the practice of law or constitute a violation of the Georgia Rules of
7 Professional Conduct or any Rules or Code subsequently adopted by the Supreme Court
8 of Georgia in lieu thereof, and any Domestic or Foreign Lawyer specially admitted by a
9 court of this jurisdiction for a particular proceeding and any Domestic or Foreign Lawyer
10 who practices law or renders or offers to render any legal services in this jurisdiction, is
11 subject to the disciplinary jurisdiction of the State Bar of Georgia.

12 ...

Rule 4-221. Hearing Procedures

(a) Oaths. Before entering upon his duties as herein provided, each member of the State Disciplinary Board, each member of the State Disciplinary Review Board, and each Special Master shall swear or affirm to the following oath by signing a copy and returning it to the Clerk of the Boards or to the Clerk of the Supreme Court of Georgia, as appropriate.

“I do solemnly swear or affirm that I will faithfully and impartially discharge and perform all of the duties incumbent upon me as a member of the State Disciplinary Board of the State Bar of Georgia/member of the State Disciplinary Review Board of the State Bar of Georgia/Special Master according to the best of my ability and understanding and agreeable to the laws and Constitution of this State and the Constitution of the United States.”

The Clerk of the Boards shall maintain the completed Oaths of Board members, and the Clerk of the Supreme Court of Georgia shall file the completed Oaths of Special Masters.

(b) Pleadings and Copies. ~~Original~~ pleadings shall be filed with the Clerk of the Boards at the headquarters of the State Bar of Georgia or through the State Disciplinary Board e-filing system. ~~and~~ The parties shall serve copies upon the Special Master and the opposing party pursuant to the Georgia Civil Practice Act. Depositions and other original discovery shall be retained by counsel and shall not be filed except as permitted under the Uniform Superior Court Rules.

(c) Witnesses and Evidence; Contempt.

(1) The respondent and the State Bar of Georgia shall have the right to require the issuance of subpoenas for the attendance of witnesses to testify or to produce books and papers. The Special Master shall have the power to compel the attendance of witnesses and the production of books, papers, and documents relevant to the matter under investigation, by subpoena, and as further provided by law in civil cases under the laws of Georgia.

(2) The following shall subject a person to rule for contempt of the Special Master or State Disciplinary Board:

(i) disregard, in any manner whatsoever, of a subpoena issued pursuant to Rules 4-203

(9), 4-210 (h) or 4-221 (c) (1);

(ii) refusal to answer any pertinent or proper question of a Special Master; or

(iii) willful or flagrant violation of a lawful directive of a Special Master.

It shall be the duty of the Chair of the State Disciplinary Board or Special Master to report the facts supporting contempt to the Chief Judge of the Superior Court in and for the county in which the investigation, trial or hearing is being held. The Superior Court shall have jurisdiction of the matter and shall follow the procedures for contempt as are applicable in the case of a witness subpoenaed to appear and give evidence on the trial of a civil case before the Superior Court under the laws in Georgia.

(3) Any Special Master shall have power to administer oaths and affirmations and to issue any subpoena herein provided for.

(4) Depositions may be taken by the respondent or the State Bar of Georgia in the same manner and under the same provisions as may be done in civil cases under the laws of Georgia, and such depositions may be used upon the trial or an investigation or hearing in the same manner as such depositions may be used in civil cases under the laws of Georgia.

(5) All witnesses attending any hearing provided for under these Rules shall be entitled to the same fees as now are allowed by law to witnesses attending trials in civil cases in the Superior Courts of this State under subpoena.

(d) Venue of Hearings.

(1) The hearings on all complaints and charges against a resident respondent shall be held in the county of the respondent's main office or the county of residence of the respondent unless he otherwise agrees.

(2) Where the respondent is a nonresident of the State of Georgia and the complaint arose in the State of Georgia, the hearing shall be held in the county where the complaint arose.

(3) When the respondent is a nonresident of the State of Georgia and the offense occurs outside the State, the hearing may be held in the county of the State Bar of Georgia headquarters.

Rule 4-204.3. Answer to Notice of Investigation Required

(a) The respondent shall deliver to the State Disciplinary Board member assigned to investigate the matter a written response under oath to the Notice of Investigation within 30 days of service.

(b) The written response must address specifically all of the issues set forth in the Notice of Investigation.

(c) The State Disciplinary Board member assigned to investigate the matter may, in the State Disciplinary Board member's discretion, grant extensions of time for the respondent's answer.

Any request for extension of time must be made in writing, and the grant of an extension of time must also be in writing. Extensions of time shall not exceed 30 days and should not be routinely granted.

(d) In cases where the maximum sanction is disbarment or suspension and the respondent fails to properly respond within the time required by these Rules, the Office of the General Counsel may seek authorization from the Chair or Vice-Chair of the State Disciplinary Board to file a motion for interim suspension of the respondent.

(1) When an investigating member of the State Disciplinary Board notifies the Office of the General Counsel that the respondent has failed to respond and that the respondent should be suspended, the Office of the General Counsel shall, with the approval of the Chair or Vice-Chair of the State Disciplinary Board, file a Motion for Interim Suspension of the respondent. The Supreme Court of Georgia shall enter an appropriate order.

(2) When the State Disciplinary Board member ~~and the Chair or Vice-Chair of the State Disciplinary Board~~ determines that a respondent who has been suspended for failure to respond has filed an appropriate response and should be reinstated, the Office of the General Counsel shall file a Motion to Lift Interim Suspension. The Supreme Court of

24 Georgia shall enter an appropriate order. The determination that an adequate response has
25 been filed is within the discretion of the investigating State Disciplinary Board member.
26 ~~and the Chair of the State Disciplinary Board.~~

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

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

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

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

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

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

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

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

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

Comment

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

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

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

Affirmative Disclosure

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

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

Accountability

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

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

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

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

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

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

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

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

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

- 5 ~~1. public media, such as a telephone directory, legal directory, newspaper or other~~
6 ~~periodical;~~
7 ~~2. outdoor advertising;~~
8 ~~3. radio or television;~~
9 ~~4. written, electronic or recorded communication.~~
- 10 ~~b. A copy or recording of an advertisement or communication shall be kept for two years~~
11 ~~after its last dissemination along with a record of when and where it was used.~~
- 12 ~~c. Prominent disclosures. Any advertisement for legal services directed to potential clients~~
13 ~~in Georgia, or intended to solicit employment for delivery of any legal services in~~
14 ~~Georgia, must include prominent disclosures, clearly legible and capable of being read~~
15 ~~by the average person, if written, and clearly intelligible by an average person, if spoken~~
16 ~~aloud, of the following:~~
- 17
- 18 ~~1. Disclosure of identity and physical location of attorney. Any advertisement shall~~
19 ~~include the name, physical location and telephone number of each lawyer or law~~
20 ~~firm who paid for the advertisement and who takes full personal responsibility~~
21 ~~for the advertisement. In disclosing the physical location, the responsible lawyer~~
22 ~~shall state the full address of the location of the principal bona fide office of each~~
23 ~~lawyer who is prominently identified pursuant to this paragraph. For the~~
24 ~~purposes of this Rule, a bona fide office is defined as a physical location~~
25 ~~maintained by the lawyer or law firm from which the lawyer or law firm~~
26 ~~furnishes legal services on a regular and continuing basis. In the absence of a~~
27 ~~bona fide physical office, the lawyer shall prominently disclose the full address~~
28 ~~listed with the State Bar of Georgia or other Bar to which the lawyer is~~
29 ~~admitted. A lawyer who uses a referral service shall ensure that the service~~
30 ~~discloses the location of the lawyer's bona fide office, or the registered bar~~
31 ~~address, when a referral is made.~~
- 32 ~~2. Disclosure of referral practice. If the lawyer or law firm will refer the majority of~~
33 ~~callers to other attorneys, that fact must be disclosed and the lawyer or law firm~~
34 ~~must comply with the provisions of Rule 7.3(c) regarding referral services.~~
- 35 ~~3. Disclosure of spokespersons and portrayals. Any advertisement that includes a~~
36 ~~non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a~~
37 ~~client by a non-client, or any paid testimonial or endorsement, shall include~~
38 ~~prominent disclosure of the use of a non-attorney spokesperson, portrayal of a~~
39 ~~lawyer by a non-lawyer, or of a client by a non-client.~~

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

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

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

51
52 **Comment**

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

64 -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

109
110 Comment

111 [1] This Rule permits public dissemination of information concerning a ~~lawyer's name~~ lawyer's
112 ~~or firm~~ law firm's name, address, email address, website, and telephone number; the kinds of
113 services the lawyer will undertake; the basis on which the ~~lawyer's~~ lawyer's fees are
114 determined, including prices for specific services and payment and credit arrangements; a
115 ~~lawyer's~~ lawyer's foreign language ability; names of references and, with their consent, names
116 of clients regularly represented; and other information that might invite the attention of those
117 seeking legal assistance.

118 ~~{3} Questions of effectiveness and taste in advertising are matters of speculation and~~
119 ~~subjective judgment. Some jurisdictions have had extensive prohibitions against~~
120 ~~television advertising, against advertising going beyond specified facts about a lawyer,~~
121 ~~or against "undignified" advertising. Television is now one of the most powerful media~~
122 ~~for getting information to the public, particularly persons of low and moderate income;~~
123 ~~prohibiting television advertising, therefore, would impede the flow of information~~
124 ~~about legal services to many sectors of the public. Limiting the information that may be~~
125 ~~advertised has a similar effect and assumes that the bar can accurately forecast the kind~~
126 ~~of information that the public would regard as relevant.~~

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

~~Record of Advertising~~

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

~~-~~

Paying Others to Recommend a Lawyer

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

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

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

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

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

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

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

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

189 Communications about Fields of Practice

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

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

200 Required Contact Information

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

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

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

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

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

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

14 (1) lawyer;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

Direct Personal Contact

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

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

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

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

Direct Written Solicitation

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

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

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

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

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

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

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

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

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

181 *Paying Others to Recommend a Lawyer*

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

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

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

48 Comment

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

55 Paying Others to Recommend a Lawyer

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

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

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

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

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

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

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

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

Communications about Fields of Practice

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

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

Required Contact Information

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

1 Rule 7.3: Solicitation of Clients

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

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

9 (1) lawyer;

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

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

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

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

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

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

110

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April 28, 2022

Ms. Elizabeth Fite, President
State Bar of Georgia
104 Marietta St. NW, Suite 100
Atlanta, GA 30303

Submitted via email to: elf@rogersfite.com

Re: Revision of Disciplinary Rules 7.1, 7.2, and 7.3

Dear President Fite,

The Georgia Association of Criminal Defense Lawyers (GACDL) thanks the State Bar for the opportunity to comment on the proposed changes to Rules 7.1, 7.2, and 7.3 of the Disciplinary Rules and writes to offer that feedback. GACDL's key concerns relate to Rules 7.1 and 7.2; there are no concerns currently regarding Rule 7.3. The page numbers, comments, and line numbers, listed below, refer to the redlined version you provided and is attached here for reference.

