



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

June 6, 2019

Orlando, Florida

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<u>II. Approval of Minutes from January 11, 2019 meeting</u>	(Haubenreich) 2-31
<u>III. Action Items</u>	(Frederick)

A. Matters Referred from Executive Committee

a. (At its recent retreat the Executive Committee discussed the following possible amendments to the Rules of Professional Conduct. All have been rejected by this Committee at some point in the past. Bar President Ken Hodges has asked the Committee to reconsider them. He has convened a new committee to discuss mandatory disclosure of professional liability insurance.)

<i>i. Trade Name</i>	
1. GRPC Rule 7.5	32-33
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IV. Discussion Item

(NeSmith)

A. Rule 4-228 Receivership

- a. *(discuss whether the Committee should add paragraph k to Rule 4-228 regarding fees and costs incurred by Receivers.)*

V. Adjourn

2018-2019

Disciplinary Rules & Procedures

This 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 2020

Vice Chairperson

David S. Lipscomb 2019

Members

Jeffery L. Arnold 2019

Harold Michael Bagley 2019

Paul T. Carroll, III 2019

Hon. J. Antonio DelCampo 2020

Scott Dewitt Delius 2019

R. Keegan Federal 2019

Ashley Brooke Fournet

Laverne Lewis Gaskins 2019

Hon. John Kendall Gross 2021

Patrick H. Head 2021

Charles Bernard Hess 2019

R. Javoyne Hicks 2021

William Dixon James 2019

William James Keogh, III 2019

Seth David Kirschenbaum 2019

Edward B. Krugman 2019

David Neal Lefkowitz 2020

Kellyn O. McGee 2019

Jonathan B. Pannell 2019

Jabu Mariette Sengova 2019

R. Gary Spencer 2019

Christian Joseph Steinmetz, III 2019

Jeffrey S. Ward 2019

Hon. Paige Reese Whitaker 2019

Lay Members

Kathy Ashe 2019

Hon. Rooney Bowen, III 2019

Staff Liaison

Paula J. Frederick , Atlanta 2019

Disciplinary Rules and Procedures Committee
Meeting of January 11, 2019
Macon, Georgia

MINUTES

Chair John Haubenreich called the meeting to order at 2:00 p.m.

Attendance:

Committee members: John G. Haubenreich, David Lipscomb, H. Michael Bagley (phone), Paul T. Carroll, II, R. Keegan Federal (phone), Laverne L. Gaskins, Patrick H. Head, Charles B. Hess, R. Javoyne Hicks, William D. James (phone), William James Keogh, III, Seth D. Kirschenbaum, Edward B. Krugman, David N. Lefkowitz (phone), Kellyn O. McGee, Jabu M. Sengova, R. Gary Spencer, and Honorable Paige Reese Whitaker.

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

Guests: Justice Keith R. Blackwell, Tia Milton (phone), Anthony B. Askew, and Bridget Bagley.

The Committee approved the Minutes from the October 17, 2018 meeting.

Action Items:

Rule 4-204.1:

The Committee voted to amend section a(1), (2), and (4) to clarify that the Office of the General Counsel may send a Notice of Investigation to the State Disciplinary Board whether the investigation is based upon receipt of a grievance form or receipt of credible information.

Rule 1.15(III):

The Committee voted to amend section (c)(2)(i) and (ii) to eliminate the 3-day grace period.

Rule 1.0 and Rule 8.4:

The Committee voted to remove Rule 1.0(e)(5). The Committee voted to make Rule 8.4(b) consistent with the changes to Rule 1.0(e). The Committee also voted to remove "or upon the imposition of the first offender probation" from Rule 8.4(b)(2). The motion passed 14-3-0.

Rule 1.1

The Committee voted to change comment 6 and add comment 7 to address a lawyer's obligation of competence in technology and wellness.

Rule 1.18

The Committee voted to add Rule 1.18 to address duties to prospective clients.

Rule 1.6

The Committee voted to remove comment 4a and not to add proposed comment 4b if/when Rule 1.18 is passed by the Supreme Court of Georgia. The Committee also voted to add “See Rule 1.18” to comment 1 if/when Rule 1.18 is passed by the Supreme Court of Georgia.

Rule 4-228

The Committee voted to amend Rule 4-228 to address issues regarding disposing of property and housekeeping changes.

Revisions approved at this meeting:

Rule 4-204.1. Notice of Investigation

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

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

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

RULE 1.15(III) RECORD KEEPING; TRUST ACCOUNT OVERDRAFT

NOTIFICATION; EXAMINATION OF RECORDS

- a. Required Bank Accounts: Every lawyer who practices law in Georgia and who receives money or other property on behalf of a client or in any other fiduciary capacity shall maintain, in an approved financial institution as defined by this Rule rule, a trust account

73 or accounts, separate from any business and personal accounts. Funds received by the
74 lawyer on behalf of a client or in any other fiduciary capacity shall be deposited into this
75 account. The financial institution shall be in Georgia or in the state where the lawyer's
76 office is located, or elsewhere with the written consent and at the written request of the
77 client or third person.

