



# State Bar of Georgia

## Disciplinary Rules & Procedures Committee

### AGENDA

January 10, 2020

Atlanta, Georgia

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## **B. Use of term ‘grievance’**

(Frederick)

1. *(Consider revising the definition of grievance, Rule 1.0(j), to include a matter under investigation even where the Office of the General Counsel has not received a written MOG form.)*
2. *(All rules that include the word “grievance” may need to be revised to distinguish between a grievance form and an investigation.)*

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## **C. Rule 1.0(e) and Rule 8.4**

(Haubenreich)

1. *(Chair Haubenreich would like the Committee to consider additional amendments to make the definition of conviction consistent in both rules.)*
  - i. Current GRPC 1.0
  - ii. GRPC 8.4

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## V. Adjourn

**2019-2020**

**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**

John G. Haubenreich, Atlanta 2020

**Vice Chairperson**

David S. Lipscomb, Lawrenceville 2020

**Members**

Harold Michael Bagley, Atlanta 2020

Paul T. Carroll, III, Rome 2020

J. Antonio DelCampo, Atlanta 2020

Erin H. Gerstenzang, Atlanta 2020

John Kendall Gross, Metter 2021

Patrick H. Head, Marietta 2021

R. Javoyne Hicks, Decatur 2021

William Dixon James, Decatur 2020

William James Keogh, III, Augusta 2020

Seth David Kirschenbaum, Atlanta 2020

Edward B. Krugman, Atlanta 2020

David Neal Lefkowitz, Athens 2020

Patrick E. Longan, Macon 2020

Jonathan B. Pannell, Savannah 2020

Jabu Mariette Sengova, Atlanta 2022

Roy M. Sobelson, Atlanta 2022

R. Gary Spencer, Atlanta 2020

Christian Joseph Steinmetz, III, Savannah 2020

Jeffrey S. Ward, Savannah 2022

Paige Reese Whitaker, Atlanta 2020

**Staff Liaison**

Paula J. Frederick , Atlanta 2020

Disciplinary Rules and Procedures Committee  
Meeting of September 19, 2019  
Atlanta, Georgia

MINUTES

Chair John Haubenreich called the meeting to order at 12:30 p.m.

**Attendance:**

Committee members: John G. Haubenreich, David Lipscomb, H. Michael Bagley (phone), Paul T. Carroll, II (phone), Patrick H. Head, R. Javoyne Hicks, William D. James, Edward B. Krugman, David N. Lefkowitz (phone), Patrick E. Longan, Jabu M. Sengova (phone), Roy M. Sobelson, R. Gary Spencer, and Hon. Paige Reese Whitaker.

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

Guests: Ben Greer, ITILS Chair, Wilmer “Buddy” Parker, Laurel Terry (phone), Ellyn Rosen (phone) Philip Whit Engle (phone)

**Approval of Minutes:**

The Committee approved the Minutes from the June 6, 2019 meeting.

**Informational Item:**

**Report from the Executive Committee’s Consideration of Rules**

David Lipscomb reported that the Executive Committee considered the Committee’s proposed revision to Rules 1.0(e) and 8.4(b) (definition of “conviction”) but declined to approve the proposal. Chair Haubenreich suggested additional amendments to make the definition consistent in both rules. The Committee agreed to review his proposed revisions to Rules 1.0(e) and 8.4(b) at its next meeting.

David Lipscomb reported that the Executive Committee approved all of the other proposals from the Committee’s January and June meetings.

**Action Items:**

**Rule 1.2**

The Committee voted to amend section (d) and add section (e) to allow Georgia lawyers to provide advice to clients regarding Georgia’s Hope Act, which will allow cannabis production in the state.

Ben Greer and other representatives from the International Trade in Legal Services Committee presented their proposal to add language to Rule 1.2 to help combat money laundering. After discussion the Committee voted to amend comment 9 to address ITILS's request.

#### **Client Assistance Program**

The Committee voted to change Consumer Assistance Program to Client Assistance Program in Rules 4-202, 4-204, 4-221.1, 4-222 and 4-224.

#### **Rule 4-228**

The Committee voted to amend section (h) and add section (k) to address fees and costs incurred by receivers.

#### **Use of term "grievance"**

Bar Counsel will email proposed changes to Rules 1.0, 9.3, 4-202, 4-203, 4-204, 4-204.1, 4-204.3, 4-208.2, 4-208.4, 4-222, 4-223, 4-224, and Client Security Fund Rule 10-106 for review. The Committee will discuss the changes at its next meeting.

The next meeting will be in January 2020.

Revisions as approved:

### **RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

- a. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- b. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- c. A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- d. A Except as provided in paragraph (e), a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in

such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

d.e. A lawyer may counsel or assist a client regarding conduct expressly permitted by Georgia or other applicable law, even if such conduct would be criminal under other law, provided that the lawyer counsels the client about the legal consequences of the client's proposed course of conduct.

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

## Comment

### Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4 (a) (1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4 (a) (2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should

also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a) (3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

#### Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and the client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Georgia Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

#### Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. A lawyer's knowledge may be inferred from the circumstances. See Rule 1.0(m). Thus, a lawyer may not evade the prohibition in 1.2(d) by ignoring the obvious. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue



assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16 (a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Georgia Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4 (a) (5).

#### **Rule 4-202. Receipt of Grievances; Initial Review by Bar Counsel**

(a) Grievances shall be filed in writing with the Office of the General Counsel of the State Bar of Georgia. In lieu of a Memorandum of Grievance the Office of the General Counsel may begin an investigation upon receipt of an Intake Form from the ~~Consumer~~ Client Assistance Program. All grievances must include the name of the complainant and must be signed by the complainant.

(b) The Office of the General Counsel may investigate conduct upon receipt of credible information from any source after notifying the respondent lawyer and providing a written

description of the information that serves as the basis for the investigation. The Office of the General Counsel may deliver the information it obtains to the State Disciplinary Board for initiation of a grievance under Rule 4-203 (2).

(c) The Office of the General Counsel shall be empowered to collect evidence and information concerning any grievance. The screening process may include forwarding a copy of the grievance to the respondent in order that the respondent may respond to the grievance.

(d) The Office of the General Counsel may request the Chair of the State Disciplinary Board to issue a subpoena as provided by OCGA § 24-13-23 requiring a respondent or a third party to produce documents relevant to the matter under investigation. Subpoenas shall be enforced in the manner provided at Rule 4- 221 (c).

(e) Upon completion of its screening of a grievance, the Office of the General Counsel shall be empowered to dismiss those grievances that do not present sufficient merit to proceed. Rejection of such grievances by the Office of the General Counsel shall not deprive the complaining party of any right of action he might otherwise have at law or in equity against the respondent.

(f) Those grievances that appear to allege a violation of Part IV, Chapter 1 of the Georgia Rules of Professional Conduct may be forwarded to the State Disciplinary Board pursuant to Bar Rule 4-204. In lieu of forwarding a matter to the State Disciplinary Board, the Office of the General Counsel may refer a matter to the Consumer Client Assistance Program so that it may direct the complaining party to appropriate resources.

#### **Rule 4-204. Investigation and Disposition by State Disciplinary Board-Generally**

(a) Each grievance that presents sufficient merit to proceed may be referred with a Notice of Investigation to the State Disciplinary Board for investigation and disposition in accordance with its rules. The Clerk of the State Disciplinary Boards shall assign a lawyer member of the State Disciplinary Board to be responsible for the investigation. The Office of the General Counsel shall simultaneously assign a staff investigator to assist the State Disciplinary Board member with the investigation. If the investigation of the State Disciplinary Board establishes Probable Cause to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of these rules, it shall:

- (1) issue a Formal Letter of Admonition;

- (2) issue a Confidential Reprimand;
- (3) issue a Notice of Discipline;
- (4) refer the case to the Supreme Court of Georgia for hearing before a Special Master and file a formal complaint with the Supreme Court of Georgia, all as hereinafter provided; or
- (5) refer a respondent for evaluation by an appropriate medical or mental health professional pursuant to Bar Rule 4-104 upon the State Disciplinary Board's determination that there is cause to believe the lawyer is impaired.

All other cases may be either dismissed by the State Disciplinary Board or referred to the ~~Consumer-Client~~ Assistance Program so that it may direct the complaining party to appropriate resources.

- (b) The primary investigation shall be conducted by the member of the State Disciplinary Board responsible for the investigation, assisted by the staff of the Office of the General Counsel, upon request of the State Disciplinary Board member. The Board of Governors of the State Bar of Georgia shall fund the Office of the General Counsel so that the Office of the General Counsel will be able to adequately investigate and prosecute all cases.

#### **Rule 4-221.1 Confidentiality of Investigations and Proceedings**

- (c) The Office of the General Counsel may reveal confidential information to the following person if it appears that the information may assist them in the discharge of their duties:

- (9) The ~~Consumer-Client~~ Assistance Program;

#### **Rule 4-222. Limitation**

- (a) No proceeding under Part IV, Chapter 2, shall be brought unless a Memorandum of

Grievance or a ~~Consumer~~ Client Assistance Program referral form has been received at the State Bar of Georgia headquarters or instituted pursuant to these rules within four years after the commission of the act; provided, however, this limitation shall be tolled during any period of time, not to exceed two years, that the offender or the offense is unknown, the offender's whereabouts are unknown, or the offender's name is removed from the roll of those authorized to practice law in this state.

(b) Referral of a matter to the State Disciplinary Board by the Office of the General Counsel shall occur within 12 months of the receipt of the Memorandum of Grievance at the State Bar of Georgia headquarters or institution of an investigation.

#### Rule 4-224. Expungement of Records

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(f) A lawyer may respond in the negative when asked if he has ever been professionally disciplined or determined to have violated any professional disciplinary rules if all grievances filed against the lawyer have either been referred to the Consumer-Client Assistance Program, dismissed, or dismissed with a letter of instruction.

#### Rule 4-228-Receiverships

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(h) Professional Liability Insurance:

~~Only lawyers who~~

~~To serve as a receiver, a lawyer must either maintain errors and omissions an Errors & Omissions insurance, or other appropriate insurance, may be policy which includes coverage for conduct as a receiver.~~

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(k) State Bar of Georgia as a receiver.

If a lawyer who is an employee of the State Bar of Georgia is appointed as receiver of an Absent Lawyer's client files, the State Bar upon motion may request that the Supreme Court of Georgia enter an order assessing the absent lawyer the costs of receivership. The assessed amount must be paid in full by the absent lawyer before the Court will consider any application for reinstatement to the position practice of receiver law in this state.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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## REPORT

### LAWYER ADVERTISING RULES FOR THE 21<sup>st</sup> CENTURY

#### I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA's expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.<sup>1</sup> This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21<sup>st</sup> century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers' efforts to expand their practices and thwart clients' interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.<sup>2</sup> Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

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<sup>1</sup> Center for Professional Responsibility Jurisdictional Rules Comparison Charts, *available at*: [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts.html](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html).