1. Rule 7.1: Comment 5, Page 4, & Line 105

If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

This sentence directly addresses geographical references in trade names but then seems to conflate the use of such references with the use of terms connoting that an organization offers public legal aid. If the concern this comment intends to address is the potentially misleading use of terms in a trade name that typically identify a legal aid organization, GACDL respectfully suggests a slight modification to this proposed language:

If a firm uses a trade name that includes a geographical name **or other language which suggests that it is a public aid organization** such as "Springfield Legal Clinic" or "Smith's Legal Center," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

or

If a firm uses a trade name that includes a geographical name **language which suggests that it is a public aid organization** such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

2. Rule 7.1: Comment 8, Page 4, Line 112

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

GACDL is concerned that Comment 8 to Rule 7.1 could discourage attorneys from holding elected office, which would be to the detriment of our electorate given the dearth of lawyers currently crafting, vetting, and passing legislation in the General Assembly. Coupled with this Comment, the fact that legislative leave is available to lawyer-legislators for the duration of each legislative session arguably means that it would be deemed misleading to maintain a lawyer-legislator's name in her law firm name, or even on firm letterhead, during a legislative session. Unfortunately, GACDL has no alternative language to suggest due to its direct opposition to the very concept proposed.


3. Rule 7.2(b)(3)(iv): Page 7; line 87

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

GACDL objects to this provision. Requiring errors and omissions insurance contravenes the recent Board of Governors' decision rejecting mandatory professional liability insurance for Bar members. Moreover, GACDL questions the efficacy of mandating an attorney secure insurance when she is a member of a qualified referral source but not when receiving referrals in any other fashion. GACDL recognizes and would support increased client/consumer protections when non-regulated lawyer-originating marketing and referral services are interacting with licensed Bar members; however, the onus of that protection ought to be born by such services rather than the Bar member. GACDL can conceive of several ways such protections could be secured (e.g., the service providing insurance for its lawyer-members, regulation of such services, etc.) and would welcome an opportunity to engage in a larger conversation about the changing dynamics of legal marketing and the impact on client/consumers because the status quo is troubling.

I welcome any further discussion that would be helpful to you as the process for finalizing a modified version of Rules 7.1, 7.2, and 7.3 continues. You can reach me by phone (404-218-4590) or email (jasonsheffieldattorney@gmail.com). Thank you, again, for your engagement and consideration.

Sincerely yours,



Jason B. Sheffield
President

cc: Kim Dymecki, Immediate Past President, GACDL (dymecki@bellsouth.net)
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Enclosure (1) Ad Rules - Part 7--Redline[100][26].pdf (as provided to GACDL by Ms. Fite)

From: [Auden L. Grumet, Esq.](#)
To: [Kathy Jackson](#)
Subject: GA State Bar Disciplinary Rules - Proposed Amendments to Part VII of the Bar Rules
Date: Tuesday, July 26, 2022 3:25:54 PM

Looks like mostly very logical and helpful changes!

I was, however, confused by the changes to the word “attorney’s” in the redlined version. Is it perhaps a spacing issue? Fixing that would be helpful.

In addition, I’ve always wondered about the following scenario. Assume that I personally witness a vehicle collision and a person is injured - and assume that I won’t be expected to testify in the matter if litigation follows. My opinion from the Rules is that it would not be a violation of same for me to hand the injured person my business card and say something like “here’s my contact information if you decide you need legal representation”.

My primary motivation would not be financial gain at that moment, but rather a willingness to assist someone I’ve seen who may have been wronged. In addition, in that context there is no pressure of the expectation of an immediate response. In other words, the person would have plenty of time to reflect and decide whether or not to contact me.

So I think this kind of scenario should be better addressed in the Rules. Direct personal contact should be expressly allowed if there is no pressure and time for reflection is provided - ie “call me if you need help”. This is particularly true when a lawyer merely happens to randomly come across a situation in which he makes contact with someone he believes he may be able to assist - as opposed to routinely seeking out and making such direct communications with a purely pecuniary motive. For clearly the primary motive of such random, direct communications is not pecuniary, but rather virtue or aid or the like.

On a completely separate note, were law firm names that included tradenames such as “Red Hot Law Group” - but omitted the name of any attorney - allowed previously? I had always assumed that such names were prohibited in the past, yet I knew an attorney who had a firm with just such nomenclature. Which also reminds me of another related question/issue: what if a firm name contains the word “group” or the like, but there is only one attorney employed by same? Is that “misleading”? I seem to recall a specific Rule on point yet I don’t see any reference to this issue in the new proposed Rule.

Thanks in advance for your time and thoughts.

(FYI, I’m having problems with my primary email address on my mobile devices and I’m currently traveling, so I may not immediately receive and or may be delayed in replying to any response. With this in mind, please copy any response to audengrumet@gmail.com).

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Sent from iPad - typos likely!

515 U.S. 618, 132 L.Ed.2d 541

1⁶¹⁸FLORIDA BAR, Petitioner

v.

WENT FOR IT, INC., and

John T. Blakely.

No. 94-226.

Argued Jan. 11, 1995.

Decided June 21, 1995.

Lawyer and lawyer referral service brought action challenging constitutional validity of Florida Bar rules which prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident. The United States District Court for the Middle District of Florida, Elizabeth A. Kovachevich, J., 808 F.Supp. 1543, held that 30-day ban on such advertising violated First Amendment. Florida Bar appealed. The Eleventh Circuit Court of Appeals, Black, Circuit Judge, 21 F.3d 1038, affirmed. The Supreme Court granted certiorari, 115 S.Ct. 42, and the Court, Justice O'Connor, held that restriction withstood First Amendment scrutiny under three-part *Central Hudson* test for restrictions on commercial speech.

Reversed.

Justice Kennedy, filed dissenting opinion in which Justice Stevens, Justice Souter, and Justice Ginsburg, joined.

1. Constitutional Law ⇨90.3

Lawyer advertising is commercial speech, and as such is accorded a measure of First Amendment protection. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇨90.3

First Amendment protection accorded lawyer advertising as commercial speech is not absolute. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇨90.2

Commercial speech enjoys limited measure of protection, commensurate with its subordinate position in scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the

realm of noncommercial expression. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇨90.2

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the First Amendment's guarantee with regard to non-commercial speech. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇨90.2

Supreme Court engages in intermediate scrutiny of restrictions on commercial speech, analyzing them under framework established in *Central Hudson*. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇨90.2

Under *Central Hudson*, government may freely regulate commercial speech that concerns unlawful activity or is misleading. U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇨90.2

Under *Central Hudson*, commercial speech that neither concerns unlawful activity nor is misleading may be regulated if: government asserts substantial interest in support of its regulation; government demonstrates that restriction on commercial speech directly and materially advances that interest; and regulation is narrowly drawn. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇨90.2

Unlike rational basis review, *Central Hudson* intermediate scrutiny of restrictions on commercial speech does not permit court to supplant precise interest put forward by state with other suppositions. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇨90.2

A single substantial interest is sufficient to satisfy first prong of *Central Hudson* standard for government regulation of commercial speech, the assertion of a substantial interest in support of the regulation. U.S.C.A. Const.Amend. 1.

10. Attorney and Client ⇨32(9)**Constitutional Law** ⇨90.1(1.5)

State bar's interest in protecting privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers was substantial, for purposes of *Central Hudson* intermediate scrutiny of state bar rules which prohibited lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster or accepting referrals obtained in violation of that prohibition. U.S.C.A. Const.Amend. 1; West's F.S.A. Bar Rules 4-7.4(b)(1), 4-7.8(a).

11. Constitutional Law ⇨90.1(1.5)

Protection of potential clients' privacy is substantial state interest, for purposes of *Central Hudson* intermediate scrutiny of restrictions on commercial speech. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⇨90.2

Burden under *Central Hudson* intermediate scrutiny of restrictions on commercial speech of demonstrating that challenged regulation advances government's interest in direct and material way is not satisfied by mere speculation and conjecture; rather, governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. U.S.C.A. Const. Amend. 1.

13. Attorney and Client ⇨32(9)**Constitutional Law** ⇨90.3

State bar rules which prohibited lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster advanced bar's interest in protecting privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers in direct and material way, for purposes of *Central Hudson* intermediate scrutiny of restrictions on commercial speech; statistical and anecdotal evidence was submitted supporting bar's contentions that public viewed direct-mail solicitations in the immediate wake of accidents as an intrusion of privacy that reflected poorly

on the profession. U.S.C.A. Const.Amend. 1; West's F.S.A. Bar Rules 4-7.4(b)(1), 4-7.8(a).

14. Constitutional Law ⇨90.2

Empirical data justifying speech restrictions need not be accompanied by surfeit of background information, on First Amendment challenge to regulation of commercial speech. U.S.C.A. Const.Amend. 1.

15. Constitutional Law ⇨90.2

Least restrictive means test has no role in First Amendment analysis in commercial speech context. U.S.C.A. Const.Amend. 1.

16. Constitutional Law ⇨90.2

In commercial speech context, there must be a "fit" between legislature's ends in regulating speech and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective. U.S.C.A. Const.Amend. 1.

17. Attorney and Client ⇨32(9)**Constitutional Law** ⇨90.1(1.5)

State bar rules which prohibited lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster or accepting referrals obtained in violation of that prohibition was sufficiently narrowly drawn to pass *Central Hudson* intermediate scrutiny of restrictions on commercial speech; rules were reasonably well targeted at stated objective of eliminating targeted mailings whose type and timing were source of distress to state residents, distress which caused many of them to lose respect for the legal profession, and the many alternative channels for communicating information about attorneys were sufficient. U.S.C.A. Const.Amend. 1; West's F.S.A. Bar Rules 4-7.4(b)(1), 4-7.8(a).

18. Attorney and Client ⇨32(9)**Constitutional Law** ⇨90.3

State bar rules which prohibited lawyers from sending targeted direct-mail solicita-

tions to victims and their relatives for 30 days following an accident or disaster or accepting referrals obtained in violation of that prohibition were constitutional, under *Central Hudson* intermediate scrutiny of restrictions on commercial speech; Bar had substantial interest in protecting injured residents from invasive conduct by lawyers and in preventing erosion of confidence in profession caused by such invasions, bar offered evidence indicating that the harms it targeted were not illusory, and palliative devised to address those harms was narrow in scope and duration. U.S.C.A. Const.Amend. 1; West's F.S.A. Bar Rules 4-7.4(b)(1), 4-7.8(a).