78 b. Description of Accounts:

- 79 1. A lawyer shall designate all trust accounts, whether general or specific, as well as
80 all deposit slips and checks drawn thereon, as an "Attorney Trust Account,"
81 "Attorney Escrow Account" "IOLTA Account" or "Attorney Fiduciary Account."
82 The name of the attorney or law firm responsible for the account shall also appear
83 on all deposit slips and checks drawn thereon.
- 84 2. A lawyer shall designate all business accounts, as well as all deposit slips and all
85 checks drawn thereon, as a "Business Account," a "Professional Account," an
86 "Office Account," a "General Account," a "Payroll Account," "Operating Account"
87 or a "Regular Account."
- 88 3. Nothing in this ~~Rule~~ rule shall prohibit a lawyer from using any additional
89 description or designation for a specific business or trust account including
90 fiduciary accounts maintained by the lawyer as executor, guardian, trustee,
91 receiver, agent or in any other fiduciary capacity.

92 c. Procedure:

93 1. Approved Institutions:

- 94 i. A lawyer shall maintain his or her trust account only in a financial
95 institution approved by the State Bar of Georgia, which shall annually
96 publish a list of approved institutions.

97 A. Such institutions shall be located within the ~~State~~ state of Georgia,
98 within the state where the lawyer's office is located, or elsewhere
99 with the written consent and at the written request of the client or
100 third-person. The institution shall be authorized by federal or state
101 law to do business in the jurisdiction where located and shall be
102 federally insured. A financial institution shall be approved as a
103 depository for lawyer trust accounts if it abides by an agreement to

report to the Office of the General Counsel whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon ~~thirty~~ 30 days notice in writing to the Office of the General Counsel. The agreement shall be filed with the Office of the General Counsel on a form approved by the ~~Investigative Panel of the~~ State Disciplinary Board. The agreement shall provide that all reports made by the financial institution shall be in writing and shall include the same information customarily forwarded to the depositor when an instrument is presented against insufficient funds. If the financial institution is located outside of the ~~State~~ state of Georgia, it shall also agree in writing to honor any properly issued State Bar of Georgia subpoena.

B. In addition to the requirements above, the financial institution must also be approved by the Georgia Bar Foundation and agree to offer IOLTA Accounts in compliance with the additional requirements set out in Part XV of the Rules of the State Bar of Georgia.

- ii. The Georgia Bar Foundation may waive the provisions of this ~~Rule~~ rule in whole or in part for good cause shown. A lawyer or law firm may appeal the decision of the Georgia Bar Foundation by application to the Supreme Court of Georgia.

2. Timing of Reports:

- i. The financial institution shall file a report with the Office of the General Counsel of the State Bar of Georgia in every instance where a properly payable instrument is presented against a lawyer trust account containing insufficient funds. ~~and said instrument is not honored within three business days of presentation.~~
- ii. The report shall be filed with the Office of the General Counsel within ~~fifteen~~ 15 days of the date of the presentation of the instrument, even if the

instrument is subsequently honored. ~~after the three business days provided in (2) (i) above.~~

3. Nothing shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this ~~Rule~~ rule.

4. Every lawyer and law firm maintaining a trust account as provided by these ~~Rule~~ rules is hereby and shall be conclusively deemed to have consented to the reporting and production requirements mandated by this ~~Rule~~ rule and shall indemnify and hold harmless each financial institution for its compliance with the aforesaid reporting and production requirements.

d. Effect on Financial Institution of Compliance: The agreement by a financial institution to offer accounts pursuant to this ~~Rule~~ rule shall be a procedure to advise the State Disciplinary Board of conduct by lawyers and shall not be deemed to create a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

e. Availability of Records: A lawyer shall not fail to produce any of the records required to be maintained by these ~~Rule~~ rules at the request of the ~~Investigative Panel of the State~~ Disciplinary Board or the Supreme Court of Georgia. This obligation shall be in addition to and not in lieu of the procedures contained in Part IV of these ~~Rule~~ rules for the production of documents and evidence.

f. Audit for Cause: A lawyer shall not fail to submit to an Audit for Cause conducted by the State Disciplinary Board pursuant to Bar Rule 4-111.

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

Comment

[1] Each financial institution wishing to be approved as a depository of client trust funds must file an overdraft notification agreement with the Office of the General Counsel of the State Bar of Georgia. The State Bar of Georgia will publish a list of approved institutions at least annually.

[2] The overdraft agreement requires that all overdrafts be reported to the Office of the General

Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust account, particularly in exchange for the institution's promise to delay or not to report an overdraft. The institution must notify the Office of the General Counsel of all overdrafts even where the institution is certain that its own error caused the overdraft or that the matter could have been resolved between the institution and the lawyer within a reasonable period of time.