<sup>2</sup> See Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/april\\_june\\_22\\_2015%20report\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/april_june_22_2015%20report_authcheckdam.pdf) at 18-19 ("According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.").

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- Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
- Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term “certified specialist”.
- Permit nominal “thank you” gifts under certain conditions as an exception to the general prohibition against paying for recommendations.
- Define solicitation as “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.”
- Prohibit live, person-to-person solicitation for pecuniary gain with certain exceptions.
- Eliminate the labeling requirement for targeted mailings but continue to prohibit targeted mailings that are misleading, involve coercion, duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited.

### **III. Discussion of the Proposed Amendments**

#### **A. Rule 7.1: Communications Concerning a Lawyer’s Services**

Rule 7.1 remains unchanged; however, additional guidance is inserted in Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. New Comment [3] provides that communications that contain information about a lawyer’s fee must also include information about the client’s responsibility for costs to avoid being labeled as a misleading communication.

In Comment [4], SCEPR recommends replacing “advertising” with “communication” to make the Comment consistent with the title and scope of the Rule. SCEPR expands the guidance in Comment [4] by explaining that an “unsubstantiated claim” may also be misleading. SCEPR also recommends in Comment [5] that lawyers review Rule 8.4(c) for additional guidance.

Comments [6] through [9] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. SCEPR has concluded that Rule 7.1, with the guidance of new Comments [6] through [9], better addresses the issues.

#### **B. Rule 7.2: Communications Concerning a Lawyer’s Services: Specific Rules**

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Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term “office address” is changed to “contact information” to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All “communications” about a lawyer’s services must include the firm name (or lawyer’s name) and some contact information (street address, telephone number, email, or website address).

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.

New Comment [2] explains that the term “recommendations” does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate “station employees or spokespersons” as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e. “employees, agents and vendors who are engaged to provide marketing or client development services.”

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] (“Legal services plans and lawyer referral services may communicate with the public, *but such communication must be in conformity with these Rules.*”) (Emphasis added.).

### **C. Rule 7.3: Solicitation of Clients**

The black letter of the current Rules does not define “solicitation;” the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia’s definition. A solicitation is:



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Committee on Professional Discipline's suggestion to review both Oregon's rules and Washington State's proposed rules, which do not require such labeling, SCEPR has concluded that the requirement is no longer necessary to protect the public. Consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers due to the nature of the communications. SCEPR was presented with no evidence that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are misleading, that harm can and will be addressed by Rule 7.1's prohibition against false and misleading advertising.

The statement that the rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (d) of Rule 7.3.

Amendments were made to Rule 7.3(e) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to wide range of groups. They do not engage in solicitation as defined by the Rules.

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.

#### **IV. SCEPR's Process and Timetable**

The amendments were developed during two years of intensive study by SCEPR, after SCEPR received a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016.<sup>5</sup> Throughout, SCEPR's process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR's work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.<sup>6</sup>

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<sup>5</sup> APRL's April 26, 2016 Supplemental Report can be accessed here: [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aprl\\_april\\_26\\_2016%20report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf).

<sup>6</sup> Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here:

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On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.<sup>8</sup>

### **C. Working Group Meetings and Reports – 2017**

In January 2017, SCEPR's then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, included representatives from Center for Professional Responsibility ("CPR") committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of Bar Presidents, the ABA Solo, Small Firm and General Practice Division, NOBC, and APRL were also appointed.

Chang provided SCEPR with two memoranda summarizing the various suggestions received for each advertising rule and, where applicable, identified recommendations from the working group.

### **D. SCEPR December 2017 Draft**

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

### **E. ABA Public Forum – February 2018**

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals.<sup>9</sup> The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives,

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<sup>8</sup> Written submissions to SCEPR are available at:

[https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/ethicsandprofessionalresponsibility/mrpc\\_rule71\\_72\\_73\\_74\\_75/modelrule7\\_1\\_7\\_5comments.html](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html).

<sup>9</sup> Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.

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*Bates* established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in *Central Hudson*,<sup>14</sup> the Supreme Court explained that regulations on commercial speech must “directly advance the [legitimate] state interest involved” and “[i]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive.”<sup>15</sup>

In the years that followed, the Supreme Court applied the *Central Hudson* test to strike down a number of regulations on attorney-advertising.<sup>16</sup> The Court reviewed issues such as the failure to adhere to a state “laundry list” of permitted content in direct mail advertisements,<sup>17</sup> a newspaper advertisement’s use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations,<sup>18</sup> and an attorney’s letterhead that included his board certification in violation of prohibition against referencing expertise.<sup>19</sup> The court’s decisions in these cases reinforced the holding in *Bates*: a state may not constitutionally prohibit commercial speech unless the regulation advances a substantial state interest, and no less restrictive means exists to accomplish the state’s goal.<sup>20</sup>

### C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In *Ohralik v. Ohio State Bar Ass’n*, the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: “[T]he State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.”<sup>21</sup> The Court added: “It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.”<sup>22</sup> The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.<sup>23</sup>

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<sup>14</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm’n of N.Y.*, 447 U.S. 557 (1980).

<sup>15</sup> 447 U.S. at 564.

<sup>16</sup> See APRL 2015 Report, *supra* note 2, at 9-18, for a discussion of these cases.

<sup>17</sup> *In re R.M.J.*, 455 U.S. 191, 197 (1982).

<sup>18</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

<sup>19</sup> *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 93-94 (1990).

<sup>20</sup> *In re R.M.J.*, 455 U.S. 191, 197 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985); *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 93-94 (1990).

<sup>21</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978).

<sup>22</sup> *Id.* at 464-65.

<sup>23</sup> *Id.* at 465-467.

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speech might fail the *Central Hudson* test.<sup>27</sup> The court concluded that even assuming that New York could justify its regulations under the first three prongs of the *Central Hudson* test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.<sup>28</sup>

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana's 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in *Central Hudson*.<sup>29</sup> The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations.<sup>30</sup> Although paying homage to a state's substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court's decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.<sup>31</sup>

[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.<sup>32</sup>

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida's rules and related guidelines have failed constitutional challenges. For example, in *Rubenstein v. Florida Bar* the Eleventh Circuit declared Florida Bar's prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television, or radio.<sup>33</sup> The state's underlying regulatory premise was that these "specific media . . . present too high a risk of being misleading." This total ban on commercial speech again did not survive constitutional scrutiny.<sup>34</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.

<sup>29</sup> *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York's in *Cahill* by indicating that the Bar had produced evidence in the form of survey results that supported the requirement that the regulation materially advanced the government's interest in protecting the public.

<sup>30</sup> *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

<sup>31</sup> *Id.* at 220.

<sup>32</sup> *Id.* citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985).

<sup>33</sup> *Rubenstein v. Fla. Bar*, 72 F. Supp. 3d 1298 (S.D. Fla. 2014).

<sup>34</sup> *Id.* at 1312.

## **MODEL 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.**

### **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(c). See also Rule 8.4(e) 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.

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[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 charges of a legal service plan or a not-for-profit or qualified lawyer referral service;**

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

**(4) 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**

**(5) 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 shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:**

**(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and**

**(2) the name of the certifying organization is clearly identified in the communication.**

**(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.**

## **Comment**

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

## **Paying Others to Recommend a Lawyer**

[2] Except as permitted under paragraphs (b)(1)-(b)(5), 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)(5) 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.

[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) (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 not-for-profit or qualified 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. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[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 (a) 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.

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[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

#### **Required Contact Information**

[12] 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.

### **MODEL RULE 7.3: SOLICITATION OF CLIENTS**

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

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

(1) lawyer;

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

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

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

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

(2) the solicitation involves coercion, duress or harassment.

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

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

#### **Comment**

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

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

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

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

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

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

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

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

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

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**PART SEVEN**

**INFORMATION ABOUT LEGAL SERVICES**

**RULE 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

(a) A lawyer may advertise through all forms of public media and through written communication not involving personal contact so long as the communication is not false, fraudulent, deceptive or misleading. By way of illustration, but not limitation, a communication is false, fraudulent, deceptive or misleading if it:

(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."

31           (6)     contains the language “no fee unless you win or collect” or any similar  
32 phrase and fails to conspicuously present the following disclaimer:  
33 “No fee unless you win or collect” [or insert the similar language used in the  
34 communication] refers only to fees charged by the attorney. Court costs and other  
35 additional expenses of legal action usually must be paid by the client. Contingent fees are  
36 not permitted in all types of cases.

37  
38           (b)     A public communication for which a lawyer has given value must be identified as  
39 such unless it is apparent from the context that it is such a communication.

40  
41           (c)     A lawyer retains ultimate responsibility to ensure that all communications  
42 concerning the lawyer or the lawyer’s services comply with the Georgia Rules of Professional  
43 Conduct.

44  
45           The maximum penalty for a violation of this Rule is disbarment.

46  
47           Comment

48  
49           [1] This rule governs the content of all communications about a lawyer’s services,  
50 including the various types of advertising permitted by Rules 7.3 through 7.5. Whatever means  
51 are used to make known a lawyer’s services, statements about them should be truthful.

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53           [2] The prohibition in sub-paragraph (a)(2) of this *Rule 7.1: Communications Concerning*  
54 *a Lawyer’s Services* of statements that may create “unjustified expectations” would ordinarily  
55 preclude advertisements about results obtained on behalf of a client, such as the amount of a  
56 damage award or the lawyer’s record in obtaining favorable verdicts, and advertisements  
57 containing client endorsements. Such information may create the unjustified expectation that  
58 similar results can be obtained for others without reference to the specific factual and legal  
59 circumstances.

62 *Affirmative Disclosure*

63  
64 [3] In general, the intrusion on the First Amendment right of commercial speech resulting  
65 from rationally-based affirmative disclosure requirements is minimal, and is therefore a  
66 preferable form of regulation to absolute bans or other similar restrictions. For example, there is  
67 no significant interest in failing to include the name of at least one accountable attorney in all  
68 communications promoting the services of a lawyer or law firm as required by sub-paragraph  
69 (a)(5) of *Rule 7.1: Communications Concerning a Lawyer's Services*. Nor is there any  
70 substantial burden imposed as a result of the affirmative disclaimer requirement of sub-paragraph  
71 (a)(6) upon a lawyer who wishes to make a claim in the nature of "no fee unless you win."  
72 Indeed, the United States Supreme Court has specifically recognized that affirmative disclosure  
73 of a client's liability for costs and expenses of litigation may be required to prevent consumer  
74 confusion over the technical distinction between the meaning and effect of the use of such terms  
75 as "fees" and "costs" in an advertisement.