Syllabus *

Respondent lawyer referral service and an individual Florida attorney filed this action for declaratory and injunctive relief challenging, as violative of the First and Fourteenth Amendments, Florida Bar (Bar) Rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The District Court entered summary judgment for the plaintiffs, relying on *Bates v. State Bar of Ariz.*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, and subsequent cases. The Eleventh Circuit affirmed on similar grounds.

Held: In the circumstances presented here, the Bar Rules do not violate the First and Fourteenth Amendments. Pp. 2375–2381.

(a) *Bates* and its progeny establish that lawyer advertising is commercial speech and, as such, is accorded only a limited measure of First Amendment protection. Under the “intermediate” scrutiny framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction di-

rectly and materially advances that interest; and (3) demonstrates that the regulation is “‘narrowly drawn,’” *id.*, at 564–565, 100 S.Ct. at 2350–2351. Pp. 2375–2376.

(b) The Bar’s 30-day ban on targeted direct-mail solicitation withstands *Central Hudson* scrutiny. First, the Bar has substantial interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. Second, the fact that the harms targeted by the ban are quite real is demonstrated by a Bar study, effectively unrebutted by respondents below, that contains extensive statistical and anecdotal data suggesting that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. *Edenfield v. Fane*, 507 U.S. 761, 771–772, 113 S.Ct. 1792, 1800–1801, 123 L.Ed.2d 543; *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 475–476, 108 S.Ct. 1916, 1922–1923, 100 L.Ed.2d 475; and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72, 103 S.Ct. 2875, 2882, 77 L.Ed.2d 469, distinguished. Third, the ban’s scope is reasonably well tailored to its stated objectives. Moreover, its duration is limited to a brief 30-day period, and there are many other ways for injured Floridians to learn about the availability of legal representation during that time. Pp. 2376–2381.

21 F.3d 1038 (CA11 1994), reversed.

O’CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 2381.

Barry Scott Richard, Tallahassee, FL, for petitioner.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Bruce S. Rogow, Fort Lauderdale, FL, for respondents.

For U.S. Supreme Court briefs, see:

- 1994 WL 614916 (Pet.Brief)
- 1994 WL 690146 (Resp.Brief)
- 1994 WL 708001 (Reply.Brief)

¹⁶²⁰Justice O'CONNOR delivered the opinion of the Court.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such Rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

I

In 1989, the Florida Bar (Bar) completed a 2-year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So.2d 451 (Fla.1990). Two of these amendments are at issue in this case. Rule 4-7.4(b)(1) provides that “[a] lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.” Rule 4-7.8(a) states that “[a] lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Pro-

fessional Conduct if the communication or contact were made by the lawyer.” Together, these Rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or ¹⁶²¹indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4-7.4(b)(1) and 4-7.8(a) as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc., represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit, *Florida Bar v. McHenry*, 605 So.2d 459 (Fla. 1992). Another Florida lawyer, John T. Blakely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Bar had substantial government interests, predicated on a concern for professionalism, both in protecting the personal privacy and tranquility of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Bar's extensive study, the Magistrate Judge found that the Rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Bar's motion for summary judgment on the ground that the Rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, 808 F.Supp. 1543 (MD Fla.1992), relying on *Bates v. State Bar of Ariz.*, 433 U.S. 350, 97

S.Ct. 2691, 53 L.Ed.2d 810 (1977), and subsequent⁶²² cases. The Eleventh Circuit affirmed on similar grounds, *McHenry v. Florida Bar*, 21 F.3d 1038 (1994). The panel noted, in its conclusion, that it was “disturbed that *Bates* and its progeny require the decision” that it reached, 21 F.3d, at 1045. We granted certiorari, 512 U.S. 1289, 115 S.Ct. 42, 129 L.Ed.2d 937 (1994), and now reverse.

II

A

Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage. Until the mid-1970’s, we adhered to the broad rule laid out in *Valentine v. Chrestensen*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942), that, while the First Amendment guards against government restriction of speech in most contexts, “the Constitution imposes no such restraint on government as respects purely commercial advertising.” In 1976, the Court changed course. In *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, we invalidated a state statute barring pharmacists from advertising prescription drug prices. At issue was speech that involved the idea that “‘I will sell you the X prescription drug at the Y price.’” *Id.*, at 761, 96 S.Ct., at 1825. Striking the ban as unconstitutional, we rejected the argument that such speech “is so removed from ‘any exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,’ that it lacks all protection.” *Id.*, at 762, 96 S.Ct., at 1826 (citations omitted).

In *Virginia Bd.*, the Court limited its holding to advertising by pharmacists, noting that “[p]hysicians and lawyers . . . do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.” *Id.*, at 773, n. 25, 96 S.Ct., at 1831 n. 25 (emphasis in original). One year later, however, the Court applied the *Virginia Bd.* principles to invalidate a state rule prohibit-

ing lawyers from advertising in newspapers⁶²³ and other media. In *Bates v. State Bar of Arizona*, *supra*, the Court struck a ban on price advertising for what it deemed “routine” legal services: “the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like.” 433 U.S., at 372, 97 S.Ct., at 2703. Expressing confidence that legal advertising would only be practicable for such simple, standardized services, the Court rejected the State’s proffered justifications for regulation.

[1–4] Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. See, e.g., *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 472, 108 S.Ct. 1916, 1921, 100 L.Ed.2d 475 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637, 105 S.Ct. 2265, 2274, 85 L.Ed.2d 652 (1985); *In re R.M.J.*, 455 U.S. 191, 199, 102 S.Ct. 929, 935, 71 L.Ed.2d 64 (1982). Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment’s core. “[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’” *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477, 109 S.Ct. 3028, 3033, 106 L.Ed.2d 388 (1989), quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). We have observed that “[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.” 492 U.S., at 481, 109 S.Ct., at 3035, quoting *Ohralik*, *supra*, 436 U.S., at 456, 98 S.Ct., at 1918.

[5–7] Mindful of these concerns, we engage in “intermediate” scrutiny of restrictions on commercial speech, analyzing them

under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Under *Central Hudson*, the government may ⁶²⁴freely regulate commercial speech that concerns unlawful activity or is misleading. *Id.*, at 563–564, 100 S.Ct., at 2350. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be “‘narrowly drawn.’” *Id.*, at 564–565, 100 S.Ct., at 2350–51.

B

[8, 9] “Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions,” *Edenfield v. Fane*, 507 U.S. 761, 768, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993). The Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. See Brief for Petitioner 8, 25–27; 21 F.3d, at 1043–1044.¹ This interest obviously factors into the Bar’s paramount (and repeatedly professed) objective of curbing activities that “negatively affect[t] the administration of justice.” *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So.2d, at 455; see also Brief for Petitioner 7, 14, 24; 21 F.3d, at 1043 (describing Bar’s effort “to preserve the integrity of the legal profession”). ⁶²⁵Because direct-mail solicitations in the wake of accidents are perceived

by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately. See Pet. for Cert. 14–15; Brief for Petitioner 28–29. The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, “‘is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.’” Brief for Petitioner 28, quoting *In re Anis*, 126 N.J. 448, 458, 599 A.2d 1265, 1270 (1992).

[10, 11] We have little trouble crediting the Bar’s interest as substantial. On various occasions we have accepted the proposition that “States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975); see also *Ohralik*, *supra*, 436 U.S., at 460, 98 S.Ct., at 1920–1921; *Cohen v. Hurley*, 366 U.S. 117, 124, 81 S.Ct. 954, 958–959, 6 L.Ed.2d 156 (1961). Our precedents also leave no room for doubt that “the protection of potential clients’ privacy is a substantial state interest.” See *Edenfield*, *supra*, 507 U.S., at 769, 113 S.Ct., at 1799. In other contexts, we have consistently recognized that “[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 2295–2296, 65 L.Ed.2d 263 (1980). Indeed, we have noted that “a special benefit of the privacy all citizens enjoy within their own walls, which

1. At prior stages of this litigation, the Bar asserted a different interest, in addition to that urged now, in protecting people against undue influence and overreaching. See 21 F.3d, at 1042–1043; cf. *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 474–476, 108 S.Ct. 1916, 1922–1923, 100 L.Ed.2d 475 (1988); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462, 98 S.Ct. 1912, 1921–22, 56 L.Ed.2d 444 (1978). Because the

Bar does not press this interest before us, we do not consider it. Of course, our precedents do not require the Bar to point to more than one interest in support of its 30-day restriction; a single substantial interest is sufficient to satisfy *Central Hudson*’s first prong. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485, 115 S.Ct. 1585, 1591, 131 L.Ed.2d 532 (deeming only one of the government’s proffered interests “substantial”).

the State may legislate to protect, is an ability to avoid intrusions.” *Frisby v. Schultz*, 487 U.S. 474, 484–485, 108 S.Ct. 2495, 2502–2503, 101 L.Ed.2d 420 (1988).

[12] Under *Central Hudson*’s second prong, the State must demonstrate that the challenged regulation “advances the Government’s interest ‘in a direct and material way.’” ⁶²⁶*Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995), quoting *Edenfield, supra*, 507 U.S., at 767, 113 S.Ct., at 1798. That burden, we have explained, “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” 514 U.S., at 487, 115 S.Ct., at 1592, quoting *Edenfield, supra*, 507 U.S., at 770–771, 113 S.Ct., at 1800. In *Edenfield*, the Court invalidated a Florida ban on in-person solicitation by certified public accountants (CPA’s). We observed that the State Board of Accountancy had “present[ed] no studies that suggest personal solicitation of prospective business clients by CPA’s creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear.” 507 U.S., at 771, 113 S.Ct., at 1800. Moreover, “[t]he record [did] not disclose any anecdotal evidence, either from Florida or another State, that validate[d] the Board’s suppositions.” *Ibid.* In fact, we concluded that the only evidence in the record tended to “contradict, rather than strengthen, the Board’s submissions.” *Id.*, at 772, 113 S.Ct., at 1801. Finding nothing in the record to substantiate the State’s allegations of harm, we invalidated the regulation.