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of the General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

Waiver

[4] A lawyer may seek to have the provisions of this ~~Rule~~ rule waived if the lawyer or law firm has its principal office in a county where no bank, credit union, or savings and loan association will agree or has agreed to comply with the provisions of this ~~Rule~~ rule. Other grounds for requesting a waiver may include significant financial or business harm to the lawyer or law firm, such as where the unapproved bank is a client of the lawyer or law firm or where the lawyer serves on the board of the unapproved bank.

[5] The request for a waiver should be in writing, sent to the Georgia Bar Foundation, and should include sufficient information to establish good cause for the requested waiver.

[6] The Georgia Bar Foundation may request additional information from the lawyer or law firm if necessary to determine good cause.

Audits

[7] Every lawyer's financial records and trust account records are required records and therefore are properly subject to audit for cause. The audit provisions are intended to uncover errors and omissions before the public is harmed, to deter those lawyers who may be tempted to misuse client's funds and to educate and instruct lawyers as to proper trust accounting methods. Although

the auditors will be employed by the Office of the General Counsel of the State Bar of Georgia, it is intended that disciplinary proceedings will be brought only when the auditors have reasonable cause to believe discrepancies or irregularities exist. Otherwise, the auditors should only educate the lawyer and the lawyer's staff as to proper trust accounting methods.

[8] An audit for cause may be conducted at any time and without advance notice if the Office of the General Counsel receives sufficient evidence that a lawyer poses a threat of harm to clients or the public. The Office of the General Counsel must have the written approval of the Chairman of the ~~Investigative Panel of the~~ State Disciplinary Board and the President-elect of the State Bar of Georgia to conduct an audit for cause.

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:

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

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

237
238 (f) “Domestic Lawyer” denotes a person authorized to practice law by the duly
239 constituted and authorized governmental body of any State or Territory of the United States or the
240 District of Columbia but not authorized by the Supreme Court of Georgia or its Rules to practice
241 law in the State of Georgia.

242
243 (g) “Firm” or “law firm” denotes a lawyer or lawyers in a private firm, law partnership,
244 professional corporation, sole proprietorship or other association authorized to practice law pursuant
245 to Rule 1-203 (d); or lawyers employed in a legal services organization or the legal department of a
246 corporation or other organization.

247
248 (h) “Foreign Lawyer” denotes a person authorized to practice law by the duly constituted
249 and authorized governmental body of any foreign nation but not authorized by the Supreme Court
250 of Georgia or its Rules to practice law in the State of Georgia.

251
252 (i) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or
253 procedural law of the applicable jurisdiction and has a purpose to deceive; not merely negligent
254 misrepresentation or failure to apprise another of relevant information.

255
256 (j) “Grievance/Memorandum of Grievance” denotes an allegation of unethical conduct
257 filed against a lawyer.

258
259 (k) “He,” “him” or “his” denotes generic pronouns including both male and female.

260
261 (l) “Informed consent” denotes the agreement by a person to a proposed course of
262 conduct after the lawyer has communicated adequate information and explanation about the material
263 risks of and reasonably available alternatives to the proposed course of conduct.

264
265 (m) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in
266 question. A person's knowledge may be inferred from the circumstances.

267
268 (n) “Lawyer” denotes a person authorized by the Supreme Court of Georgia or its Rules
269 to practice law in the State of Georgia including persons admitted to practice in this State pro hac
270 vice.

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

272
273 (1) Supreme Court of Georgia or its Rules (including pro hac vice admission), or

274
275 (2) duly constituted and authorized governmental body of any other State or
276 Territory of the United States, or the District of Columbia, or

277
278 (3) duly constituted and authorized governmental body of any foreign nation.
279

(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. *** (approved at 7/18/18 meeting)*

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

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

(~~w~~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.

(~~w~~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.

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

(y~~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.

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

(~~a~~ab~~b~~) “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.

(b)cc) "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.

RULE 8.4 MISCONDUCT

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

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

b. (1) "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; or

4. a verdict of guilty but mentally ill.

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

~~i. a guilty plea;~~

~~ii. a plea of nolo contendere;~~

~~iii. a verdict of guilty; or~~

~~iv. a verdict of guilty but mentally ill.~~

2. The record of a ~~conviction~~ Conviction or disposition in any jurisdiction based upon a guilty plea, a 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~~ 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 8.4 (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.

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

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

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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

Comment

427 *Legal Knowledge and Skill*

428
429 [1A] The purpose of these rules is not to give rise to a cause of action nor to create a presumption
430 that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and
431 to provide a structure for regulating conduct through disciplinary agencies. They are not designed
432 to be a basis for civil liability.