76  
77 [4] Certain promotional communications of a lawyer may, as a result of content or  
78 circumstance, tend to mislead a consumer to mistakenly believe that the communication is  
79 something other than a form of promotional communication for which the lawyer has paid.  
80 Examples of such a communication might include advertisements for seminars on legal topics  
81 directed to the lay public when such seminars are sponsored by the lawyer, or a newsletter or  
82 newspaper column which appears to inform or to educate about the law. Paragraph (b) of this  
83 *Rule 7.1: Communications Concerning a Lawyer's Services* would require affirmative disclosure  
84 that a lawyer has given value in order to generate these types of public communications if such is  
85 in fact the case.

86  
87 *Accountability*

88  
89 [5] Paragraph (c) makes explicit an advertising attorney's ultimate responsibility for all  
90 the lawyer's promotional communications and would suggest that review by the lawyer prior to  
91 dissemination is advisable if any doubts exist concerning conformity of the end product with  
92 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.

## **RULE 7.2. ADVERTISING**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:

(1) public media, such as a telephone directory, legal directory, newspaper or other periodical;

(2) outdoor advertising;

(3) radio or television;

(4) written, electronic or recorded communication.

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

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

(1) Disclosure of identity and physical location of attorney. Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible

124 lawyer shall state the full address of the location of the principal bona fide office of each  
125 lawyer who is prominently identified pursuant to this paragraph. For the purposes of this  
126 Rule, a bona fide office is defined as a physical location maintained by the lawyer or law  
127 firm from which the lawyer or law firm furnishes legal services on a regular and  
128 continuing basis. In the absence of a bona fide physical office, the lawyer shall  
129 prominently disclose the full address listed with the State Bar of Georgia or other Bar to  
130 which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the  
131 service discloses the location of the lawyer's bona fide office, or the registered bar  
132 address, when a referral is made.

133  
134 (2) Disclosure of referral practice. If the lawyer or law firm will refer the  
135 majority of callers to other attorneys, that fact must be disclosed and the lawyer or law  
136 firm must comply with the provisions of Rule 7.3 (c) regarding referral services.

137  
138 (3) Disclosure of spokespersons and portrayals. Any advertisement that  
139 includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of  
140 a client by a non-client, or any paid testimonial or endorsement, shall include prominent  
141 disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-  
142 lawyer, or of a client by a non-client.

143  
144 (4) Disclosures regarding fees. A lawyer or law firm advertising any fixed fee  
145 for specified legal services shall, at the time of fee publication, have available to the  
146 public a written statement clearly describing the scope of each advertised service, which  
147 statement shall be available to the client at the time of retainer for any such service.

148  
149 (5) Appearance of legal notices or pleadings. Any advertisement that includes  
150 any representation that resembles a legal pleading, notice, contract or other legal  
151 document shall include prominent disclosure that the document is an advertisement rather  
152 than a legal document.

153  
154 The maximum penalty for a violation of this Rule is a public reprimand.

155           Comment  
156

157           [1] To assist the public in obtaining legal services, lawyers should be allowed to make  
158 known their services not only through reputation but also through organized information  
159 campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to  
160 the tradition that a lawyer should not seek clientele. However, the public's need to know about  
161 legal services can be fulfilled in part through advertising. This need is particularly acute in the  
162 case of persons of moderate means who have not made extensive use of legal services. The  
163 interest in expanding public information about legal services ought to prevail over considerations  
164 of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading  
165 or overreaching.  
166

167           [2] This Rule permits public dissemination of information concerning a lawyer's name or  
168 firm name, address and telephone number; the kinds of services the lawyer will undertake; the  
169 basis on which the lawyer's fees are determined, including prices for specific services and  
170 payment and credit arrangements; a lawyer's foreign language ability; names of references and,  
171 with their consent, names of clients regularly represented; and other information that might invite  
172 the attention of those seeking legal assistance.  
173

174           [3] Questions of effectiveness and taste in advertising are matters of speculation and  
175 subjective judgment. Some jurisdictions have had extensive prohibitions against television  
176 advertising, against advertising going beyond specified facts about a lawyer, or against  
177 "undignified" advertising. Television is now one of the most powerful media for getting  
178 information to the public, particularly persons of low and moderate income; prohibiting  
179 television advertising, therefore, would impede the flow of information about legal services to  
180 many sectors of the public. Limiting the information that may be advertised has a similar effect  
181 and assumes that the bar can accurately forecast the kind of information that the public would  
182 regard as relevant.

183           [4] Neither this Rule nor *Rule 7.3: Direct Contact with Prospective Clients* prohibits  
184 communications authorized by law, such as notice to members of a class in class action  
185 litigation.

188 [5] Paragraph (b) requires that a record of the content and use of advertising be kept in  
189 order to facilitate enforcement of this Rule.  
190

191 **RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS**  
192

193 (a) A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer,  
194 the lawyer's firm, lawyer's partner, associate, or any other lawyer affiliated with the lawyer or  
195 the lawyer's firm, a written communication to a prospective client for the purpose of obtaining  
196 professional employment if:  
197

198 (1) it has been made known to the lawyer that a person does not desire to  
199 receive communications from the lawyer;  
200

201 (2) the communication involves coercion, duress, fraud, overreaching,  
202 harassment, intimidation or undue influence;  
203

204 (3) the written communication concerns an action for personal injury or  
205 wrongful death or otherwise relates to an accident or disaster involving the person to  
206 whom the communication is addressed or a relative of that person, unless the accident or  
207 disaster occurred more than 30 days prior to the mailing of the communication; or  
208

209 (4) the lawyer knows or reasonably should know that the physical, emotional  
210 or mental state of the person is such that the person could not exercise reasonable  
211 judgment in employing a lawyer.  
212

213 (b) Written communications to a prospective client, other than a close friend, relative,  
214 former client or one whom the lawyer reasonably believes is a former client, for the purpose of  
215 obtaining professional employment shall be plainly marked "Advertisement" on the face of the

envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

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

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

(i) does not engage in conduct that would violate these Rules if engaged in by a lawyer;

(ii) provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and

(iii) discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.

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

(i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies that can provide the assistance the clients need. Such organization shall file annually with

247 the State Disciplinary Board a report showing its rules and regulations, its  
248 subscription charges, agreements with counsel, the number of lawyers  
249 participating and the names and addresses of the lawyers participating in the  
250 service;

251  
252 (ii) the sponsoring bar association for the lawyer referral service must  
253 be open to all lawyers licensed and eligible to practice in this state who maintain  
254 an office within the geographical area served, and who meet reasonable  
255 objectively determinable experience requirements established by the bar  
256 association;

257  
258 (iii) the combined fees charged by a lawyer and the lawyer referral  
259 service to a client referred by such service shall not exceed the total charges  
260 which the client would have paid had no service been involved; and  
261

262 (iv) a lawyer who is a member of the qualified lawyer referral service  
263 must maintain in force a policy of errors and omissions insurance in an amount no  
264 less than \$100,000 per occurrence and \$300,000 in the aggregate.  
265

266 (3) A lawyer may pay the usual and reasonable fees to a qualified legal  
267 services plan or insurer providing legal services insurance as authorized by law to  
268 promote the use of the lawyer's services, the lawyer's partner or associates services so  
269 long as the communications of the organization are not false, fraudulent, deceptive or  
270 misleading;  
271

272 (4) A lawyer may pay for a law practice in accordance with *Rule 1.17. Sale of*  
273 *Law Practice.*  
274

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

278 (e) A lawyer shall not accept employment when the lawyer knows or reasonably  
279 should know that the person who seeks to employ the lawyer does so as a result of conduct by  
280 any person or organization that would violate these Rules if engaged in by a lawyer.  
281

282 The maximum penalty for a violation of this Rule is disbarment.  
283

284 Comment  
285

286 *Direct Personal Contact*  
287

288 [1] There is a potential for abuse inherent in solicitation through direct personal contact  
289 by a lawyer of prospective clients known to need legal services. It subjects the lay person to the  
290 private importuning of a trained advocate, in a direct interpersonal encounter. A prospective  
291 client often feels overwhelmed by the situation giving rise to the need for legal services, and may  
292 have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the  
293 lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest,  
294 which may color the advice and representation offered the vulnerable prospect.  
295

296 [2] The situation is therefore fraught with the possibility of undue influence, intimidation,  
297 and overreaching. The potential for abuse inherent in solicitation of prospective clients through  
298 personal contact justifies its prohibition, particularly since the direct written contact permitted  
299 under paragraph (b) of this Rule offers an alternative means of communicating necessary  
300 information to those who may be in need of legal services. Also included in the prohibited types  
301 of personal contact are direct personal contact through an intermediary and live contact by  
302 telephone.  
303

304 *Direct Written Solicitation*  
305

306 [3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule,  
307 promotional communication by a lawyer through direct written contact is generally permissible.  
308 The public's need to receive information concerning their legal rights and the availability of legal

309 services has been consistently recognized as a basis for permitting direct written communication  
310 since this type of communication may often be the best and most effective means of informing.  
311 So long as this stream of information flows cleanly, it will be permitted to flow freely.  
312

313 [4] Certain narrowly-drawn restrictions on this type of communication are justified by a  
314 substantial state interest in facilitating the public's intelligent selection of counsel, including the  
315 restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an  
316 injured and hospitalized accident victim or the bereaved family of a deceased.  
317

318 [5] In order to make it clear that the communication is commercial in nature, paragraph  
319 (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the  
320 traditional exception for contact with close friends, relatives and former clients is recognized and  
321 permits elimination of the disclaimer in direct written contact with these persons.  
322

323 [6] This Rule does not prohibit communications authorized by law, such as notice to  
324 members of a class in class action litigation.  
325

326 *Paying Others to Recommend a Lawyer*  
327

328 [7] A lawyer is allowed to pay for communications permitted by these Rules, but  
329 otherwise is not permitted to pay another person for channeling professional work. This  
330 restriction does not prevent an organization or person other than the lawyer from advertising or  
331 recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or  
332 prepaid legal insurance organization may pay to advertise legal services provided under its  
333 auspices.  
334

335 [8] A lawyer may not indirectly engage in promotional activities through a lay public  
336 relations or marketing firm if such activities would be prohibited by these Rules if engaged in  
337 directly by the lawyer.  
338  
339



340 **RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE**

341  
342 A lawyer may communicate the fact that the lawyer does or does not practice in  
343 particular fields of law. A lawyer who is a specialist in a particular field of law by experience,  
344 specialized training or education, or is certified by a recognized and bona fide professional  
345 entity, may communicate such specialty or certification so long as the statement is not false or  
346 misleading.

347  
348 The maximum penalty for a violation of this Rule is a public reprimand.

349  
350 **Comment**

351  
352 [1] This Rule permits a lawyer to indicate areas of practice in communications about the  
353 lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in  
354 such fields, the lawyer is permitted to so indicate.