[13] The direct-mail solicitation regulation before us does not suffer from such infirmities. The Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar’s contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profes-

sion. As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. Summary of the Record in No. 74,987 (Fla.) on Petition to Amend the Rules Regulating Lawyer Advertising (hereinafter Summary of Record), App. H, p. 2. A survey of Florida adults commissioned by the Bar indicated that Floridians “have negative feelings about ⁶²⁷those attorneys who use direct mail advertising.” Magid Associates, Attitudes & Opinions Toward Direct Mail Advertising by Attorneys (Dec. 1987), Summary of Record, App. C(4), p. 6. Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. *Id.*, at 7. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is “designed to take advantage of gullible or unstable people”; 34% found such tactics “annoying or irritating”; 26% found it “an invasion of your privacy”; and 24% reported that it “made you angry.” *Ibid.* Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was “lower” as a result of receiving the direct mail. *Ibid.*

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like “Scavenger Lawyers” (The Miami Herald, Sept. 29, 1987) and “Solicitors Out of Bounds” (St. Petersburg Times, Oct. 26, 1987), newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. See Summary of Record, App. B, pp. 1–8 (excerpts from articles); see also Peltz, Legal Advertising—Opening Pandora’s Box, 19 Stetson L.Rev. 43, 116 (1989) (listing Florida editorials critical of direct-mail solicitation of accident victims in 1987, several of which are referenced in the record). The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was “appalled and angered by the brazen attempt” of a law firm to solicit him by letter shortly after he was

injured and his fiancée was killed in an auto accident. Summary of Record, App. I(1), p. 2. Another found it “‘despicable and inexcusable’” that a Pensacola lawyer wrote to his mother three days after his father’s funeral. *Ibid.* Another described how she was “‘astounded’” and then “‘very angry’” when ⁶²⁸she received a solicitation following a minor accident. *Id.*, at 3. Still another described as “‘beyond comprehension’” a letter his nephew’s family received the day of the nephew’s funeral. *Ibid.* One citizen wrote, “‘I consider the unsolicited contact from you after my child’s accident to be of the rankest form of ambulance chasing and in incredibly poor taste. . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind.’” *Ibid.*

[14] In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the Rule lacked “any factual basis,” Plaintiffs’ Motion for Summary Judgment and Supplementary Memorandum of Law in No. 92–370–Civ. (MD Fla.), p. 5—we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. In dissent, Justice KENNEDY complains that we have before us few indications of the sample size or selection procedures employed by Magid Associates (a nationally renowned consulting firm) and no copies of the actual surveys employed. See *post*, at 2384. As stated, we believe the evidence adduced by the Bar is sufficient to meet the standard elaborated in *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether; see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50–51, 106 S.Ct. 925, 930–931, 89 L.Ed.2d 29 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584–585, 111 S.Ct. 2456, 2469–2470, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and “sim-

ple common sense,” *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 1858, 119 L.Ed.2d 5 (1992). Nothing in *Edenfield*, a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more. After scouring the record, we are satisfied that the ban on direct-mail⁶²⁹ solicitation in the immediate aftermath of accidents, unlike the rule at issue in *Edenfield*, targets a concrete, nonspeculative harm.

In reaching a contrary conclusion, the Court of Appeals determined that this case was governed squarely by *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). Making no mention of the Bar’s study, the court concluded that “‘a targeted letter [does not] invade the recipient’s privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient’s legal affairs, not when he confronts the recipient with the discovery.’” 21 F.3d, at 1044, quoting *Shapero, supra*, 486 U.S., at 476, 108 S.Ct., at 1923. In many cases, the Court of Appeals explained, “this invasion of privacy will involve no more than reading the newspaper.” 21 F.3d, at 1044.

While some of *Shapero*’s language might be read to support the Court of Appeals’ interpretation, *Shapero* differs in several fundamental respects from the case before us. First and foremost, *Shapero*’s treatment of privacy was casual. Contrary to the dissent’s suggestions, *post*, at 2382, the State in *Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers’ invasions of privacy interests. See generally Brief for Respondent in *Shapero v. Kentucky Bar Assn.*, O.T.1987, No. 87–16. Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations. *Ibid.* Second, in contrast to this case, *Shapero* dealt with a broad ban on *all* direct-mail solicitations, whatever the time frame and whoever the recipient. Finally, the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State’s effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and

overreaching. 486 U.S., at 475, 108 S.Ct., at 1922–1923. Because the State did not make a privacy-based argument at all, its empirical showing on that issue was similarly infirm.

¹₆₃₀We find the Court’s perfunctory treatment of privacy in *Shapero* to be of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents. While it is undoubtedly true that many people find the image of lawyers sifting through accident and police reports in pursuit of prospective clients unpalatable and invasive, this case targets a different kind of intrusion. The Bar has argued, and the record reflects, that a principal purpose of the ban is “protecting the personal privacy and tranquility of [Florida’s] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma.” Brief for Petitioner 8; cf. Summary of Record, App. I(1) (citizen commentary describing outrage at lawyers’ timing in sending solicitation letters). The intrusion targeted by the Bar’s regulation stems not from the fact that a lawyer has learned about an accident or disaster (as the Court of Appeals notes, in many instances a lawyer need only read the newspaper to glean this information), but from the lawyer’s confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untargeted letter mailed to society at large is different in kind from a targeted solicitation; the untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Bar’s study.

Nor do we find *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), dispositive of the issue, despite any superficial resemblance. In *Bolger*, we rejected the Federal Government’s paternalistic effort to ban potentially “offensive” and “intrusive” direct-mail advertisements for contraceptives. Minimizing the

Government’s allegations of harm, we reasoned that “[r]ecipients of objectionable mailings . . . may ‘effectively avoid further bombardment of their sensibilities simply by averting their eyes.’” *Id.*, at 72, 103 S.Ct., at 2883, quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Com’n of N.Y.*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980), in turn quoting *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). We found that the “‘short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.’” 463 U.S., at 72, 103 S.Ct., at 2883 (ellipses in original), quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F.Supp. 880, 883 (SDNY), summarily aff’d, 386 F.2d 449 (CA2 1967). Concluding that citizens have at their disposal ample means of averting any substantial injury inhering in the delivery of objectionable contraceptive material, we deemed the State’s intercession unnecessary and unduly restrictive.

Here, in contrast, the harm targeted by the Bar cannot be eliminated by a brief journey to the trash can. The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens’ “offense” in the abstract, see *post*, at 2382–2383, but with the demonstrable detrimental effects that such “offense” has on the profession it regulates. See Brief for Petitioner 7, 14, 24, 28.² Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters’ contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former. We see no basis in *Bolger*, nor in the other, similar cases cited by the dissent, *post*, at 2382–2383, for dismissing the Bar’s assertions of harm, particularly ¹₆₃₂given the unrefuted empirical and anecdotal basis for the Bar’s conclusions.

2. Missing this nuance altogether, the dissent asserts apocalyptically that we are “unsettl[ing] leading First Amendment precedents,” *post*, at 2381, 2383–2384. We do no such thing. There is an obvious difference between situations in

which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism. The cases cited by the dissent, *post*, at 2382–2383, focus on the latter situation.

[15–17] Passing to *Central Hudson*’s third prong, we examine the relationship between the Bar’s interests and the means chosen to serve them. See *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S., at 480, 109 S.Ct., at 3034–3035. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In *Fox*, we made clear that the “least restrictive means” test has no role in the commercial speech context. *Ibid.* “What our decisions require,” instead, “is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends,” a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’ that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.” *Ibid.* (citations omitted). Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, n. 13, 113 S.Ct. 1505, 1510 n. 13, 123 L.Ed.2d 99 (1993), for example, we observed that the existence of “numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.”

Respondents levy a great deal of criticism, echoed in the dissent, *post*, at 2384–2386, at the scope of the Bar’s restriction on targeted mail. “[B]y prohibiting written communications to all people, whatever their state of mind,” respondents charge, the Rule “keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer’s advice.” Brief for Respondents 14. This criticism may be parsed into two components. First, the Rule does not distinguish between victims in terms of the severity of their injuries. According to respondents, the Rule is unconstitutionally overinclusive insofar as it bans targeted mailings⁶³³ even to citizens whose injuries or grief are relatively minor. *Id.*, at 15. Second, the Rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing

counsel and insurance adjusters—may be clamoring for victims’ attentions. Any benefit arising from the Bar’s regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents’ allegations of constitutional infirmity. We find little deficiency in the ban’s failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regulation that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are “severe” and some situations appropriate (and others, presumably, inappropriate) for grief, anger, or emotion, the Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. Unlike respondents, we do not see “numerous and obvious less-burdensome alternatives” to Florida’s short temporal ban. *Cincinnati*, *supra*, at 417, n. 13, 113 S.Ct., at 1510, n. 13. The Bar’s rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.

Respondents’ second point would have force if the Bar’s Rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted⁶³⁴ to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. See generally Rule 4–7.2(a), Rules Regulating The Florida Bar (“[A] lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television, and recorded mes-

sages the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4-7.4"); *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So.2d, at 461. These ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent, see *post*, at 2385. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding a lawyer when they need one. See, e.g., Summary of Record, App. C(4), p. 7; *id.*, App. C(5), p. 8. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. See, e.g., *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991); *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). This case, however,⁶³⁵ concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "subordinate position" of commercial speech in the scale of First

Amendment values. *Fox*, 492 U.S., at 477, 109 S.Ct., at 3033, quoting *Ohralik*, 436 U.S., at 456, 98 S.Ct., at 1918–1919.

[18] We believe that the Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

The judgment of the Court of Appeals, accordingly, is *Reversed*.

Justice KENNEDY, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. That principle has been understood since *Bates v. State Bar of Ariz.*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). The Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance. With all respect for the Court, in ⁶³⁶my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Mean-

while, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 766–767 [113 S.Ct. 1792, 1797–1798], 123 L.Ed.2d 543 (1993). If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care¹⁶³⁷ and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in enacting the speech restriction is a substantial one. *Ante*, at 2376. The State says two different interests meet this standard. The first is the interest “in protecting the personal privacy

and tranquility” of the victim and his or her family. Brief for Petitioner 8. As the Court notes, that interest has recognition in our decisions as a general matter; but it does not follow that the privacy interest in the cases the majority cites is applicable here. The problem the Court confronts, and cannot overcome, is our recent decision in *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct, in-person solicitations and direct-mail solicitations. *Shapero*, like this case, involved a direct-mail solicitation, and there the State recited its fears of “over-reaching and undue influence.” *Id.*, at 475, 100 S.Ct., at 1922. We found, however, no such dangers presented by direct-mail advertising. We reasoned that “[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded.” *Id.*, at 475–476, 100 S.Ct., at 1923. We pointed out that “[t]he relevant inquiry is not whether there exist potential clients whose ‘condition’ makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.” *Id.*, at 474, 100 S.Ct., at 1922. In assessing the substantiality of the evils to be prevented, we concluded that “the mode of communication makes all the difference.” *Id.*, at 475, 100 S.Ct., at 1922. The direct mail in *Shapero* did not present the justification for regulation of speech presented in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (a ¹⁶³⁸lawyer’s direct, in-person solicitation of personal injury business may be prohibited by the State). See also *Edenfield, supra* (an accountant’s direct, in-person solicitation of accounting business did implicate a privacy interest, though not one permitting state suppression of speech when other factors were considered).

To avoid the controlling effect of *Shapero* in the case before us, the Court seeks to declare that a different privacy interest is implicated. As it sees the matter, the substantial concern is that victims or their families will be offended by receiving a solici-

tion during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these “are classically not justifications validating the suppression of expression protected by the First Amendment.” *Carey v. Population Services Int’l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977). And in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), where we struck down a ban on attorney advertising, we held that “the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.” *Id.*, at 648.