433
434 [1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular
435 matter, relevant factors include the relative complexity and specialized nature of the matter, the
436 lawyer's general experience, the lawyer's training and experience in the field in question, the
437 preparation and study the lawyer is able to give the matter and whether it is feasible to refer the
438 matter to, or associate or consult with, a lawyer of established competence in the field in question.
439 In many instances, the required proficiency is that of a general practitioner. Expertise in a
440 particular field of law may be required in some circumstances.

441
442 [2] A lawyer need not necessarily have special training or prior experience to handle legal
443 problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as
444 competent as a practitioner with long experience. Some important legal skills, such as the analysis
445 of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.
446 Perhaps the most fundamental legal skill consists of determining what kind of legal problems a
447 situation may involve, a skill that necessarily transcends any particular specialized knowledge. A
448 lawyer can provide adequate representation in a wholly novel field through necessary study.
449 Competent representation can also be provided through the association of a lawyer of established
450 competence in the field in question.

451
452 [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does
453 not have the skill ordinarily required where referral to or consultation or association with another
454 lawyer would be impractical. Even in an emergency, however, assistance should be limited to that
455 reasonably necessary in the circumstances, for ill-considered action under emergency conditions
456 can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person subject to Rule 6.2: Accepting Appointments.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

~~[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.~~ To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

[7] A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

Rule 1.18: Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

487 (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a
488 prospective client shall not use or reveal that information, except as Rule 1.9 would permit with
489 respect to information of a former client.

490 (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse
491 to those of a prospective client in the same or a substantially related matter if the lawyer received
492 information from the prospective client that could be significantly harmful to that person in the
493 matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under
494 this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake
495 or continue representation in such a matter, except as provided in paragraph (d).

496 (d) When the lawyer has received disqualifying information as defined in paragraph (c),
497 representation is permissible if both the affected client and the prospective client have given
498 informed consent, confirmed in writing.

499
500 **Comment**

501 [1] Prospective clients, like clients, may disclose information to a lawyer, place documents or
502 other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations
503 with a prospective client usually are limited in time and depth and leave both the prospective client
504 and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients
505 should receive some but not all of the protection afforded clients.

506 [2] A person becomes a prospective client by consulting with a lawyer about the possibility of
507 forming a client-lawyer relationship with respect to a matter. Whether communications, including
508 written, oral, or electronic communications, constitute a consultation depends on the
509 circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person
510 or through the lawyer's advertising in any medium, specifically requests or invites the submission
511 of information about a potential representation without clear and reasonably understandable
512 warnings and cautionary statements that limit the lawyer's obligations, and a person provides
513 information in response. See also Comment [4]. In contrast, a consultation does not occur if a
514 person provides information to a lawyer in response to advertising that merely describes the
515 lawyer's education, experience, areas of practice, and contact information, or provides legal

information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(l) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients.

[8] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

GRPC RULE 1.6 CONFIDENTIALITY OF INFORMATION *(the committee voted to make changes to Comment 1, 4A and 4B if Rule 1.18 is passed by the Supreme Court of Georgia.)*
(All other changes were made at previous meetings 6/9/17, 10/27/17, 1/5/18 and 7/18/18).

- a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

b.

1. A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:
 - i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
 - ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;
 - iii. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - iv. to secure legal advice about the lawyer's compliance with these Rules.

v. to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

2. In a situation described in paragraph (b) (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

3. Before using or disclosing information pursuant to paragraph (b) (1) (i) or (ii), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

~~e. The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.~~

~~d. The lawyer shall reveal information under paragraph (b) as the applicable law requires.~~

c. e The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

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

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. See Rule 1.18. ***(approved at 1/11/19 meeting if Rule 1.18 is passed by The Supreme Court of Georgia).*

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law

605 recognizes that the client's confidences must be protected from disclosure. Based upon experience,
606 lawyers know that almost all clients follow the advice given, and the law is upheld.

607
608 [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain
609 confidentiality of information relating to the representation. The client is thereby encouraged to
610 communicate fully and frankly with the lawyer even as to embarrassing or legally damaging
611 subject matter.

612
613 ~~[4A] Information gained in the professional relationship includes information gained from a~~
614 ~~person (prospective client) who discusses the possibility of forming a client-lawyer relationship~~
615 ~~with respect to a matter. Even when no client-lawyer relationship ensues, the restrictions and~~
616 ~~exceptions of these Rules as to use or revelation of the information apply, e.g. Rules 1.9 and 1.10.~~
617 *** (approved at 1/11/19 meeting only if Rule 1.18 is passed by The Supreme Court of Georgia)*