355  
356 [2] A lawyer may truthfully communicate the fact that the lawyer is a specialist or is  
357 certified in a particular field of law by experience or as a result of having been certified as a  
358 "specialist" by successfully completing a particular program of legal specialization. An example  
359 of a proper use of the term would be "Certified as a Civil Trial Specialist by XYZ Institute"  
360 provided such was in fact the case, such statement would not be false or misleading and provided  
361 further that the Civil Trial Specialist program of XYZ Institute is a recognized and bona fide  
362 professional entity.

363  
364 **RULE 7.5. FIRM NAMES AND LETTERHEADS**

365  
366 (a) A lawyer shall not use a firm name, letterhead or other professional designation  
367 that violates Rule 7.1.

368  
369 (b) A law firm with offices in more than one jurisdiction may use the same name in  
370 each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the

jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

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

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

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

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

#### Comment

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

401 [2] Trade names may be used so long as the name includes the name of at least one or  
402 more of the lawyers actively practicing with the firm. Firm names consisting entirely of the  
403 names of deceased or retired partners have traditionally been permitted and have proven a useful  
404 means of identification. Sub-paragraph (e) (1) permits their continued use as an exception to the  
405 requirement that a firm name include the name of at least one active member.  
406

# Marijuana Laws, Rule or Comment Changes, Ethics Opinions, and Discipline: by Jurisdiction

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
AL			X				
AK	1998	2014	Rule 1.2(f) (2015) (lawyer may counsel and assist in conduct lawyer reasonably believes is authorized by AK law and shall advise re: federal law and policy)	Comment [5] to R. 8.4 (2015) ("[5] Although assisting a client under Rule 1.2(f) may violate federal drug laws, it is not a violation of Rule 8.4(b).")			
AZ	2010				Op. 11-01: Scope of Representation (lawyer may counsel or assist client re: conduct expressly permitted under AZ Med MJ Act only if no court decisions have held the Act preempted, void, or invalid; lawyer reasonably believes client conduct complies fully with state law; and lawyer advises client re: federal law, refers client to other counsel for those issues, or limits scope of rep.)		
AR	2016						

Based on information received or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
CA	1996	2016	Rule 1.2.1 (2018) (lawyer may not counsel or assist in conduct lawyer knows is criminal or fraudulent, but may discuss legal consequences of any proposed conduct and counsel or assist client to make good faith effort to determine validity, scope, meaning, or application of law)	Comment [6] to R. 1.2.1 (2018) (lawyer may advise client re: validity, scope, and meaning of CA laws that may conflict with federal or tribal law and may assist client in drafting, administering, interpreting, or complying with CA law, even if client's conduct may violate federal or tribal law; must inform client of related federal or tribal law and may be required to advise client re: the conflict)	Bar Assoc. of SF Ethics Op. 2015-1: (lawyer may represent client re: conduct permissible under state law; should advise client re: federal law.) L.A. County Bar Assoc. Op. 527 (2015) (lawyer may advise and assist re: conduct permitted under state law provided lawyer does not advise or assist client in violating federal law in manner that would enable client to evade arrest or prosecution; must limit scope of representation to exclude assistance or advice to violate federal law with impunity; must advise re: federal law and penalties)		

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
CO	2000	2012		<p><u>Comment [14] to Rule 1.2 (2014) (lawyer may counsel and assist client re: conduct lawyer reasonably believes is permitted by state law and shall advise client re: federal law and policy)</u></p>	<p><u>Formal Op. 124 (April 2012, addendum Dec. 2012): A Lawyer's Medical Use of Marijuana (lawyer's medical (addendum: or recreational) use of MJ per CO law does not violate R. 8.4(b) absent additional evidence use adversely implicates honesty, trustworthiness, or fitness)</u></p>	<p><u>People v. Furrado</u>, 2015 WL 7574128 (CO 2015) (Gen. Counsel for MJ dispensaries publicly censored for violating 8.4(c) where lawyer opened two trust accounts with bank under his own name, did not inform bank purpose of accounts was to pay bills for med. MJ dispensaries, and where bank did not allow MJ-related businesses to open accounts.)</p>	<p><u>Judicial Ethics Op. 2014-01</u> (judge's use of med. or rec. MJ impermissible as it is a federal crime)</p>

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
CT	2012, 2016		Rule 1.2(d)(3), 2015 (lawyer may counsel or assist client re: conduct expressly permitted by CT law if lawyer counsels re: legal consequences under federal law)		Inf. Op. 2013-02 (lawyer may advise client re: requirements of state law and must inform client of conflict between state and federal law, regardless of federal enforcement policy; may advise clients re: CT Palliative Use of MJ Act but may not assist in violation of federal law)		
DE	2011						
DC	2011	2015					Sale, purchase, and public consumption of MJ in DC remains illegal; federal govt. controls 29% of DC land and still enforces fed. prohibition of MJ possession

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
FL	2014							<p><b>FL Bar Board of Governors Policy 2014</b>                      (lawyers will not be prosecuted solely for advising or assisting client re: conduct lawyer reasonably believes is permitted by FL law if lawyer also advises re: federal law and policy)</p>

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019



State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
GA	CBD oil 2019		New 1.2(c) being proposed: "A lawyer may counsel a client re: conduct expressly permitted by GA or other applicable law, even if such conduct would be criminal under other law, provided that the lawyer counsels the client about the legal consequences of the client's proposed course of conduct."				
HI	2015		<u>Rule 1.2(d), 2015</u> (lawyer may advise and assist re: conduct permitted by state law; must advise re: other applicable law)		FO 49, withdrawn after amendment of 1.2(d) (not available online)		
ID							

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
IL	2014	2020		Rule 1.2(d), 2015 (lawyer may counsel or assist in conduct expressly permitted by IL law; must advise about federal law)	Comment [10] to Rule 1.2 (allows lawyer to provide advice and assistance to client re: conduct permitted by IL Med. MJ law; should advise about federal law and policy; should be especially careful about counseling or assisting re: conduct in context other than MJ law that violates or conflicts with federal, state, or local law.)	Advisory Op. 14-07 (lawyer may advise and assist in conduct permitted by IL MJ law; recommends rule change)		
IN	CBD Oil, 2018							
IA	CBD Oil, 2014							
KS			X					
KY	CBD Oil, 2014							
LA	2015							

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
ME	1999	2016			<p><u>Opinion 199 (2010)</u> (urges caution; case by case determination as to where the line is drawn; significant risk)</p> <p><u>Opinion 215 (2017)</u> (lawyer may advise re: conduct permitted by state law but must advise re: federal law and policy)</p>		
MD	2014			<p><u>Comment 12 to Rule 1.2 (MD 19-301.2) (2017)</u> (Given 2014 federal govt. policy not to interfere with state-compliant retail sales, atty may counsel client and provide legal services in connection with business activities permitted by state law, provided atty advises about federal law.)</p>	<p><u>Ethics Op. 2016-10</u> (lawyer may advise and assist compliance with state law; lawyer may have ownership interest in med. MJ business; based in part on federal enforcement policy)</p>		

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
MA	2012	2016					<u>Board of Bar Overseers/Office of Bar Counsel Joint Policy on Legal Advice on MJ (2017)</u> (no prosecution for advising in or assisting in conduct permitted by MA law)
MI	2008	2019					
MN	2004				<u>MN Ethics Op 23 (2015)</u> (lawyer may advise and assist re: conduct permissible under state law; must advise clients re: federal law)		
MS			X				

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
MO	CBD Oil 2014;				<u>Inf. Op. 2014-04:</u> (whether lawyer's MJ-related counseling and/or assistance would violate R. 4-1.2(f) is question of law and fact)		
	Med MJ 2018				<u>Inf. Op. 2019-09:</u> (whether assisting client in MJ licensure process or providing corporate legal services for state-law-compliant MJ entity violates R. 4-1.2(f) or 4-8.4 are questions of fact and law)		
					<u>Inf. Op. 2019-10</u> (Attorney may provide legal services from MO office to MJ-related business in another state if attorney has reasonable belief attorney's conduct will conform to rules and laws in the other state and that predominant effect of conduct will be in the other state.)		

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
MT	2004					<i>In the Matter of Christopher J. Lindsey</i> , PR 13-0025 (6-month suspension and five years' probation; followed guilty plea in federal court in 2012 to Conspiracy to Maintain Drug-Involved Premises in violation of 21 USC § 846	Preamble paragraph (6) effective 1/1/20: [lawyer may counsel and assist client re: MT cannabis laws; must advise of any conflict with federal or tribal law]
NE			X				
NV	2001, 2013	2016		Comment [1] to Rule 1.2. 2014 (lawyer may counsel or assist re: conduct that is consistent with NV law; should advise about federal law) Comment [1] to 8.4. 2017 (federal prosecution of lawyer for use, possession, or distribution of MJ in violation of federal law may trigger disciplinary proceedings)			

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
NH	2013		Rule 1.2(e) (lawyer may counsel or assist conduct expressly permitted by state law if lawyer counsels client re: consequences under federal law)	Comment [4] to Rule 1.2 (Rule 1.2(e) allows lawyer to counsel or assist in state-law compliant conduct without violating NH RPCs, despite conflict with federal law, if lawyer also counsels re: federal law)			
NJ	2010		Rule 1.2(d), 2016 (lawyer may counsel and assist client in conduct lawyer reasonably believes authorized by NJ MJ law; should advise client about federal law and policy)				
NM	2007			Comment [11] to NMRA 16-102 (amended re: MJ in 2017) (lawyer may counsel and assist in conduct expressly permitted by NM MJ Act and assist in conduct lawyer reasonably believes permitted by the Act)	Ethics Op. 2016-01 (lawyer may advise client re: legality of proposed conduct but may not assist in conduct that violates federal law)		Op. 2016-01 (a. 1) notes the NM Sup. Ct. declined to adopt proposed R. 16-102(E) permitting lawyer to counsel or assist re: conduct expressly permitted by NM MJ law)

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
NY	2014				<p><u>NY Ethics Op. 1024, 2014</u> (In light of current federal enforcement policy, lawyer may assist client in conduct designed to comply with state law, notwithstanding federal law prohibiting the conduct.)</p> <p><u>NY State Bar Assoc. Ethics Op. 1177 (2019)</u> (reaffirming conclusion from Op. 1024, notwithstanding rescission of the Cole Memo, because in light of Rohrabacher Amendment, federal policy continues to permit NY to implement its med. MJ law)</p>		
NC							

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019



State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
ND	2016		<u>Rule 1.2(e), 2017</u> (lawyer may counsel or assist conduct ND law; shall counsel client about legal consequences under other law)		<u>Ethics Op. 14-02</u> (Lawyer licensed in ND violates ND R. 8.4(b) if lawyer moves to MN to participate in medical MJ treatment program legal under MN law because conduct would be illegal under ND and federal law.)		
OH	2016		<u>Rule 1.2(d)(2), 2016</u> (lawyer may counsel or assist in conduct expressly permitted by state law and shall advise client re: federal law)		<u>Ethics Op. 2016-6</u> (Aug. 5, 2016) (superseded in part by amendment of Rule 1.2, Sep. 20, 2016) (lawyer may not advise or assist client in conduct that violates federal law, even if conduct complies with state law; lawyer's personal use/investment re: medical MJ in compliance with state law can reflect adversely on lawyer's fitness to practice)		

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
OK	2018, 2019						OK House of Delegates proposed in 2018 <u>OK House of Delegates Res. No. One</u> (page 4 of link) (1.2(e): atty may counsel and assist re: OK MJ law; shall advise re: federal and tribal law); Bd. of Governors did not recommend passage. <u>Supreme Court did not adopt.</u> Federal prosecutors in OK opposed rule change.