We have applied this principle to direct-mail cases as well as with respect to general advertising, noting that the right to use the mails is protected by the First Amendment. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 76, 103 S.Ct. 2875, 2885–86, 77 L.Ed.2d 469 (1983) (REHNQUIST, J., concurring) (citing *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971)). In *Bolger*, we held that a statute designed to “shield[d] recipients of mail from materials that they are likely to find offensive” furthered an interest of “little weight,” noting that “we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.” 463 U.S., at 71, 103 S.Ct., at 2883 (citing *Carey*, *supra*, at 701, 97 S.Ct., at 2024–2025). It is only where an audience is captive that we will ⁶³⁹assure its protection from some offensive speech. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 542, 100 S.Ct. 2326, 2335–2336, 65 L.Ed.2d 319 (1980). Outside that context, “we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended.” *Bolger*, *supra*, at 72, 103 S.Ct., at 2883. The occupants of a household receiving mailings are not a captive audience, 463 U.S., at 72, 103 S.Ct., at 2883, and the asserted interest in preventing their offense

should be no more controlling here than in our prior cases. All the recipient of objectionable mailings need do is to take “the ‘short, though regular, journey from mail box to trash can.’” *Ibid.* (citation omitted). As we have observed, this is “an acceptable burden, at least so far as the Constitution is concerned.” *Ibid.* If these cases forbidding restrictions on speech that might be offensive are to be overruled, the Court should say so.

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the *amicus* brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from no other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise from an unethical or improper practice, the majority begs a most critical question by assuming that direct-mail solicitations constitute such a practice. The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to the extent the bar seeks to protect lawyers’ reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more (as *amicus* the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public’s opinion by suppressing speech ⁶⁴⁰that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban

advance that asserted state interest in a direct and material way. *Edenfield*, 507 U.S., at 771 [113 S.Ct., at 1800]. The burden of demonstrating the reality of the asserted harm rests on the State. *Ibid.* Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar (Bar), one of the adverse parties, and submitted to the District Court in this case. See *ante*, at 2377. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," *ante*, at 2377, but when examined, it is noteworthy for its incompetence. The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct-mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from ⁶⁴¹that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct-mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct mail (some of them favorable), excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic. Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State

seeks to suppress truthful and nondeceptive speech. See, e.g., *Edenfield*, 507 U.S., at 771–772 [113 S.Ct., at 1800–1801].

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. Indeed, when asked at oral argument what a "typical injured plaintiff get[s] in the mail," the Bar's lawyer replied: "That's not in the record . . . and I don't know the answer to that question." Tr. of Oral Arg. 25. Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat ⁶⁴²ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss, but our speech jurisprudence requires that it do so. *Central Hudson*, 447 U.S., at 569–571, 100 S.Ct., at 2353–2354; *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034–3035, 106 L.Ed.2d 388 (1989).

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, see *ante*, at 2380, but making such distinctions is not important in this analysis. Even were it significant, the

Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, see, *e.g.*, United States Sentencing Commission, Guidelines Manual § 1B1.1, comment., n. 1(b), (h), (j) (Nov. 1994), and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement. *Ante*, at 2380.

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.

Even as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents. ⁶⁴³The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it concedes the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services. Cf. *Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3-4, 84 S.Ct. 1113, 1115-1116, 12 L.Ed.2d 89 (1964).

The reasonableness of the State's chosen methods for redressing perceived evils can

be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried. Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed. See, *e.g.*, Rules Regulating the Florida Bar, Rule 4-1.5 (Statement of Client's Rights) (effective Jan. 1, 1993). The State's restriction deprives accident victims of information which may be critical to their right to make a claim for compensation for injuries. The telephone book and general advertisements may serve this purpose in part; but the direct solicitation ban will fall on those who most need legal representation: for those with minor injuries, the victims too ill informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement⁶⁴⁴ negotiations or evidentiary discussions with investigators for opposing parties. One survey reports that over a recent 5-year period, 68% of the American population consulted a lawyer. N.Y. Times, June 11, 1995, section 3, p. 1, col. 1. The use of modern communication methods in a timely way is essential if clients who make up this vast demand are to be advised and informed of all of their choices and rights in selecting an attorney. The very fact that some 280,000 direct-mail solicitations are sent to accident victims and their survivors in Florida each year is some indication of the efficacy of this device. Nothing in the Court's opinion demonstrates that these efforts do not serve some beneficial role. A solicitation letter is not a contract. Nothing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel, after an interview with one or more interested attorneys, can be deliberate and informed. And if

these communications reveal the social costs of the tort system as a whole, then efforts can be directed to reforming the operation of that system, not to suppressing information about how the system works. The Court's approach, however, does not seem to be the proper way to begin elevating the honor of the profession.

IV

It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct-mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information⁶⁴⁵ about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. I agree that if this amounts to mere "sermonizing," see *Shapero*, 486 U.S., at 490, 108 S.Ct., at 1930 (O'CONNOR, J., dissenting), the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients." *Ohralik*, 436 U.S., at 461, 98 S.Ct., at 1921.

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a newfound and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the

First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, 507 U.S., at 767 [113 S.Ct., at 1798]. By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.



515 U.S. 646, 132 L.Ed.2d 564

1⁶⁴⁶ **VERNONIA SCHOOL DISTRICT
47J, Petitioner,**

v.

Wayne ACTON, et ux., etc.

No. 94-590.

Argued March 28, 1995.

Decided June 26, 1995.

Student and his parents brought action against school district, challenging random urinalysis requirement for participation in interscholastic athletics. The United States District Court for the District of Oregon, Malcolm F. Marsh, J., upheld policy, 796 F.Supp. 1354, and student appealed. The Court of Appeals, Fernandez, J., 23 F.3d 1514, reversed and remanded, and certiorari review was sought. The Supreme Court, Justice Scalia, held that public school district's student athlete drug policy did not violate student's federal or state constitutional right to be free from unreasonable searches.

Vacated and remanded.

Justice Ginsburg, concurred and filed opinion.

Justice O'Connor dissented and filed opinion in which Justice Stevens and Souter, joined.

- (3) under such circumstances that it is the opinion of the State Disciplinary Board that the protection of the public and rehabilitation of the respondent would be best achieved by the issuance of a Formal Letter of Admonition or a Confidential Reprimand rather than by any other form of discipline.

Rule 4-206. Confidential Discipline; Contents

- (a) Formal Letters of Admonition and Confidential Reprimands shall contain a statement of the specific conduct of the respondent that violates Part IV, Chapter I of these Rules, shall state the name of the complainant, if any, and shall state the reasons for issuance of such confidential discipline.
- (b) A Formal Letter of Admonition shall also contain the following information:
 - (1) the right of the respondent to reject the Formal Letter of Admonition under Rule 4-207;
 - (2) the procedure for rejecting the Formal Letter of Admonition under Rule 4-207; and
 - (3) the effect of an accepted Formal Letter of Admonition in the event of a third or subsequent imposition of discipline.
- (c) A Confidential Reprimand shall also contain information concerning the effect of the acceptance of such reprimand in the event of a third or subsequent imposition of discipline.

Rule 4-207. Letters of Formal Admonition and Confidential Reprimands; Notification and Right of Rejection

In any case where the State Disciplinary Board votes to impose discipline in the form of a Formal Letter of Admonition or a Confidential Reprimand, such vote shall constitute the State Disciplinary Board's finding of Probable Cause. The respondent shall have the right to reject, in writing, the imposition of such discipline.

- (a) Notification to respondent shall be as follows:
 - (1) in the case of a Formal Letter of Admonition, the letter of admonition;
 - (2) in the case of a Confidential Reprimand, the letter notifying the respondent to appear for the administration of the reprimand; sent to the respondent at his or her address as reflected in the membership records of the State Bar of Georgia, via certified mail, return receipt requested.
- (b) Rejection by respondent shall be as follows:
 - (1) in writing, within 30 days of notification; and
 - (2) sent to the State Disciplinary Board via any of the methods authorized under Rule 4-203.1 (c) and directed to the Clerk of the State Disciplinary Boards at the current headquarters address of the State Bar of Georgia.
- (c) If the respondent rejects the imposition of a Formal Letter of Admonition or Confidential Reprimand, the Office of the General Counsel may file a formal complaint with the Clerk of the Supreme Court of Georgia unless the State Disciplinary Board reconsiders its decision.
- (d) Confidential Reprimands shall be administered before the State Disciplinary Board by the Chair or his designee.

Rule 4-208. Confidential Discipline; Effect in Event of Subsequent Discipline

In the event of a subsequent disciplinary proceeding, the confidentiality of the imposition of confidential discipline shall be waived and the Office of the General Counsel may use such information as aggravation of discipline.

Rule 4-208.1. Notice of Discipline

- (a) In any case where the State Disciplinary Board finds Probable Cause, the State Disciplinary Board may issue a Notice of Discipline requesting that the Supreme Court of Georgia impose any level of public discipline authorized by these Rules.
- (b) Unless the Notice of Discipline is rejected by the respondent as provided in Rule 4-208.3, (1) the respondent shall be in default; (2) the respondent shall have no right to any evidentiary hearing; and (3) the respondent shall be subject to such discipline and further proceedings as may be determined by the Supreme Court of Georgia. The Supreme Court of Georgia is not bound by the State Disciplinary Board's recommendation and may impose any level of discipline it deems appropriate.

Rule 4-208.2. Notice of Discipline; Contents; Service

- (a) The Notice of Discipline shall include:
 - (1) the Rules that the State Disciplinary Board found the respondent violated;
 - (2) the allegations of facts that, if unrebutted, support the finding that such Rules have been violated;
 - (3) the level of public discipline recommended to be imposed;
 - (4) the reasons why such level of discipline is recommended, including matters considered in mitigation and matters considered in aggravation, and such other considerations deemed by the State Disciplinary Board to be relevant to such recommendation;
 - (5) the entire provisions of Rule 4-208.3 relating to rejection of a Notice of Discipline. This may be satisfied by attaching a copy of the Rule to the Notice of Discipline and referencing the same in the notice;
 - (6) a copy of the Memorandum of Grievance or written description pursuant to Bar Rule 4-202 (a); and
 - (7) a statement of any prior discipline imposed upon the respondent, including confidential discipline under Rules 4-205 to 4-208.
- (b) The Notice of Discipline shall be filed with the Clerk of the Supreme Court of Georgia, and a copy of the Notice of Discipline shall be served upon the respondent pursuant to Rule 4-203.1.
- (c) The Office of the General Counsel shall file documents evidencing service with the Clerk of the Supreme Court of Georgia.
- (d) The level of disciplinary sanction in any Notice of Discipline rejected by the respondent or the Office of the General Counsel shall not be binding on the Special Master, the State Disciplinary Board or the Supreme Court of Georgia in subsequent proceedings in the same matter.