618
619 [4B] A person becomes a prospective client by consulting with a lawyer about the possibility of
620 forming a client-lawyer relationship with respect to a matter. Whether communications, including
621 written, oral, or electronic communications, constitute a consultation depends on the
622 circumstances. For example, a consultation is likely to have occurred if a person provides
623 information in response to a lawyer's invitation to submit information about a potential
624 representation, unless the lawyer's invitation includes clear and reasonably understandable
625 warnings and cautionary statements that limit the lawyer's obligations. A consultation may occur
626 in person or through the lawyer's advertising in any medium. In contrast, a consultation does not
627 occur if a person provides information to a lawyer in response to advertising that merely describes
628 the lawyer's education, experience, areas of practice, and contact information, or provides legal
629 information of general interest. Such a person communicates information unilaterally to a lawyer,
630 without any reasonable expectation that the lawyer is willing to discuss the possibility of forming
631 a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who
632 communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective
633 client." *** (at 1/11/19 meeting Committee voted not to add 4B if Rule 1.18 is passed by The*
634 *Supreme Court of Georgia)*

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. Rule 1.6 applies not merely to matters communicated in confidence by the client but also to all information gained in the professional relationship, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. The requirement of maintaining confidentiality of information gained in the professional relationship applies to government lawyers who may disagree with the client's policy goals.

Authorized Disclosure

[6] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[7] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[7A] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized paragraph (b)(1)(iv) permits such disclosure because of the importance of a lawyer's compliance with the

Rules of Professional Conduct.

Disclosure Adverse to Client

[8] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[9] Several situations must be distinguished. First, the lawyer may not knowingly assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence.

[10] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "knowingly assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[11] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent death or serious bodily injury which the lawyer reasonably believes will occur. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[12] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action

permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

[13] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[14] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[15] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[16] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(1)(iii) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which

limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(1)(iii) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Detection of Conflicts of Interest

[18] Paragraph (b)(1)(v) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [6]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interests that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the

person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[19] Any information disclosed pursuant to paragraph (b)(1)(v) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(1)(v) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(1)(v). Paragraph (b)(1)(v) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [7], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Disclosures Otherwise Required or Authorized

[18-20] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[19-21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

[22] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In

790 any case, a disclosure adverse to the client's interest should be no greater than the lawyer
791 reasonably believes necessary to accomplish the purpose. If the disclosure will be made in
792 connection with a judicial proceeding, the disclosure should be made in a manner that limits
793 access to the information to the tribunal or other persons having a need to know it and appropriate
794 protective orders or other arrangements should be sought by the lawyer to the fullest extent
795 practicable.

796
797 [23] Paragraph (b) permits but does not require the disclosure of information relating to a client's
798 representation to accomplish the purposes specified. In exercising the discretion conferred by this
799 Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the
800 client and with those who might be injured by the client, the lawyer's own involvement in the
801 transaction and factors that may extenuate the conduct in question. A lawyer's decision not to
802 disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required,
803 however, by other Rules. Some Rules require disclosure only if such disclosure would be
804 permitted by paragraph (b). See Rules 1.2(d), 4.1(b), and 8.1. Rule 3.3, on the other hand, requires
805 disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule.
806 See Rule 3.3(b).

807 808 Acting Competently to Preserve Confidentiality

809 [24] A lawyer should make reasonable efforts to prevent the inadvertent or unauthorized
810 disclosure of, or unauthorized access to, information covered by this Rule. A lawyer should make
811 reasonable efforts to safeguard information relating to the representation of a client against
812 unauthorized access by third parties and against inadvertent or unauthorized disclosure by the
813 lawyer or other persons who are participating in the representation of the client or who are subject
814 to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Factors to be considered in determining
815 the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the
816 information, the likelihood of disclosure if additional safeguards are not employed, the cost of
817 employing additional safeguards, the difficulty of implementing the safeguards, and the extent to
818 which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a
819 device or important piece of software excessively difficult to use). Whether a lawyer may be
820 required to take additional steps to safeguard a client's information in order to comply with other

law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

[25] When transmitting a communication that includes information relating to the representation of a client, the lawyer should take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Rule 4-228. Receiverships

(a) Definitions:

~~Absent Lawyer: A~~ Attorney - a member of the State Bar of Georgia (or a ~~Domestic~~ foreign or Foreign domestic lawyer authorized to practice law in Georgia) who has disappeared, died, been disbarred, ~~disciplined or~~ suspended, incarcerated, become so impaired as to be unable to properly represent his or her clients; or who otherwise poses such a substantial threat of harm to his or her clients or the public that it is necessary for the Supreme Court of Georgia to appoint a ~~receiver~~ Receiver.

(b) Appointment of Receiver:

~~Upon a final determination by the Supreme Court of Georgia, on a petition filed by the (1)~~
~~The State Bar of Georgia, that a lawyer has become~~ may petition the Supreme Court of Georgia to appoint a receiver to take charge of an absent lawyer, and that no partner, associate, attorney's client files when necessary to protect the interests of clients and the public. The respondent, his or her partners, associates or legal representatives, or the State Bar of Georgia may file a Motion for Reconsideration of the Court's order granting or denying the petition. Any such petition, motion or other appropriate representative is available to notify his clients of this fact. the pleading filed with the Court shall be served as set forth in Bar Rule 4-203.1.