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
OR	1988 et seq.	2015		Rule 1.2(d), 2015 (lawyer may counsel and assist in conduct re: OR MJ laws, but shall advise client about federal and tribal law and policy)			(5 disciplinary cases from 1993 – 2012; 4 for conduct related to MJ but violating RPCs or laws other than the Fed. CSA)  <u>In re Conduct of Taylor</u> , 851 P.2d 1138 (Or. 1993) (lawyer disbarred following federal conviction for 2 MJ-related felonies (conspiracy to mfr., possess, and distribute and for possession with intent to distribute) and conviction for federal tax evasion; lawyer also charged with misappropriating funds from decedents' estates.)	

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
PA	2016		Rule 1.2(c), 2017 (lawyer may counsel or assist regarding conduct expressly permitted by state law, provided lawyer counsels client re: consequences under other law)		PA Bar Assoc. and Phil. Bar Assoc. Joint Formal Opinion 2015-100 (R. 1.2(d) forbids counseling or assisting regarding conduct permitted by state law that violates federal law, even if federal enforcement policy does not target such conduct; recommends amendment of Rule 1.2(d))		
RI	2012				Ethics Op. 2017-01 (2017) (lawyer may advise and assist in complying with state med. MJ law and shall advise re: federal law and policy)		
SC					Ethics Op. 19-03 (lawyer's ownership interest in MJ-related business illegal under federal or state law may violate SC R. 8.4; lawyers cautioned about participating in activities illegal under state or federal law)		
SD							
TN							

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
TX	CBD Oil 2017	N/A				<u>In re Jose Luis Palacios</u> , 54410, 2014 (disbarred after pleading guilty to knowingly and intentionally conspiring to possess with intent to distribute a controlled substance in violation of 21 USC §§ 846, 841); <u>In re Damon Dean Robertson</u> , 54411, 2014 (suspended after pleading guilty in AZ state court to violation of AZ law for Transportation of MJ for Sale)	
UT VT	2018 2003 or 2004	2018 limited adult possession and cultivation)		<u>Comment [14] to Rule 1.2</u> , 2016 (lawyer may counsel and assist client in conduct lawyer reasonably believes permitted by state law and shall advise client re: consequences under federal law and policy)			

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
VA	CBD Oil							

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

WA

2012,  
2014

Comment [18] to Rule 1.2.

2014: amended 2018  
(lawyer may counsel and assist conduct lawyer reasonably believes permitted by state law and shall advise client re: federal or tribal law and policy)

Comment [8] to Rule 8.4.

2018 (lawyer who counsels or assists conduct lawyer reasonably believes is permitted by state law does not violate 8.4)

WA Bar Assoc. Op. 201501 (2015) (advice and assistance in compliance with state law is permissible; lawyer may own and operate state-law compliant MJ business, consume MJ if fitness to practice not affected, and engage in implementation of state law. Issued prior to Obama-era DOJ guidelines' withdrawal)

(Revision of opinion is under consideration to reflect amended Comments to Rules 1.2 and 8.4)

King County Bar Assoc. Op. 1-502 (2013)

(lawyer should not be subject to discipline for advising re: compliance with state MJ law, for lawyer ownership of med. MJ dispensary, or for lawyer's personal use of MJ complying with state law)

WV

2017

Rule 1.2(c), 2018  
(lawyer may counsel and assist conduct

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019

State	Permitted MJ use:		New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.					
	not yet implemented		lawyer reasonably believes authorized by state law and shall advise re: federal law and consequences)				
WI			X				
WY			X				

Based on information received from NOBC survey or gathered from other sources, Nov. – Dec., 2019





## SUPREME COURT OF GEORGIA

November 18, 2019

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

The Court having considered the 2019-4, 2019-5 and 2019-6 Motions to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia, it is ordered that Part IV – Georgia Rules of Professional Conduct, Chapter 1, Rule 4-102 (Disciplinary Action; Levels of Discipline; Georgia Rules of Professional Conduct), Rule 1.0 (Terminology and Definitions); Rule 1.4 (Communication); Rule 1.17 (Sale of Law Practice); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); Rule 5.4 (Professional Independence of a Lawyer); Rule 7.1 (Communications Concerning a Lawyer's Services); Rule 9.4 (Jurisdiction and Reciprocal Discipline); Chapter 2, Rule 4-220 (Notice of Punishment or Acquittal; Administration of Reprimands); Part XIV – Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law; 14-3, Standing Committee; Rule 14-3.1 (Generally); 14-4, District Committees, Rule 14-4.1 (Generally); Part XVI. Institute of Continuing Legal Education of the State Bar of Georgia, Rule 16-101 (Preamble and Establishment of the Institute of Continuing Legal Education); Rule 16-103 (Powers and Duties of the ICLE Board); and Rule 16-105 (Finances); be amended effective November 14, 2019, to read as follows:

### **PART IV GEORGIA RULES OF PROFESSIONAL CONDUCT**

#### **CHAPTER 1 GEORGIA RULES OF PROFESSIONAL CONDUCT AND ENFORCEMENT THEREOF**

...

## **RULE 1.0. TERMINOLOGY AND DEFINITIONS**

(a) “Belief” or “believes” denotes that the person involved actually thought the fact in question to be true. A person’s belief may be inferred from the circumstances.

(b) “Confidential Proceedings” denotes any proceeding under these Rules which occurs prior to a filing in the Supreme Court of Georgia.

(c) “Confirmed in writing” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (1) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(e) “Conviction” or “convicted” denotes any of the following accepted by a court, whether or not a sentence has been imposed:

- (1) a guilty plea;
- (2) a plea of nolo contendere;
- (3) a verdict of guilty;
- (4) a verdict of guilty but mentally ill; or

(5) A plea entered under the Georgia First Offender Act, OCGA § 42-8-60 et seq., or a substantially similar statute in Georgia or another jurisdiction.

(f) “Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

(g) “Firm” or “law firm” denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Rule 1-203 (d); or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(h) “Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

(i) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive; not merely negligent misrepresentation or failure to apprise another of relevant information.

(j) “Grievance/Memorandum of Grievance” denotes an allegation of unethical conduct filed against a lawyer.

(k) “He,” “Him” or “His” denotes generic pronouns including both male and female.

(l) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(m) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.

(n) “Lawyer” denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia including persons admitted to practice in this state pro hac vice.

(o) “Nonlawyer” denotes a person not authorized to practice law by either the:

(1) Supreme Court of Georgia or its Rules (including pro hac vice admission), or

(2) duly constituted and authorized governmental body of any other State or Territory of the United States, or the District of Columbia, or

(3) duly constituted and authorized governmental body of any foreign nation.

(p) “Notice of Discipline” denotes a Notice by the State Disciplinary Board that the respondent will be subject to a disciplinary sanction for violation of one or more Georgia Rules of Professional Conduct unless the respondent affirmatively rejects the notice.

(q) “Partner” denotes a member of a partnership, a shareholder in a law firm organized pursuant to Rule 1-203 (d), or a member of an association authorized to practice law.

(r) “Petition for Voluntary Surrender of License” denotes a Petition for Voluntary Discipline in which the respondent voluntarily surrenders his license to practice law in this State. A voluntary surrender of license is tantamount to disbarment.

(s) “Probable Cause” denotes a finding by the State Disciplinary Board that there is sufficient evidence to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of the Bar Rules.

(t) “Prospective Client” denotes a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.

(u) “Public Proceedings” denotes any proceeding under these Rules that has been filed with the Supreme Court of Georgia.

(v) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(w) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(x) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(y) “Respondent” denotes a person whose conduct is the subject of any disciplinary investigation or proceeding.

(z) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(aa) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(bb) “Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.

(cc) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including but not limited to handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

## **RULE 1.4. COMMUNICATION**

...

### **Comment**

...

[4] A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information

concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer ~~shall~~should promptly respond to or acknowledge client communications. The timeliness of a lawyer's "Prompt" communication with the client does not equate to "instant" communication must be judged by all the controlling factors. communication with the client and is sufficient if reasonable under the relevant circumstances.

...

## **RULE 1.17. SALE OF LAW PRACTICE**

...

### **Comment**

...

#### **Client Confidences, Consent and Notice**

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6: Confidentiality of Information than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...

## **RULE 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

...

### **Comment**

...

#### **Nonlawyers Outside the Firm**

[4] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. ~~Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information.~~ When using such ~~services~~assistance outside the firm, a lawyer must make reasonable efforts to ensure that the ~~services~~assistance is provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the ~~services~~assistance involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (~~competence~~Competence), 1.2 (~~allocation~~Allocation of authority), 1.4 (~~communication~~Communication with client), 1.6 (~~confidentiality~~Confidentiality of information), 5.4 (a) (~~professional~~Professional independence of ~~the~~a lawyer), and 5.5 (a) (~~unauthorized~~Unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.



[5] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

...

## **RULE 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer or law firm who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter;

(5) a lawyer who undertakes to complete unfinished business of a deceased lawyer may pay to the estate of the

deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(6) a lawyer may pay a referral fee to a bar-operated nonprofit lawyer referral service where such fee is calculated as a percentage of legal fees earned by the lawyer to whom the service has referred a matter pursuant to Rule 7.3; Direct Contact with Prospective Clients.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof;  
or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may:

(1) ~~Provide~~provide legal services to clients while working with other lawyers or law firms practicing in, and organized under the rules of, other jurisdictions, whether domestic or foreign, that permit ~~non-lawyers~~nonlawyers to participate in the management of such firms, have equity ownership in such firms, or share in legal fees generated by such firms; and

(2) ~~Share~~share legal fees arising from such legal services with such other lawyers or law firms to the same extent as the sharing of legal fees is permitted under applicable Georgia Rules of Professional Conduct.

(f) The activities permitted under paragraph (e) are subject to the following:

(1) The association shall not compromise or interfere with the lawyer's independence of professional judgment, the client-lawyer relationship between the client and the lawyer, or the lawyer's compliance with these Rules; and

(2) Nothing in ~~this~~ paragraph (e) is intended to affect the lawyer's obligation to comply with other applicable Rules of Professional Conduct, or to alter the forms in which a lawyer is permitted to practice, including but not limited to the creation of an alternative business structure in Georgia.