Rule 4-208.3. Rejection of Notice of Discipline

- (a) In order to reject the Notice of Discipline, the respondent or the Office of the General Counsel must file a Notice of Rejection of the Notice of Discipline with the Clerk of the Supreme Court of Georgia within 30 days following service of the Notice of Discipline.
- (b) Any Notice of Rejection by the respondent shall be served upon the opposing party. In accordance with Rule 4-204.3 if the respondent has not previously filed a sworn response to the Notice of Investigation the rejection must include a sworn response in order to be considered valid. The respondent must also file a copy of such written response with the Clerk of the Supreme Court of Georgia at the time of filing the Notice of Rejection.
- (c) The timely filing of a Notice of Rejection shall constitute an election for the matter to proceed pursuant to Rule 4-208.4 et seq.

Rule 4-208.4. Formal Complaint Following Notice of Rejection of Discipline

- (a) The Office of the General Counsel shall file with the Clerk of the Supreme Court of Georgia a formal complaint and a Petition for Appointment of Special Master within 30 days following the filing of a Notice of Rejection. The Notice of Discipline shall operate as the notice of finding of Probable Cause by the State Disciplinary Board.
- (b) The Office of the General Counsel may obtain extensions of time for the filing of the formal complaint from the Chair of the State Disciplinary Board or his designee.
- (c) After the rejection of a Notice of Discipline and prior to the time of the filing of the formal complaint, the State Disciplinary Board may reconsider the grievance and take appropriate action.

Rule 4-209. Docketing by Supreme Court; Appointment of Special Master; Challenges to Special Master

- (a) Upon receipt of a notice of finding of Probable Cause, a petition for appointment of a Special Master and a formal complaint, the Clerk of the Supreme Court of Georgia shall file the matter in the records of the Court, give the matter a Supreme Court of Georgia docket number, and notify the Coordinating Special Master that appointment of a Special Master is appropriate. In those proceedings where a Notice of Discipline has been filed, the notice of finding of Probable Cause need not be filed.
- (b) Within a reasonable time after receipt of a petition for appointment of a Special Master or notification that a Special Master previously appointed has been disqualified, withdrawn, or is otherwise unable to serve, the Coordinating Special Master shall appoint a Special Master to conduct formal disciplinary proceedings in such complaint. The Coordinating Special Master shall select a Special Master from the list approved by the Supreme Court of Georgia.
- (c) The Clerk of the Supreme Court shall serve the signed Order Appointing Special Master on the Office of the General Counsel of the State Bar of Georgia. Upon notification of the appointment of a Special Master, the State Bar of Georgia shall immediately serve the respondent with the order of appointment of a Special Master and with its formal complaint as hereinafter provided.
- (d) Within 10 days of service of the notice of appointment of a Special Master, the respondent and the State Bar of Georgia may file any and all objections or challenges either of them may have to the competency, qualifications or impartiality of the Special Master with the Coordinating Special Master. The party filing such objections or challenges must also serve a copy of the objections or challenges upon the opposing party and the Special Master, who may respond to such objections or challenges. Within a reasonable time, the Coordinating Special Master shall consider the challenges and the responses of respondent, the State Bar of Georgia, and the Special Master, if any, determine whether the Special Master is disqualified and notify the parties, the Clerk of the Supreme Court of Georgia and the Special Master of the decision. Exceptions to the Coordinating Special Master's denial of disqualification are subject to review by the Supreme Court of Georgia at the time the record in the matter is filed with the Court pursuant to Rule 4-216 (e). If a Special Master is disqualified, appointment of a successor Special Master shall proceed as provided in this Rule.

Rule 4-209.1. Coordinating Special Master

- (a) The Supreme Court of Georgia shall appoint a lawyer to serve as the Coordinating Special Master for disciplinary cases.
- (b) The Supreme Court of Georgia annually shall appoint up to 20 lawyers to serve as Special Masters in disciplinary cases. The Court may reappoint lawyers appointed in prior years, although it generally is preferable for a lawyer to serve as a Special Master for no more than five consecutive years. When a case is assigned to a lawyer appointed as Special Master, such lawyer shall continue to serve as Special Master in that case until final disposition, unless the Coordinating Special Master or the Court directs otherwise, irrespective of whether such lawyer is reappointed to serve as Special Master for another year.
- (c) The Coordinating Special Master and Special Masters shall serve at the pleasure of the Supreme Court of Georgia.
- (d) No member of the State Disciplinary Board, State Disciplinary Review Board, Special Master Compensation Commission, or Executive Committee of the State Bar of Georgia shall be appointed to serve as Coordinating Special Master or as a Special Master.
- (e) A list of the lawyers appointed by the Supreme Court of Georgia as Special Masters shall be published on the website of the State Bar of Georgia and annually in a regular publication of the State Bar of Georgia.
- (f) Training for Special Masters is expected, and the Coordinating Special Master shall be responsible for the planning and conduct of training sessions, which the State Bar of Georgia shall make available without cost to Special Masters. At a minimum, a lawyer appointed for the first time as a Special Master should attend a training session within six months of his appointment. The failure of a Special Master to complete the minimum required training session shall not be a basis for a motion to disqualify a Special Master.
- (g) A Special Master (including the Coordinating Special Master) shall be disqualified to serve in a disciplinary case when circumstances exist, which, if the Special Master were a judge, would require the recusal of the Special Master under the Code of Judicial Conduct. In the event that the Coordinating Special Master is disqualified in any case, the Supreme Court of Georgia shall assign the case to a Special Master, and the Court shall designate another Special Master to act as Coordinating Special Master for purposes of that case only.

Rule 4-209.2. Special Masters

At any time after the State Disciplinary Board finds Probable Cause, the Office of the General Counsel may dismiss the proceeding with the consent of the Chair or Vice-Chair of the State Disciplinary Board or with the consent of any three members of the State Disciplinary Board.

Rule 4-212. Answer of Respondent; Discovery

- (a) The respondent shall file and serve his answer to the formal complaint of the State Bar of Georgia pursuant to Rule 4-221 (b) within 30 days after service of the formal complaint. If the respondent fails to answer or to obtain an extension of time for his answer, the facts alleged and violations charged in the formal complaint shall be deemed admitted. In the event the respondent's answer fails to address specifically the issues raised in the formal complaint, the facts alleged and violations charged in the formal complaint and not specifically addressed in the answer shall be deemed admitted. A respondent may obtain an extension of time not to exceed 15 days to file the answer from the Special Master. Extensions of time for the filing of an answer shall not be routinely granted.
- (b) The pendency of objections or challenges to one or more Special Masters shall provide no justification for a respondent's failure to file his answer or for failure of the State Bar of Georgia or the respondent to engage in discovery.
- (c) Both parties to the disciplinary proceeding may engage in discovery under the rules of practice and procedure then applicable to civil cases in the State of Georgia.
- (d) In lieu of filing an answer to the formal complaint of the State Bar of Georgia, the respondent may submit to the Special Master a Petition for Voluntary Discipline as provided in Rule 4-227 (c). Each such petition shall contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these Rules sufficient to authorize the imposition of discipline. As provided in Rule 4-227 (c) (1), the Special Master shall allow Bar counsel 30 days within which to respond.

Rule 4-213. Evidentiary Hearing

- (a) Within 90 days after the filing of respondent's answer to the formal complaint or the expiration of the time for filing of the answer, whichever is later, the Special Master shall proceed to hear the case. The evidentiary hearing shall be reported and transcribed at the expense of the State Bar of Georgia. When the hearing is complete, the Special Master shall proceed to make findings of fact, conclusions of law and a recommendation of discipline and file a report with the Clerk of the State Disciplinary Boards as hereinafter provided. Alleged errors in the hearing may be reviewed by the Supreme Court of Georgia when the findings and recommendations of discipline are filed with the Court. There shall be no interlocutory appeal of alleged errors in the hearing.
- (b) Upon respondent's showing of necessity and financial inability to pay for a copy of the transcript, the Special Master shall order the State Bar of Georgia to purchase a copy of the transcript for respondent.

Rule 4-214. Report of the Special Master

- (a) Unless the Coordinating Special Master extends the deadline for good cause, the Special Master shall prepare a report within 45 days from receipt of the transcript of the evidentiary hearing. Failure of the Special Master to issue the report within 45 days shall not be grounds for dismissal. The report shall contain the following:
 - (1) findings of fact on the issues raised by the formal complaint;
 - (2) conclusions of law on the issues raised by the pleadings of the parties; and
 - (3) a recommendation of discipline.
- (b) The Special Master shall file his or her original report and recommendation with the Clerk of the State Disciplinary Boards and shall serve a copy on the respondent and counsel for the State Bar of Georgia pursuant to Rule 4-203.1.
- (c) The Clerk of the State Disciplinary Boards shall file the original record in the case directly with the Supreme Court of Georgia, unless any party files with the Clerk a request for review by the State Disciplinary Review Board and exceptions to the report within 30 days of the date the report is filed as provided in Rule 4-216 et seq. The Clerk shall inform the State Disciplinary Review Board when a request for review and exceptions are filed.
- (d) In the event any party requests review, the responding party shall file a response to the exceptions within 30 days of the filing. Within 10 days after the receipt of a response or the expiration of the time for responding, the Clerk shall transmit the record in the case to the State Disciplinary Review Board.

Rule 4-215. Powers and Duties of the State Disciplinary Review Board

In accordance with these Rules, the State Disciplinary Review Board shall have the following powers and duties:

- (a) to review reports of Special Masters, and to recommend to the Supreme Court of Georgia the imposition of punishment and discipline or dismissal of the complaint;
- (b) to adopt forms for notices and any other written instruments necessary or desirable under these Rules;
- (c) to prescribe its own rules of conduct and procedure;
- (d) to receive Notice of Reciprocal Discipline and to recommend to the Supreme Court of Georgia the imposition of punishment and discipline pursuant to Bar Rule 9.4 (b) (3); and
- (e) to administer State Disciplinary Review Board reprimands.

Rule 4-216. Proceedings Before the State Disciplinary Review Board

- (a) Upon receipt of the record and exceptions to the report of the Special Master pursuant to Rule 4-214, the State Disciplinary Review Board shall consider the record, review findings of fact and conclusions of law, and determine whether a recommendation of disciplinary action will be made to the Supreme Court of Georgia and the nature of such recommended discipline. The findings of fact made by a

- (a) The Coordinating Special Master and the Special Masters shall be paid by the State Bar of Georgia from the general operating fund at rates to be set by the Supreme Court of Georgia, which the Court may adjust from time to time.
- (b) To advise the Supreme Court of Georgia with respect to the compensation of the Coordinating Special Master and Special Masters, the Court shall appoint a Special Master Compensation Commission, which shall consist of the current Treasurer of the State Bar of Georgia; the second, third, and fourth immediate past presidents of the State Bar of Georgia, unless any such past president should decline to serve; and such other persons as the Court may designate. The Commission shall make annual recommendations to the Court about the rate to be paid to the Coordinating Special Master and the rate to be paid to the Special Masters, and the Commission shall report such recommendations to the Court no later than January 1 of each year.