853 (2) ~~The Supreme Court of Georgia may enter an order that appointing~~ a member or members of
854 the State Bar of Georgia as Receiver to take charge of the Absent Attorney's client files and
855 records.

856 (3) ~~If the Office of the General Counsel is not able to locate a member who is willing to be~~
857 ~~appointed as receiver~~ Receiver, the State Bar of Georgia may petition the Supreme Court of
858 Georgia to appoint a lawyer from the Office of the General Counsel as Receiver to take charge of
859 the ~~absent lawyer's~~ Absent Attorney's files and records. ~~Such receiver~~

860 (4) The Receiver shall take custody of client legal files, records and property. The Receiver
861 shall not be responsible for or take custody of the Absent Attorney's personal or business property
862 unless necessary to return client files and property. If the Receiver determines that the Absent
863 Attorney's personal or business property is commingled with client files, records and property, the
864 Receiver shall make every effort to return such files to the Absent Attorney or his or her estate.
865 Personal property that cannot be returned after reasonable efforts by the Receiver may be
866 appropriately disposed of.

867 (5) The Receiver shall review the files, and diligently attempt to notify the absent
868 lawyer's Absent Attorney's clients and take such reasonable steps as seem indicated to protect the
869 interests of the clients and the public. A motion for reconsideration may be taken from the
870 issuance or denial of such protective order by the respondent, his partners, associates, or legal
871 representatives or by the State Bar of Georgia, and the public. The Receiver shall not be required
872 to act as legal counsel for a client in any matter.

873 (6) ~~If the receiver~~ Receiver should encounter, or anticipate, situations or issues not covered by
874 the ~~order~~ Order of appointment, including but not limited to, those concerning proper procedure
875 and scope of authority, the ~~receiver~~ Receiver may petition the Supreme Court of Georgia or its
876 designee for such further order or orders as may be necessary or.

877 (7) The Receiver shall deliver files, records and property to the appropriate client files and
878 property to the appropriate to address the situation or issue so encountered or anticipated.

879 ~~The receiver shall be entitled to release to each client the papers, money, or other property to~~
880 ~~which the client is entitled.~~ client. Before releasing the property, the ~~receiver~~ Receiver may require
881 a receipt from the client for the files and property.

882 (c) Applicability of Lawyer-Attorney-Client Rules-

883 (1) Confidentiality:- The receiver Receiver shall not be permitted to disclose any information
884 contained in the files and records in his or her care without the consent of the client, or the client's
885 guardian, administrator, executor or lawful representative to whom such file or record relates,
886 except as clearly necessary to carry out the order of the Supreme Court of Georgia or, upon
887 application, by order of the Supreme Court of Georgia.

~~Lawyer~~(2) ~~Attorney-Client Relationship; Privilege.~~ - The ~~receiver~~Receiver relationship standing alone does not create a ~~lawyer~~an attorney-client relationship between the ~~receiver~~Receiver and the clients of the ~~absent lawyer~~Absent Attorney. However, the ~~lawyer-attorney-client privilege~~confidentiality in Rule 1.6 shall apply to communications by or between the ~~receiver~~Receiver and the clients of the ~~absent lawyer~~Absent Attorney to the same extent as it would have applied to communications by or to the ~~absent lawyer~~Absent Attorney.

(d) Trust Account:

(1) If after appointment the ~~receiver~~Receiver should determine that the ~~absent lawyer~~Absent Attorney maintained one or more trust accounts and that there are no provisions ~~extant~~that would allow the clients; or other appropriate entities; to receive from the accounts the funds to which they are entitled, the ~~receiver~~Receiver may petition the Supreme Court of Georgia or its designee for an order extending the scope of the ~~receivership~~Receivership to include the management of the ~~said~~ trust account or accounts. ~~In the event~~ If the scope of the ~~receivership~~Receivership is extended to include the management of the trust account or accounts, the ~~receiver~~Receiver shall file quarterly with the Supreme Court of Georgia or its designee a report showing the activity in and status of said accounts.