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

### **Comment**

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than

the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] The provisions of ~~paragraph~~paragraphs (e) and (f) of this Rule are not intended to allow a Georgia lawyer or law firm to create or participate in alternative business structures (ABS) in Georgia. An alternative business structure is a law firm where a ~~non-lawyer~~nonlawyer is a manager of the firm, or has an ownership-type interest in the firm. A law firm may also be an ABS where another body is a manager of the firm, or has an ownership-type interest in the firm. This Rule only allows a Georgia lawyer to work with an ABS outside of the ~~state~~State of Georgia and to share fees for that work.

...

## **RULE 7.1. COMMUNICATIONS CONCERNING A 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 communication is false or misleading if it:

(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.

...

## **RULE 9.4. JURISDICTION AND RECIPROCAL DISCIPLINE**

...

### **Comment**

...

[3] The imposition of discipline in one jurisdiction does not mean that Georgia and every other jurisdiction in which the lawyer is admitted must necessarily impose discipline. The State Disciplinary Review Board has jurisdiction to recommend reciprocal discipline when a lawyer is suspended or disbarred in a jurisdiction in which the lawyer is licensed or otherwise admitted.

[4] A judicial determination of misconduct by the respondent in another jurisdiction is conclusive, and not subject to re-litigation in the forum jurisdiction. The State Disciplinary Review Board should recommend substantially similar discipline unless it determines, after review limited to the record of the proceedings in the foreign jurisdiction, that one of the grounds specified in paragraph (b) (3) exists.

**Rule 4-220. Notice of Punishment or Acquittal;  
Administration of Reprimands**

...

(c) Public Reprimands shall be prepared by the Office of the General Counsel based upon the record in the case. They shall be read in open court in the presence of the respondent by the judge of a Superior Court in the county of the respondent's address as shown on the Membership Records of the State Bar of Georgia or as otherwise ordered by the Supreme Court of Georgia. Notice of issuance of the reprimand shall be published in advance in the legal organ of the county of the respondent's address as shown on the Membership Records of the State Bar of Georgia, and provided to the complainant in the underlying case.



**MEMORANDUM  
CONFIDENTIAL**

To: Members, Executive Committee

From: Paula Frederick

Date: October 31, 2019

Re: Letter from Greg Beck

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The attached letter threatens litigation over the constitutionality of Georgia Rule of Professional Conduct 7.5(e). This matter will be on the agenda for discussion in Executive Session. The Rule reads as follows (the challenged language is in boldface):

**RULE 7.5 FIRM NAMES AND LETTERHEADS**

- a. A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.
- b. A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- c. The name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- d. Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.
- e. **A trade name may be used by a lawyer in private practice if:**
  1. **the trade name includes the name of at least one of the lawyers practicing under said name.** A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm; and
  2. the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection.

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

**Comment**

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

[2] Trade names may be used so long as the name includes the name of at least one or more of the lawyers actively practicing with the firm. Firm names consisting entirely of the names of deceased or retired partners have traditionally been permitted and have proven a useful means of identification. Sub-paragraph (e)(1) permits their continued use as an exception to the requirement that a firm name include the name of at least one active member.

/pjf



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## Greg Beck

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Washington, DC 20036

October 14, 2019

Paula Frederick  
General Counsel  
State Bar of Georgia  
104 Marietta St. NW  
Suite 100  
Atlanta, Georgia 30303  
Via email to paulaf@gabar.org

Re: Georgia Rule of Professional Conduct 7.5(e)

Dear Ms. Frederick:

I represent LawHQ, a law firm based in Salt Lake City, Utah focused on protecting consumers from the proliferation of illegal telephone spam. The firm is expanding and intends to soon provide legal services in all fifty states through association with locally licensed attorneys. The firm's national scale, as well as its innovative use of technology, will allow it to improve the speed, cost, simplicity, and effectiveness of legal services.

Unfortunately, the Georgia Rules of Professional Conduct stand as a barrier to the firm's practice in the state. Rule 7.5(e) permits a trade name to "be used by a lawyer in private practice" only if it "includes the name of at least one of the lawyers practicing under" that name. On its face, the rule prohibits my client from operating in Georgia under its LawHQ trade name—even though nothing about the name is misleading or poses even a hypothetical threat to potential clients.

Rule 7.5(e) is, as written, unconstitutional. On behalf of my clients in *Alexander v. Cahill*, I obtained a permanent injunction against enforcement of a former New York prohibition on a lawyer's use of a "trade name that implies an ability to obtain results in a matter." *Alexander v. Cahill*, 598 F.3d 79, 94–95 (2d Cir. 2010). The Second Circuit in *Alexander* held that the rule violated the First Amendment because it was too broad, prohibiting trade names "even when they are not actually misleading." *Id.* at 95. Under the logic of *Alexander*, Rule 7.5(e) also violates the First Amendment—if the state cannot prohibit trade names that imply an ability to obtain results, it cannot impose an even broader prohibition on all trade names that do not contain the name of a lawyer either. *See also Pub. Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 224 (5th Cir. 2011) (upholding a restriction on trade names only because lawyers remained free to use trade names

that would not mislead the public); *Harrell v. Fla. Bar*, 915 F. Supp. 2d 1285, 1305 & n.21 (M.D. Fla. 2011) (holding unconstitutional a Florida restriction on a lawyer's slogan); *Michel v. Bare*, 230 F. Supp. 2d 1147 (D. Nev. 2002) (holding unconstitutional a Nevada rule prohibiting use of trade names by law firms). Cf. *Heffner v. Murphy*, 745 F.3d 56, 87 (3d Cir. 2014) (relying on *Alexander* to hold unconstitutional a prohibition on use of trade names by funeral homes).

Those states that have prohibited trade names have typically done so in reliance on the Supreme Court's decision *Friedman v. Rogers*, 440 U.S. 1 (1979). As the Second Circuit noted in *Alexander*, however, *Friedman* was decided before the Court formulated its standard of review for restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). See *Alexander*, 598 F.3d at 95. The state's burden under *Central Hudson* is a "heavy" one, 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996), requiring actual evidence, not just speculation and conjecture, that the restrictions are effective and narrowly tailored to further an important state interest. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). No evidence—or even common-sense reasoning—shows that trade names are harmful to consumers of legal services. See *Alexander*, 598 F.3d at 95.

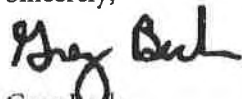
Following *Alexander*, I was hopeful that the states would quickly eliminate any remaining restrictions on law-firm trade names. But almost a decade later, Georgia remains one of just a handful of states that continues to maintain such a trade-name restriction. The state's retention of an obviously unconstitutional rule leaves LawHQ with little choice but to seek legal relief to protect its First Amendment rights.

I am writing you in the hope of avoiding that outcome. An assurance from your office that LawHQ may operate under its trade name in the state without threat of discipline could render a lawsuit unnecessary. We therefore respectfully request that you provide us with such assurance by agreeing, in writing, to forego enforcement of Rule 7.5(e) on the ground that the rule is contrary to the First Amendment.

Because LawHQ wishes to begin operating in Georgia as soon as possible, we would appreciate a response by November 4, 2019.

Please feel free to contact me if you would like to discuss this matter further.

Sincerely,



Greg Beck

## **RULE 1.0 TERMINOLOGY AND DEFINITIONS**

- (a) “Belief” or “believes” denotes that the person involved actually thought the fact in question to be true. A person’s belief may be inferred from the circumstances.
- (b) “Confidential Proceedings” denotes any proceeding under these rules which occurs prior to a filing in the Supreme Court of Georgia.
- (c) “Confirmed in writing” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (l) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
- (d) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
- (e) “Conviction” or “convicted” denotes any of the following accepted by a court, whether or not a sentence has been imposed:
- a. a guilty plea;
  - b. a plea of nolo contendere;
  - c. a verdict of guilty;
  - d. a verdict of guilty but mentally ill; or
  - e. A plea entered under the Georgia First Offender Act, OCGA § 42-8-60 et seq., or a substantially similar statute in Georgia or another jurisdiction.
- (f) “Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any state or territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.
- (g) “Firm” or “law firm” denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Bar Rule 1-203 (d); or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

- (h) "Foreign Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.
- (i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive; not merely negligent misrepresentation or failure to apprise another of relevant information.
- (j) "~~Grievance/Memorandum of Grievance~~" denotes an allegation of unethical conduct ~~filed~~ against a lawyer.
- (k) "He," "Him" or "His" denotes generic pronouns including both male and female.
- (l) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (m) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.
- (n) "Lawyer" denotes a person authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia including persons admitted to practice in this state pro hac vice.
- (o) "Memorandum of Grievance" denotes an allegation of unethical conduct against a lawyer filed in writing with the Office of the General Counsel and containing the name and signature of the complainant.
- (p) "Nonlawyer" denotes a person not authorized to practice law by either the:
- (1) Supreme Court of Georgia or its rules (including pro hac vice admission),
  - or
  - (2) duly constituted and authorized governmental body of any other state or territory of the United States, or the District of Columbia, or
  - (3) duly constituted and authorized governmental body of any foreign nation.
- (q) "Notice of Discipline" denotes a notice by the State Disciplinary Board that the respondent will be subject to a disciplinary sanction for violation of one or more Georgia Rules of Professional Conduct unless the respondent affirmatively rejects the notice.
- (r) "Partner" denotes a member of a partnership, a shareholder in a law firm organized pursuant to Bar Rule 1-203 (d), or a member of an association authorized to practice law.

- (s) "Petition for Voluntary Surrender of License" denotes a Petition for Voluntary Discipline in which the respondent voluntarily surrenders his license to practice law in this state. A voluntary surrender of license is tantamount to disbarment.
- (t) "Probable Cause" denotes a finding by the State Disciplinary Board that there is sufficient evidence to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of the rules.
- (u) "Prospective Client" denotes a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.
- (v) "Public Proceedings" denotes any proceeding under these rules that has been filed with the Supreme Court of Georgia.
- (w) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (x) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (y) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (z) "Respondent" denotes a person whose conduct is the subject of any disciplinary investigation or proceeding.
- (aa) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.
- (bb) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- (cc) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(dd) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

#### Comment

[1] Bar Rule 4-110 includes additional definitions for terminology used in the procedural section of these rules.

#### Confirmed in Writing

[1A] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

#### Firm

[2] Whether two or more lawyers constitute a firm within paragraph (e) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Georgia Rules of Professional Conduct. There can be uncertainty, however, as to the

identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

#### Fraud

[5] When used in these rules, the terms "fraud" or "fraudulent" refers to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

#### Informed Consent

[6] Many of the Georgia Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2 (c), 1.6 (a) and 1.7 (b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In

determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. *See Rules 1.7 (b) and 1.9 (a)*. For a definition of "writing" and "confirmed in writing," see paragraphs (s) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. *See, e.g., Rules 1.8 (a) (3) and (g)*. For a definition of "signed," see paragraph (s).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 and 1.12.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened

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lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Writing

[11] The purpose of this definition is to permit a lawyer to use developing technologies that maintain an objective record of a communication that does not rely upon the memory of the lawyer or any other person. *See OCGA § 10-12-2(8)*.