Rule 4-209.3 Powers and Duties of the Coordinating Special Master

The Coordinating Special Master shall have the following powers and duties:

- (a) to establish requirements for, conduct, and supervise Special Master training;
- (b) to assign cases to Special Masters from the list provided in Rule 4-209 (b);
- (c) to exercise all of the powers and duties provided in Rule 4-210 when acting as a Special Master under paragraph (h) below;
- (d) to monitor and evaluate the performance of Special Masters and to submit a report to the Supreme Court of Georgia regarding such performance annually;
- (e) to remove Special Masters for such cause as may be deemed proper by the Coordinating Special Master;
- (f) to fill all vacancies occasioned by incapacity, disqualification, recusal, or removal;
- (g) to administer Special Master compensation, as provided in Rule 4-209.2 (b);
- (h) to hear pretrial motions when no Special Master is serving;
- (i) to perform all other administrative duties necessary for an efficient and effective hearing system;
- (j) to allow a late filing of the respondent's answer where there has been no final selection of a Special Master within 30 days of service of the formal complaint upon the respondent;
- (k) to receive and pass upon challenges and objections to the appointment of Special Masters; and
- (l) to extend the time for a Special Master to file a report, in accordance with Rule 4-214 (a).

Rule 4-210. Powers and Duties of Special Masters

In accordance with these Rules a duly appointed Special Master shall have the following powers and duties:

- (a) to exercise general supervision over assigned disciplinary proceedings, including emergency suspension cases as provided in Rule 4-108, and to perform all duties specifically enumerated in these Rules;
- (b) to rule on all questions concerning the sufficiency of the formal complaint;
- (c) to encourage negotiations between the State Bar of Georgia and the respondent, whether at a pretrial meeting set by the Special Master or at any other time;
- (d) to receive and evaluate any Petition for Voluntary Discipline filed after the filing of a formal complaint;
- (e) to grant continuances and to extend any time limit provided for herein as to any pending matter subject to Rule 4-214 (a);
- (f) to apply to the Coordinating Special Master for leave to withdraw and for the appointment of a successor in the event that he becomes incapacitated or otherwise unable to perform his duties;
- (g) to hear, determine and consolidate action on the complaints, where there are multiple complaints against a respondent growing out of different transactions, whether they involve one or more complainants, and to make recommendations on each complaint as constituting a separate offense;
- (h) to sign subpoenas and to exercise the powers described in Rule 4-221 (c);
- (i) to preside over evidentiary hearings and to decide questions of law and fact raised during such hearings;
- (j) to make findings of fact and conclusions of law and a recommendation of discipline as hereinafter provided and to submit his findings for consideration by the Supreme Court of Georgia in accordance with Rule 4-214;
- (k) to exercise general supervision over discovery by parties to disciplinary proceedings and to conduct such hearings and sign all appropriate pleadings and orders pertaining to such discovery as are provided for by the law of Georgia applicable to discovery in civil cases; and
- (l) in disciplinary cases, to make a recommendation of discipline, and in emergency suspension cases a recommendation as to whether the respondent should be suspended pending further disciplinary proceedings.

Rule 4-211. Formal Complaint; Service

1. Within 30 days after a finding of Probable Cause, the Office of the General Counsel shall file a formal complaint that specifies with reasonable particularity the acts complained of and the grounds for disciplinary action. A copy of the formal complaint shall be served upon the respondent after appointment of a Special Master. In those cases where a Notice of Discipline has been filed and rejected, the filing of the formal complaint shall be governed by the time period set forth in Rule 4-208.4. The formal complaint shall be served pursuant to Rule 4-203.1.
2. Reserved.
3. At all stages of the proceeding, both the respondent and the State Bar of Georgia may be represented by counsel. Counsel representing the State Bar of Georgia shall be authorized to prepare and sign notices, pleadings, motions, complaints, and certificates for and in behalf of the State Bar of Georgia and the State Disciplinary Board.

Rule 4-211.1 Dismissal after Formal Complaint

In the Supreme Court of Georgia

Decided: July 6, 2022

S22Y0802. IN THE MATTER OF GLEN ROY FAGAN.

PER CURIAM.

This disciplinary matter is before the Court on the report and recommendation of Special Master Adam M. Hames, who recommends that respondent Glen Roy Fagan (State Bar No. 253944) be disbarred based on his violations of Rules 1.7, 1.8 (b), 1.15 (I), 8.4 (a) (4), and 9.3 of the Georgia Rules of Professional Conduct found in Bar Rule 4-102 (d). Because Fagan did not answer or otherwise respond to the formal complaint, which was properly served by publication, the Special Master granted the State Bar's motion for default pursuant to Bar Rule 4-212 (a), and the facts as set out in the formal complaint were deemed admitted. See *In the Matter of Wadsworth*, 312 Ga. 159, 159 (861 SE2d 104) (2021). In addition, the Special Master determined, as an initial matter, that

while Fagan, who became a member of the State Bar in 2000, resigned his membership in the State Bar before the complaint giving rise to this matter was filed with the Office of General Counsel, he was still subject to these disciplinary proceedings. See Bar Rule 9.4 (a) (providing that “[a]ny lawyer admitted to practice law in this jurisdiction, including any formerly admitted lawyer with respect to acts committed prior to resignation . . . is subject to the disciplinary jurisdiction of the State Bar of Georgia”); *In the Matter of Fry*, 300 Ga. 862, 865 (800 SE2d 514) (2017) (concluding that allowing a resignation, in the absence of disbarment, “would leave [a lawyer’s] disciplinary record completely clean, and if he chose to apply for admission in other jurisdictions in future years, he would be able to truthfully report that he has no disciplinary record in Georgia”). See also Bar Rule 1-108 (e) (“Resignation shall not be a bar to institution of subsequent disciplinary proceedings for any conduct of the resigned person occurring prior to the resignation. If the penalty imposed on the resigned member is disbarment or suspension, the status of the member shall be changed from

‘resigned member’ to that of a person so disciplined.”).

The facts as set forth in the Special Master’s report are as follows. Fagan was employed as an associate general counsel by U.S. Xpress, Inc. (“USX”) in Tennessee from August 2015 until February 2019, and at all relevant times, he was also registered as in-house counsel to practice law in Tennessee. As part of his employment with USX, Fagan oversaw employment-related lawsuits, administrative charges, and complaints and allegations of employee misconduct. On April 30, 2018, Fagan falsified in its entirety an Equal Employment Opportunity Commission (“EEOC”) complaint allegedly filed by an individual named Karen Sawyer; on May 2, 2018, he incorporated the law firm of Kirk James and Associates, LLC (“Kirk James”); and on August 27, 2018, he communicated to his supervisor that he attended a mediation in the Sawyer matter and also created a confidential settlement agreement and general release in the matter. Fagan then signed the settlement agreement and general release on behalf of himself and Sawyer, whose signature he forged, and on August 28, 2018, he instructed

USX to issue payment for \$27,000 to Kirk James for the Sawyer settlement and provided USX with a W-9 form for Kirk James. Fagan then deposited the \$27,000 settlement check into the account of Kirk James and converted the money to his own use.

In addition, on January 29, 2019, Fagan signed a confidential settlement agreement and general release purporting to be initialed and signed by Virginia Ladd to settle her claim against USX for \$14,000, and then forged Ladd's initials and signature on the settlement agreement. On the same day, Fagan emailed an employee with USX to authorize the disbursement of funds to Kirk James, the purported firm representing Ladd; USX then issued a check in the amount of \$14,000 payable to Kirk James; and Fagan deposited the check into Kirk James's account and converted the money to his own use.

On February 1, 2019, Fagan announced that he was resigning from his position with USX to accept a position with another company in Atlanta, Georgia. On February 12, 2019, he signed and filed a position statement with the EEOC on the Ladd case, even

though the case was allegedly settled; on February 14, 2019, Fagan met with employees at USX regarding his cases and listed the Ladd case as pending with a note that he submitted the position statement to the EEOC; and on February 15, 2019, he stopped working for USX. On August 20, 2019, the EEOC contacted USX regarding settling the Ladd case, and upon review, USX became aware of Fagan's misconduct in that case, as well as in the Sawyer case. USX filed a complaint with the Tennessee Board of Responsibility in October 2019, and after USX filed its complaint, Fagan entered into a promissory note with USX, paying USX \$45,243.29, which included full repayment of the \$41,000 from the Ladd and Sawyer settlements, plus interest. Fagan resigned his membership with the Georgia Bar before it received USX's complaint in this matter, and thereafter, he failed to respond to disciplinary authorities' requests for information in this disciplinary proceeding.

The Special Master determined that Fagan admitted through his default to the State Bar's allegations that he violated Rule 1.7

(a), because his own interests materially and adversely affected his representation of USX; Rule 1.8 (b), by using information gained in his professional relationship with USX to the disadvantage of USX; and Rule 1.15 (I), when he retained and misappropriated settlement funds paid out by USX and failed to disburse to the proper parties the settlement funds paid out by USX. The Special Master stated that Fagan also admitted violating Rule 8.4 (a) (4) when he (1) falsified a complaint allegedly filed by an employee of USX; (2) entered into fraudulent settlements on behalf of USX; (3) falsified documents, including but not limited to settlement documents in matters he was overseeing; (4) misled USX regarding the status of matters he was overseeing; (5) forged signatures of the complaints on settlement agreements and settlement checks; (6) incorporated a law firm, Kirk James, and instructed USX to disburse settlement funds for falsified settlements to this law firm; (7) misled USX into disbursing settlement funds in the amount of \$41,000 to Kirk James; and (8) retained settlement funds paid out by USX. The Special Master also stated that Fagan admitted violating Rule 9.3 when he

failed to respond to disciplinary authorities.

Finally, the Special Master stated that Fagan admitted violating Rule 4.1 (a), by falsely representing to USX that he had settled claims and falsely representing to USX the status of matters he was overseeing. However, the Special Master determined that USX was not a “third person,” as contemplated in Rule 4.1 (a), but rather Fagan’s client, and although Fagan made false statements to other third parties, the State Bar’s allegation was specifically that he had falsely stated to USX (i.e., his client) that he settled claims and provided false status reports on his cases. Accordingly, based upon the plain language of Rule 4.1 (a) and the specific allegation in the State Bar’s complaint, the Special Master concluded that this admission provided no basis for a sanction. The Special Master noted that the maximum sanction for a single violation of Rules 1.7, 1.8 (b), 1.15 (I) and 8.4 (a) (4) is disbarment, while the maximum sanction for a violation of Rule 9.3 is a public reprimand.