(2) Service on a bank or financial institution of a copy of the order extending the scope of the ~~receivership~~Receivership to include management of the trust account or accounts shall operate as a modification of any agreement of deposit among such bank or financial institution, the ~~absent lawyer~~Absent Attorney and any other party to the account so as to make the ~~receiver~~Receiver a necessary signatory on any trust account maintained by the ~~absent lawyer~~Absent Attorney with such bank or financial institution. The Supreme Court of Georgia or its designee, on application by the ~~receiver~~Receiver, may order that the ~~receiver~~Receiver shall be sole signatory on any such account and may direct the disposition and distribution of client and other funds to the extent necessary for the purposes of these Rules ~~and may direct the disposition and distribution of client and other funds.~~

(3) In determining ownership of funds in the trust accounts, including by subrogation or indemnification, the ~~receiver~~Receiver should act as a reasonably prudent lawyer maintaining a client trust account. The ~~receiver~~Receiver may (i) rely on a certification of ownership issued by an auditor employed by the ~~receiver~~Receiver; or (ii) interplead any funds of questionable ownership into the appropriate Superior Court; or (iii) proceed under the terms of the Disposition of Unclaimed Property Act (OCGA §-OGCA §44-12-190 et seq.). If the ~~absent lawyer's~~Absent Attorney's trust account does not contain sufficient funds to meet known client balances, the ~~receiver~~Receiver may disburse funds on a pro rata basis.

(e) Payment of Expenses of Receiver:

(1) The ~~receiver~~Receiver shall be entitled to reimbursement for actual and reasonable costs incurred by the ~~receiver~~Receiver for expenses, including, but not limited to, (i) the actual and

reasonable costs associated with the employment of accountants, auditors, and bookkeepers as necessary to determine the source and ownership of funds held in the ~~absent lawyer's~~ Absent Attorney's trust account, and (ii) reasonable costs of secretarial, postage, bond premiums, and moving and storage expenses associated with carrying out the ~~receiver's~~ Receiver's duties. Application for allowance of costs and expenses shall be made by affidavit to the Supreme Court of Georgia, or its designee, who may determine the amount of the reimbursement. The application shall be accompanied by an accounting in a form and substance acceptable to the Supreme Court of Georgia or its designee. The amount of reimbursement as determined by the Supreme Court of Georgia or its designee shall be paid to the ~~receiver~~ Receiver by the State Bar of Georgia. The State Bar of Georgia may seek from a court of competent jurisdiction a judgment against the ~~absent lawyer~~ Absent Attorney or his or her estate in an amount equal to the amount paid by the State Bar of Georgia to the ~~receiver~~ Receiver. The amount of reimbursement as determined by the Supreme Court of Georgia or its designee shall be considered as prima facie evidence of the fairness of the amount, and the burden of proof shall shift to the ~~absent lawyer~~ Absent Attorney or his or her estate to prove otherwise.

(2) The provision of paragraph (e)-(1) above shall apply to all ~~receivers~~ Receivers serving on the effective date of this Rule and thereafter.

(f) Receiver-Client Relationship:

With full disclosure and the informed consent, as defined in Bar Rule 1.0 (l), of any client of the ~~absent lawyer~~ Absent Attorney, the ~~receiver~~ Receiver may, ~~but need not, choose to~~ accept employment to complete any legal matter. Any written consent by the client shall include an acknowledgment that the client is not obligated to use the ~~receiver~~ Receiver.

(g) Unclaimed and Abandoned Files:

(1) If upon completion of the ~~receivership~~ Receivership there are files belonging to the clients of the ~~absent lawyer~~ Absent Attorney that have not been claimed, the ~~receiver~~ Receiver shall deliver them to the State Bar of Georgia which shall serve as custodian of the unclaimed client files

(2) The State Bar of Georgia as custodian or Receiver shall store the files ~~shall store the files~~ hold all unclaimed client files until such files have been closed for at least six years, after which time the State Bar of Georgia may exercise its discretion in maintaining or destroying the ~~unclaimed~~ unclaimed files.

(3) If the ~~receiver~~ Receiver determines that an unclaimed file contains a Last Will and Testament, the ~~receiver~~ Receiver may, but shall not be required to ~~do so~~, file said Last Will and Testament in the office of the Probate Court in such county as ~~to the receiver~~ the Receiver may seem ~~may seem~~ deems appropriate.

(4) In emergency situations and when necessary to protect the confidentiality of client information or to otherwise protect client interests, the State Bar of Georgia may take custody of

960 client files that have been abandoned by an absent attorney without petitioning the Supreme Court
961 of Georgia for a receivership. If after examination of the files it appears that a receivership is
962 necessary, the State Bar of Georgia may petition the Supreme Court of Georgia for appointment of
963 a receiver. The State Bar of Georgia may maintain or destroy abandoned files as set forth in (g)
964 (2) (ii) of this Rule.

965 (h) Professional Liability Insurance. ~~Only lawyers who maintain~~

966 In order to serve as a Receiver an attorney must either maintain an Errors & Omissions insurance
967 policy which includes coverage for conduct as a Receiver, or be eligible for coverage under an
968 errors and omissions insurance, or other appropriate insurance, may be appointed to the position of
969 receiver policy maintained by the State Bar of Georgia.