### **RULE 9.3 COOPERATION WITH DISCIPLINARY AUTHORITY**

During the investigation of a matter pursuant to grievance filed under these Rules, the lawyer complained against shall respond to disciplinary authorities in accordance with State Bar Rules.

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

Comment

[1] Much of the work in the disciplinary process is performed by volunteer lawyers and lay persons. In order to make good use of their valuable time, it is imperative that the lawyer complained against cooperate with the investigation. In particular, the lawyer must file a sworn response with the member of the Investigative Panel charged with the responsibility of investigating the complaint.

[2] Nothing in this Rule prohibits a lawyer from responding by making a Fifth Amendment objection, if appropriate. However, disciplinary proceedings are civil in nature and the use of a Fifth Amendment objection will give rise to a presumption against the lawyer.

### **RULE 4-202 RECEIPT OF GRIEVANCES; INITIAL REVIEW BY BAR COUNSEL**

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- (a) ~~Grievances shall be filed in writing with the Office of the General Counsel of the State Bar of Georgia. In lieu of a Memorandum of Grievance the Office of the General Counsel may begin an investigation upon receipt of an Intake Form from the Consumer Assistance Program. All grievances must include the name of the complainant and must be signed by the complainant. The Office of the General Counsel may begin an investigation upon receipt of a Memorandum of Grievance, an Intake Form from the Client Assistance Program, or credible evidence from any source. If the investigation is based upon receipt of credible evidence the Office of the General Counsel must first notify the respondent lawyer and provide a written description of the information that serves as the basis for the investigation.~~
- (b) ~~The Office of the General Counsel may investigate conduct upon receipt of credible information from any source, after notifying the respondent lawyer and providing a written description of the information that serves as the basis for the investigation. The Office of the General Counsel may also deliver the information it obtains from any source to the State Disciplinary Board for initiation of a grievance under Rule 4-203 (2).~~
- (c) The Office of the General Counsel shall be empowered to collect evidence and information concerning any grievance matter under investigation. The screening process may include forwarding a copy of the grievance information received to the respondent in order so that the respondent may respond to the grievance.
- (d) The Office of the General Counsel may request the Chair of the State Disciplinary Board to issue a subpoena as provided by OCGA § 24-13-23 requiring a respondent or a third party to produce documents relevant to the matter under investigation. Subpoenas shall be enforced in the manner provided at Rule 4-221 (c).
- (e) Upon completion of its screening of a grievance matter, the Office of the General Counsel shall be empowered to dismiss those grievances matters that do not present sufficient merit to proceed. ~~Rejection of such grievances by the Office of the General Counsel shall not deprive the complaining party of any right of action he might otherwise have at law or in equity against the respondent.~~
- (f) Those grievances matters that appear to allege a violation of Part IV, Chapter 1 of the Georgia Rules of Professional Conduct may be forwarded to the State Disciplinary Board pursuant to Rule 4-204. In lieu of forwarding a matter to the State Disciplinary Board, the

Office of the General Counsel may refer a matter to the ~~Consumer~~ Client Assistance Program so that it may direct the complaining party to appropriate resources.

#### **RULE 4-203 POWERS AND DUTIES**

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

(1) to receive and evaluate any and all written grievances against lawyers and to frame such charges and grievances as shall conform to the requirements of these Rules. A copy of ~~any grievance~~ the information serving as the basis for investigation or proceedings before the State Disciplinary Board shall be furnished to the respondent by the procedures set forth in Rule 4-203.1;

(2) to initiate grievances on its own motion, to require additional information from a complainant, where appropriate, and to dismiss and reject ~~such grievances as they may~~ matters ~~that seem unjustified, frivolous, or patently unfounded.~~ However, the rejection of a ~~grievance~~ matter by the State Disciplinary Board shall not deprive the complaining party of any right of action he might otherwise have at law or in equity against the respondent;

(3) to issue letters of instruction when dismissing a ~~grievance~~ matter;

(4) to delegate the duties of the State Disciplinary Board enumerated in paragraphs (1), (2), (8), (9), (10), and (11) hereof to the Chair of the State Disciplinary Board or such other members as the State Disciplinary Board or its Chair may designate subject to review and approval by the full State Disciplinary Board;

(5) to conduct Probable Cause investigations, to collect evidence and information concerning ~~grievances~~ matters under investigation, and to certify ~~grievances~~ matters to the Supreme Court of Georgia for hearings by Special Masters as hereinafter provided;

(6) to prescribe its own Rules of conduct and procedure;

(7) to receive, investigate, and collect evidence and information, and review and accept or reject Petitions for Voluntary Discipline pursuant to Rule 4-227 (b) (1);

(8) to sign and enforce, as hereinafter described, subpoenas for the appearance of persons and the production of documents, things and records at investigations both during the screening process and the State Disciplinary Board's investigation;

(9) to issue a subpoena as provided in this Rule whenever a subpoena is sought in this State pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, where the issuance of the subpoena has been duly approved under the law of the other jurisdiction. Upon petition for good cause the State Disciplinary Board may compel the attendance of witnesses and production of documents in the county where the witness resides or is employed or elsewhere as agreed by the witness. Service of the subpoena shall be as provided in the Georgia Civil Practice Act. Enforcement or challenges to the subpoena shall be as provided at Rule 4-221 (c);

(10) to extend the time within which a formal complaint may be filed;

(11) to issue Formal Letters of Admonition and Confidential Reprimands as hereinafter provided;

(12) to issue a Notice of Discipline providing that unless the respondent affirmatively rejects the notice, the respondent shall be sanctioned as ordered by the Supreme Court of Georgia;

(13) to refer a lawyer who appears to be impaired for an evaluation by an appropriate medical or mental health professional; and

(14) to use the staff of the Office of the General Counsel in performing its duties.

#### **RULE 4-204 INVESTIGATION AND DISPOSITION BY STATE DISCIPLINARY BOARD-GENERALLY**

- (a) Each grievance matter that presents sufficient merit to proceed may be referred with a Notice of Investigation to the State Disciplinary Board for investigation and disposition in accordance with its Rules. The Clerk of the State Disciplinary Boards shall assign a lawyer member of the State Disciplinary Board to be responsible for the investigation. The Office of the General Counsel shall simultaneously assign a staff investigator to assist the State Disciplinary Board member with the investigation. If the investigation of

the State Disciplinary Board establishes Probable Cause to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of these Rules, it shall:

1. issue a Formal Letter of Admonition;
2. issue a Confidential Reprimand;
3. issue a Notice of Discipline;
4. refer the case to the Supreme Court of Georgia for hearing before a Special Master and file a formal complaint with the Supreme Court of Georgia, all as hereinafter provided; or
5. refer a respondent for evaluation by an appropriate medical or mental health professional pursuant to Rule 4-104 upon the State Disciplinary Board's determination that there is cause to believe the lawyer is impaired.

All other cases may be either dismissed by the State Disciplinary Board or referred to the ~~Consumer~~ Client Assistance Program so that it may direct the complaining party to appropriate resources.

- (b) The primary investigation shall be conducted by the member of the State Disciplinary Board responsible for the investigation, assisted by the staff of the Office of the General Counsel, upon request of the State Disciplinary Board member. The Board of Governors of the State Bar of Georgia shall fund the Office of the General Counsel so that the Office of the General Counsel will be able to adequately investigate and prosecute all cases.

#### **RULE 4-204.1 NOTICE OF INVESTIGATION (Revised at January 2019 meeting)**

- (a) A Notice of Investigation shall accord the respondent reasonable notice of the charges against him and a reasonable opportunity to respond to the charges in writing. The Notice shall contain:

1. a statement that the grievance or written description pursuant to Rule 4-202(b) is being transmitted to the State Disciplinary Board;
2. a copy of the grievance or written description pursuant to Rule 4-202(b);
3. a list of the Rules that appear to have been violated;

- 325 4. the name and address of the State Disciplinary Board member assigned to  
326 investigate the grievance matter and a list of the State Disciplinary Board  
327 members; and  
328 5. a statement of the respondent's right to challenge the competency, qualifications  
329 or objectivity of any State Disciplinary Board member.

330 (b) The form for the Notice of Investigation shall be approved by the State Disciplinary  
331 Board.

332 (c) The Office of the General Counsel shall cause the Notice of Investigation to be served  
333 upon the respondent pursuant to Rule 4-203.1.  
334

335 **RULE 4-204.3 ANSWER TO NOTICE OF INVESTIGATION REQUIRED**

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

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

341 (c) The State Disciplinary Board member assigned to investigate the grievance matter may,  
342 in the State Disciplinary Board member's discretion, grant extensions of time for the  
343 respondent's answer. Any request for extension of time must be made in writing, and the  
344 grant of an extension of time must also be in writing. Extensions of time shall not exceed  
345 30 days and should not be routinely granted.

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

- 350 1. When an investigating member of the State Disciplinary Board notifies the Office  
351 of the General Counsel that the respondent has failed to respond and that the  
352 respondent should be suspended, the Office of the General Counsel shall, with the  
353 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 determine 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 Georgia shall enter an appropriate order. The determination that an adequate response has been filed is within the discretion of the investigating State Disciplinary Board member and the Chair of the State Disciplinary Board.

#### **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 Rule 4-202(b); 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 4-208.4 FORMAL COMPLAINT FOLLOWING NOTICE OF REJECTION OF DISCIPLINE**

(1) 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.

(2) 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.

(3) 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 matter and take appropriate action.

#### **RULE 4-222 LIMITATION**

(a) No proceeding under Part IV, Chapter 2, shall be brought unless a Memorandum of Grievance, written description pursuant to Rule 4-202(b) or a Consumer Client Assistance Program referral form has been received at the State Bar of Georgia headquarters or instituted pursuant to these Rules within four years after the commission of the act; provided, however, this limitation shall be tolled during any period of time, not to exceed two years, that the offender or the offense is unknown, the offender's



whereabouts are unknown, or the offender's name is removed from the roll of those authorized to practice law in this State.

(b) Referral of a matter to the State Disciplinary Board by the Office of the General Counsel shall occur within 12 months of the receipt of the Memorandum of Grievance or credible information at the State Bar of Georgia ~~headquarters or institution of an investigation~~.

#### **RULE 4-223 ADVISORY OPINIONS**

(a) Any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person. Formal Advisory Opinions which have been approved or modified by the Supreme Court pursuant to Rule 4-403 shall also be binding in subsequent disciplinary proceedings which do not involve the person who requested the opinion.