In considering the appropriate sanction, the Special Master considered the ABA Standards for Imposing Lawyer Sanctions, see

In the Matter of Morse, 266 Ga. 652, 653 (470 SE2d 232) (1996), and the primary purposes of disciplinary matters, including “to protect the public from attorneys who are not qualified to practice law due to incompetence or unprofessional conduct,” *In the Matter of Skandalakis*, 279 Ga. 865, 866 (621 SE2d 750) (2005), and the protection of the public’s confidence in the legal system, see *In the Matter of Blich*, 288 Ga. 690, 692 (706 SE2d 461) (2011). The Special Master determined that Fagan violated a duty to his client and to the legal profession; that he acted knowingly; and that while he had repaid the misappropriated money, with interest, to his client, the potential injury could have been significant. See ABA Standard 3.0. Moreover, the Special Master noted that pursuant to ABA Standard 4.11, “[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client,” and that disbarment is also appropriate when a “lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.” ABA Standard

5.11 (b).

As for aggravating factors, the Special Master concluded that the State Bar had established that Fagan acted with a dishonest and selfish motive, ABA Standard 9.22 (b); engaged in a pattern of misconduct resulting in multiple offenses, ABA Standard 9.22 (c); and had substantial experience in the practice of law, ABA Standard 9.22 (i). In addition, the Special Master concluded that Fagan engaged in illegal conduct, including “theft, forgery, and wire fraud at a minimum.” ABA Standard 9.22 (k). See *In the Matter of Hunt*, 304 Ga. 635, 643 (820 SE2d 716) (2018) (reciting that the Special Master had concluded that ABA Standard 9.22 (k) applied where “[b]ased on the admitted facts, a case of theft by fiduciary would not be difficult to prove”). Indeed, as the Special Master noted, based on the admitted facts, “the potential laundry list of criminal charges [Fagan] could have, and may still face, is substantial,” and it is not clear to this Court why Fagan apparently has not been criminally prosecuted.

As to mitigation, the Special Master concluded that Fagan

admitted the facts and rule violations as alleged, but “since the potential sanction . . . depend[ed] on matters not required to be pled in the complaint,” Fagan nonetheless should have the opportunity to submit evidence in mitigation, even though he had defaulted by failing to timely answer the formal complaint. The Special Master stated that in his view, “a default under the Bar Rules is similar to a default judgment” where the defendant has “admit[ted] each and every material allegation of the complaint, except as to the amount of damages suffered.” The Special Master thus “reached out” on his own to Fagan by emailing him and asked Fagan if he wanted to submit evidence of mitigating circumstances in this case. Fagan responded by email, stated that he “sincerely appreciate[d] the offer,” mentioned some mitigating factors, and said that he was “not requesting a hearing with respect to mitigation” and did “not plan on ever returning to the practice of law.” Based on Fagan’s emailed response, the Special Master determined that although Fagan could have presented evidence of mitigating factors, he waived his right to do so. The Special Master also concluded that, in any event, Fagan’s

actions in this matter warranted a severe punishment.¹

In sum, the Special Master concluded that Fagan used his position as in-house counsel to defraud and swindle his client out of a substantial amount of money, and that in doing so he violated his duties to his client and to the legal profession. Thus, the Special Master recommended that Fagan be disbarred. See *In Matter of Cheatham*, 304 Ga. 645, 646 (820 SE2d 668) (2018) (disbarring lawyer who converted client funds to his own use and failed to respond to disciplinary authorities); *In the Matter of Snipes*, 303 Ga. 800, 801 (815 SE2d 54) (2018) (disbarring lawyer who settled client's

¹ We note that it is possible for a Special Master to open default in certain circumstances. See OCGA § 9-11-55 (b) (provision for opening default); Bar Rule 4-221.2 (b) ("In all proceedings under this Chapter occurring after a finding of Probable Cause as described in Rule 204.4, the procedures and rules of evidence applicable in civil cases under the laws of Georgia shall apply"); *In the Matter of Turk*, 267 Ga. 30, 30 (471 SE2d 842) (1996) (citing former Rule 4-221 (e) (2), which has since been moved to Rule 4-221.2 (b), for the proposition that "OCGA § 9-11-55 (b) applies in disciplinary proceedings"). But the Bar Rules do not give the Special Master authority to sua sponte invite and receive any evidence, including mitigation, when a party is currently in default. See Bar Rule 4-208.1 (b) (unless Notice of Discipline is rejected, respondent shall be in default and "shall have no right to any evidentiary hearing"). We therefore conclude that the Special Master should not have solicited such evidence by email, but agree with the Special Master's ultimate conclusion that Fagan waived his right to present mitigating evidence in this matter by virtue of his default.

case without client's knowledge and converted funds to his own personal use and failed to respond to disciplinary authorities); *In the Matter of Mathis*, 297 Ga. 867, 868 (778 SE2d 793) (2015) (disbarring lawyer who misappropriated client funds that had been wired to him in advance of real estate closing and failed to respond to disciplinary authorities); *In the Matter of Jones*, 296 Ga. 151, 152 (765 SE2d 360) (2014) (disbarring lawyer who absconded with client funds and failed to respond to disciplinary authorities); *In the Matter of Utley*, 270 Ga. 88, 88 (765 SE2d 360) (1998) (disbarring lawyer who deliberately misappropriated estate funds and failed to respond to disciplinary authorities).

Based on our review of the record, we agree with the Special Master that Fagan has violated Rules 1.7, 1.8 (b), 1.15 (I), 8.4 (a) (4), and 9.3, and that disbarment is the appropriate sanction in this disciplinary matter. Accordingly, Glen Roy Fagan is disbarred. Fagan is reminded of his duties pursuant to Bar Rule 4-219 (b).

Disbarred. All the Justices concur.

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 in a writing signed by the client or prospective client. The agreement to arbitrate and the attorney's disclosures regarding arbitration must be set out in a separate paragraph, written in a font size at least as large as the rest of the contract, and separately initialed by the client and the lawyer.

(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

42 event of settlement, trial or appeal, litigation and other expenses
43 to be deducted from the recovery, and whether such expenses
44 are to be deducted before or after the contingent fee is
45 calculated.

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

48 (i) the outcome of the matter; and,

49 (ii) if there is a recovery showing:

50 (A) the remittance to the client;

51 (B) the method of its determination;

52 (C) the amount of the attorney fee; and

53 (D) if the attorney's fee is divided with another lawyer
54 who is not a partner in or an associate of the lawyer's
55 firm or law office, the amount of fee received by each
56 and the manner in which the division is determined.

57 (d) A lawyer shall not enter into an arrangement for, charge, or collect:

58 (1) any fee in a domestic relations matter, the payment or amount
59 of which is contingent upon the securing of a divorce or upon the
60 amount of alimony or support, or property settlement in lieu
61 thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

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

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

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

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a

reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

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

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

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

[5] An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should

not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] Paragraph (b) requires informed consent to an agreement to arbitrate disputes over fees and expenses. See Rule 1.0(l). In obtaining such informed consent, the lawyer should reveal to the client or prospective client the following: (1) in an arbitration, 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; (4) how the costs of arbitration compare to the costs of litigation in a public court, including the requirement that the arbitrator or arbitrators be compensated; and (5) who will bear the costs of arbitration. The lawyer should also inform the client or prospective client regarding the existence and operation of the State

Bar of Georgia's 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

[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. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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

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

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

- 21 c. A lawyer shall not prepare an instrument giving the lawyer or a person
22 related to the lawyer as parent, grandparent, child, grandchild, sibling, or
23 spouse any substantial gift from a client, including a testamentary gift,
24 except where the client is related to the donee.
- 25 d. Prior to the conclusion of representation of a client, a lawyer shall not make
26 or negotiate an agreement giving the lawyer literary or media rights to a
27 portrayal or account based in substantial part on information relating to the
28 representation.
- 29 e. A lawyer shall not provide financial assistance to a client in connection with
30 pending or contemplated litigation, except that:
- 31 1. a lawyer may advance court costs and expenses of litigation, the
32 repayment of which may be contingent on the outcome of the matter;
- 33 2. a lawyer representing a client unable to pay court costs and expenses
34 of litigation may pay those costs and expenses on behalf of the client;
35 or
- 36 3. a lawyer representing an indigent client pro bono, a lawyer
37 representing an indigent client through a nonprofit legal services or
38 public interest organization pro bono, or a lawyer representing an
39 indigent client through a law school clinical or pro bono program may

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

- (i) may not promise, assure or imply the availability of such
gifts prior to retention or as an inducement to continue the
client-lawyer relationship after retention;
- (ii) may not seek or accept reimbursement from the client, a
relative of the client or anyone affiliated with the client; and
- (iii) may not publicize or advertise a willingness to provide such
gifts to prospective clients.

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

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

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

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

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

62 The lawyer's disclosure shall include the existence and nature of all claims
63 or pleas involved and of the participation of each person in the settlement.

64 h. A lawyer shall not make an agreement prospectively limiting the lawyer's
65 liability to a client for malpractice unless permitted by law and the client is
66 independently represented by counsel in making the agreement, or settle a
67 claim for such liability with an unrepresented client or former client without
68 first advising that person in writing that independent representation is
69 appropriate in connection therewith. To the extent that agreements to
70 arbitrate disputes over a lawyer's liability for malpractice are enforceable, a
71 lawyer may enter into such an agreement with a client or a prospective client
72 if the client or prospective client gives informed consent in a writing signed
73 by the client or prospective client. The agreement to arbitrate and the
74 attorney's disclosures regarding arbitration must be set out in a separate
75 paragraph, written in a font size at least as large as the rest of the contract,
76 and separately initialed by the client and the lawyer.

77 i. A lawyer related to another lawyer as parent, grandparent, child, grandchild,
78 sibling or spouse shall not represent a client in a representation directly
79 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.

[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 through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

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

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

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

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

[9] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its

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

Settlement of Aggregated Claims

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

Agreements to Limit Liability

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

[12] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of

clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.

Arbitration

[12A] Paragraph (h) requires informed consent to an agreement to arbitrate malpractice claims. See Rule 1.0(l). In obtaining such informed consent, the lawyer should reveal to the client or prospective client the following: (1) in an arbitration the client or prospective client waives the right to a jury 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; (4) how the costs of arbitration compare to the costs of litigation in a public court, including the requirement that the arbitrator or arbitrators be compensated; and (5) who will bear the costs of arbitration. 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

[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

220 [14] Paragraph (j) states the traditional general rule that lawyers are prohibited
221 from acquiring a proprietary interest in litigation. This general rule, which has its
222 basis in the common law prohibition of champerty and maintenance, is subject to
223 specific exceptions developed in decisional law and continued in these rules, such
224 as the exception for reasonable contingent fees set forth in Rule 1.5 and the
225 exception for lawyer's fees and for certain advances of costs of litigation set forth
226 in paragraph (e).