(b) It shall be considered as mitigation to any grievance matter being investigated under these rules that the respondent has acted in accordance with and in reasonable reliance upon a written Informal Advisory Opinion requested by the respondent pursuant to Rule 4-40 1 or a Formal Advisory Opinion issued pursuant to Rule 4-403, but not reviewed by the Supreme Court of Georgia.

#### **RULE 4-224 EXPUNGEMENT OF RECORDS**

(a) The record of any grievance investigation against a respondent under these Rules which does not result in discipline against the respondent shall be expunged by the Office of the General Counsel in accordance with the following:

1. those grievances matters closed by the Office of the General Counsel after screening pursuant to Rule 4-202 (e) shall be expunged after one year;
2. those grievances matters dismissed by the State Disciplinary Board after a Probable Cause investigation pursuant to Rule 4-204 (a) shall be expunged after two years; and

3. those complaints dismissed by the Supreme Court of Georgia after formal proceedings shall be expunged after two years.

(b) Definition. The term “expunge” shall mean that all records or other evidence of the existence of the complaint shall be destroyed.

(c) Effect of Expungement. After a file has been expunged, any response to an inquiry requiring a reference to the matter shall state that any record of such matter has been expunged and, in addition, shall state that no inference adverse to the respondent is to be drawn on the basis of the incident in question. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that the grievance matter or formal complaint was dismissed and thereafter expunged.

(d) Retention of Records. Upon application to the State Disciplinary Board by the Office of the General Counsel, for good cause shown, with notice to the respondent and an opportunity to be heard, records that would otherwise be expunged under this Rule may be retained for such additional period of time not exceeding three years as the Board deems appropriate. Counsel may seek a further extension of the period for which retention of the records is authorized whenever a previous application has been granted for the maximum period permitted hereunder.

(e) A lawyer may respond in the negative when asked if there are any complaints against the lawyer if the matter has been expunged pursuant to this Rule. Before making a negative response to any such inquiry, the lawyer shall confirm that the record was expunged and shall not presume that any matter has been expunged.

(f) A lawyer may respond in the negative when asked if he has ever been professionally disciplined or determined to have violated any professional disciplinary rules if all grievances matters filed against the lawyer have either been referred to the Consumer Client Assistance Program, dismissed, or dismissed with a letter of instruction.

#### **CLIENT SECURITY FUND RULE 10-106**

(a) The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and because of a lawyer-client relationship, or a fiduciary relationship, between the lawyer and the claimant.

(b) As used in these Rules, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value.

(c) There must be a final disposition of a grievance ~~an~~ filed with the State Disciplinary Board of the State Bar of Georgia resulting in indefinite suspension, disbarment, or voluntary surrender of license.

(d) The claim shall be filed no later than two years after the date of final disciplinary action by the Supreme Court of Georgia. In the event disciplinary action cannot be prosecuted due to the fact that the attorney is either deceased or cannot be located, the claim shall be filed no later than five years after the dishonest conduct was first discovered by the applicant; provided, however, the claim shall be filed no later than seven years after the dishonest conduct occurred.

(e) Except as provided by part (f) of this Rule, the following losses shall not be reimbursable:

(1) losses incurred by spouses, children, parents, grandparents, siblings, partners, associates and employees of lawyer(s) causing the losses;

(2) losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest;

(3) losses incurred by any financial institution, which are recoverable under a "banker's blanket bond" or similar commonly available insurance or surety contract;

(4) losses incurred by any business entity controlled by the lawyer, or any person or entity described in part (e) (1) hereof;

(5) losses incurred by any governmental entity or agency;

(6) losses incurred by corporations or partnerships, including general or limited.

(f) In cases of extreme hardship or special and unusual circumstances, the Board may, in its discretion, recognize a claim that otherwise would be excluded under these Rules in order to achieve the purpose of the Fund.

- 496 (g) In cases where it appears that there will be unjust enrichment, or the claimant unreasonably  
497 or knowingly contributed to the loss, the Board, in its discretion, may deny the claim.
- 498 (h) The Board shall require the applicant to exhaust his or her civil remedies unless the Board  
499 determines that the pursuit of the civil claim is not feasible or practical.

1 Rule 1.0 TERMINOLOGY AND DEFINITIONS.

- 2
- 3 (a) "Belief" or "believes" denotes that the person involved actually thought the fact in question to  
4 be true. A person's belief may be inferred from the circumstances.
- 5 (b) "Confidential Proceedings" denotes any proceeding under these rules which occurs prior to a  
6 filing in the Supreme Court of Georgia.
- 7 (c) "Confirmed in writing" when used in reference to the informed consent of a person, denotes  
8 informed consent that is given in writing by the person, or a writing that a lawyer promptly  
9 transmits to the person confirming an oral informed consent. See paragraph (l) for the definition  
10 of "informed consent." If it is not feasible to obtain or transmit the writing at the time the  
11 person gives informed consent, then the lawyer must obtain or transmit it within a reasonable  
12 time thereafter.
- 13 (d) "Consult" or "consultation" denotes communication of information reasonably sufficient to  
14 permit the client to appreciate the significance of the matter in question.
- 15 (e) "Conviction" or "convicted" denotes any of the following accepted by a court, whether or not a  
16 sentence has been imposed:
- 17 (1) a guilty plea;
- 18 (2) a plea of nolo contendere;
- 19 (3) a verdict of guilty;
- 20 (4) a verdict of guilty but mentally ill; or
- 21 (5) A plea entered under the Georgia First Offender Act, OCGA § 42-8-60 et seq., or a  
22 substantially similar statute in Georgia or another jurisdiction.
- 23 (f) "Domestic Lawyer" denotes a person authorized to practice law by the duly constituted and  
24 authorized governmental body of any state or territory of the United States or the District of  
25 Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the  
26 state of Georgia.
- 27 (g) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, law partnership, professional  
28 corporation, sole proprietorship or other association authorized to practice law pursuant to Bar

Rule 1-203 (d); or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

- (h) "Foreign Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.
- (i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive; not merely negligent misrepresentation or failure to apprise another of relevant information.
- (j) "Grievance/Memorandum of Grievance" denotes an allegation of unethical conduct filed against a lawyer.
- (k) "He," "Him" or "His" denotes generic pronouns including both male and female.
- (l) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (m) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.
- (n) "Lawyer" denotes a person authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia including persons admitted to practice in this state pro hac vice.
- (o) "Nonlawyer" denotes a person not authorized to practice law by either the:
  - (1) Supreme Court of Georgia or its rules (including pro hac vice admission), or
  - (2) duly constituted and authorized governmental body of any other state or territory of the United States, or the District of Columbia, or
  - (3) duly constituted and authorized governmental body of any foreign nation.
- (p) "Notice of Discipline" denotes a notice by the State Disciplinary Board that the respondent will be subject to a disciplinary sanction for violation of one or more Georgia Rules of Professional Conduct unless the respondent affirmatively rejects the notice.
- (q) "Partner" denotes a member of a partnership, a shareholder in a law firm organized pursuant to Bar Rule 1-203 (d), or a member of an association authorized to practice law.
- (r) "Petition for Voluntary Surrender of License" denotes a Petition for Voluntary Discipline in which the respondent voluntarily surrenders his license to practice law in this state. A voluntary surrender of license is tantamount to disbarment.

- (s) "Probable Cause" denotes a finding by the State Disciplinary Board that there is sufficient evidence to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of the rules.
- (t) "Prospective Client" denotes a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.
- (u) "Public Proceedings" denotes any proceeding under these rules that has been filed with the Supreme Court of Georgia.
- (v) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (w) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (x) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (y) "Respondent" denotes a person whose conduct is the subject of any disciplinary investigation or proceeding.
- (z) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.
- (aa) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- (bb) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.
- (cc) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including but not limited to handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes

an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

## Comment

[1] Bar Rule 4-110 includes additional definitions for terminology used in the procedural section of these rules.

## Confirmed in Writing

[1A] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

## Firm

[2] Whether two or more lawyers constitute a firm within paragraph (e) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Georgia Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.



[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

#### Fraud

[5] When used in these rules, the terms "fraud" or "fraudulent" refers to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

#### Informed Consent

[6] Many of the Georgia Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2 (c), 1.6 (a) and 1.7 (b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or

other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. *See Rules 1.7 (b) and 1.9 (a)*. For a definition of "writing" and "confirmed in writing," see paragraphs (s) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. *See, e.g., Rules 1.8 (a) (3) and (g)*. For a definition of "signed," see paragraph (s).

#### Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 and 1.12.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

176 Writing

177 [11] The purpose of this definition is to permit a lawyer to use developing technologies that maintain an  
178 objective record of a communication that does not rely upon the memory of the lawyer or any other  
179 person. *See OCGA § 10-12-2(8).*

180

1 RULE 8.4 MISCONDUCT

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

- 3 (1) violate or knowingly attempt to violate the Georgia Rules of Professional Conduct,  
4 knowingly assist or induce another to do so, or do so through the acts of another;  
5 (2) be convicted of a felony;  
6 (3) be convicted of a misdemeanor involving moral turpitude where the underlying conduct  
7 relates to the lawyer's fitness to practice law;  
8 (4) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;  
9 (5) fail to pay any final judgment or rule absolute rendered against such lawyer for money  
10 collected by him or her as a lawyer within ten days after the time appointed in the order  
11 or judgment;  
12 (6)  
13 (i) state an ability to influence improperly a government agency or official by  
14 means that violate the Georgia Rules of Professional Conduct or other law;  
15 (ii) state an ability to achieve results by means that violate the Georgia Rules of  
16 Professional Conduct or other law;  
17 (iii) achieve results by means that violate the Georgia Rules of Professional Conduct  
18 or other law;  
19 (7) knowingly assist a judge or judicial officer in conduct that is a violation of applicable  
20 rules of judicial conduct or other law; or  
21 (8) commit a criminal act that relates to the lawyer's fitness to practice law or reflects  
22 adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, where the  
23 lawyer has admitted in judicio, the commission of such act.

24 b.

- 25 (1) For purposes of this Rule, conviction shall include any of the following accepted by a  
26 court, whether or not a sentence has been imposed:  
27 (i) a guilty plea;  
28 (ii) a plea of nolo contendere;  
29 (iii) a verdict of guilty; or  
30 (iv) a verdict of guilty but mentally ill.  
31 (2) The record of a conviction or disposition in any jurisdiction based upon a guilty plea, a  
32 plea of nolo contendere, a verdict of guilty or a verdict of guilty but mentally ill, or upon

the imposition of first offender probation shall be conclusive evidence of such conviction or disposition and shall be admissible in proceedings under these disciplinary rules.

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

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

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

#### Comment

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

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

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

[4] Reserved.

Current GRPC 8.4  
DRPC 1/10/20 meeting

65 [5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no  
66 valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity,  
67 scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

68 [6] Persons holding public office assume responsibilities going beyond those of other citizens. A lawyer's  
69 abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true  
70 of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and  
71 officer, director or manager of a corporation or other organization.