970 (i) Requirement of Bond:

971 The Supreme Court of Georgia or its designee may require the ~~receiver~~Receiver to post a surety
972 bond conditioned upon the faithful performance of his or her duties and in an amount satisfactory
973 to the Supreme Court of Georgia or its designee. The State Bar of Georgia shall reimburse the
974 Receiver for the cost of such bond, subject to reimbursement as set forth in paragraph (e) supra.

975 (j) Immunity:

976 (1) The Supreme Court of Georgia recognizes the actions of the State Bar of Georgia and the
977 appointed receiver to be within the Court's regulatory function, and being regulatory in nature, the
978 State Bar of Georgia and the receiver are entitled to that immunity customarily afforded to court-
979 appointed receivers.

980
981 (2) The immunity granted in paragraph (j) (1) above shall not apply if the receiver is employed
982 by a client of the absent lawyer to continue the representation.

983 Service. Service under this Rule may be perfected under Rule 4-203.1.

GRPC 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.

27 [2] Trade names may be used so long as the name includes the name of at least one or more of
28 the lawyers actively practicing with the firm. Firm names consisting entirely of the names of
29 deceased or retired partners have traditionally been permitted and have proven a useful means of
30 identification. Sub-paragraph (e)(1) permits their continued use as an exception to the
31 requirement that a firm name include the name of at least one active member.

1 **ABA Rule 7.5: Firm Names & Letterhead**

2 (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates
3 Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a
4 connection with a government agency or with a public or charitable legal services organization
5 and is not otherwise in violation of Rule 7.1.

6 (b) A law firm with offices in more than one jurisdiction may use the same name or other
7 professional designation in each jurisdiction, but identification of the lawyers in an office of the
8 firm shall indicate the jurisdictional limitations on those not licensed to practice in the
9 jurisdiction where the office is located.

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

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

15 **Comment**

16 [1] A firm may be designated by the names of all or some of its members, by the names of
17 deceased members where there has been a continuing succession in the firm's identity or by a
18 trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a
19 distinctive website address or comparable professional designation. Although the United States
20 Supreme Court has held that legislation may prohibit the use of trade names in professional
21 practice, use of such names in law practice is acceptable so long as it is not misleading. If a
22 private firm uses a trade name that includes a geographical name such as "Springfield Legal
23 Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a
24 misleading implication. It may be observed that any firm name including the name of a deceased
25 partner is, strictly speaking, a trade name. The use of such names to designate law firms has
26 proven a useful means of identification. However, it is misleading to use the name of a lawyer
27 not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

28 [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact
29 associated with each other in a law firm, may not denominate themselves as, for example, "Smith
30 and Jones," for that title suggests that they are practicing law together in a firm.

1 GEORGIA RULES OF PROFESSIONAL CONDUCT

3 RULE 1.5 FEES

4 a. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an
5 unreasonable amount for expenses. The factors to be considered in determining the
6 reasonableness of a fee include the following:

- 7 1. the time and labor required, the novelty and difficulty of the questions involved,
8 and the skill requisite to perform the legal service properly;
- 9 2. the likelihood that the acceptance of the particular employment will preclude
10 other employment by the lawyer;
- 11 3. the fee customarily charged in the locality for similar legal services;
- 12 4. the amount involved and the results obtained;
- 13 5. the time limitations imposed by the client or by the circumstances;
- 14 6. the nature and length of the professional relationship with the client;
- 15 7. the experience, reputation, and ability of the lawyer or lawyers performing the
16 services; and
- 17 8. whether the fee is fixed or contingent.

18 b. The scope of the representation and the basis or rate of the fee and expenses for which the
19 client will be responsible shall be communicated to the client, preferably in writing,
20 before or within a reasonable time after commencing the representation, except when the
21 lawyer will charge a regularly represented client on the same basis or rate. Any changes
22 in the basis or rate of the fee or expenses shall also be communicated to the client in
23 writing before the fees or expenses to be billed at higher rates are actually incurred. The
24 requirements of this subsection shall not apply to:

26 (1) court-appointed lawyers who are paid by a court or other governmental
27 entity, and

28 (2) lawyers who provide pro bono short-term limited legal services to a client
29 pursuant to Rule 6.5.

31 ALTERNATE LANGUAGE FOR RULE 1.5(B):

32 (b) When the lawyer has not regularly represented the client, the basis or rate of the fee, the
33 scope of the lawyer's representation, and the expenses for which the client will be responsible

34 shall be communicated to the client, in writing, before or within a reasonable time after
35 commencing the representation.

1 **RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT**

- 2 a. A lawyer having knowledge that another lawyer has committed a violation of the Georgia
3 Rules of Professional Conduct that raises a substantial question as to that lawyer's
4 honesty, trustworthiness or fitness as a lawyer in other respects, should inform the
5 appropriate professional authority.
- 6 b. A lawyer having knowledge that a judge has committed a violation of applicable rules of
7 judicial conduct that raises a substantial question as to the judge's fitness for office should
8 inform the appropriate authority.

9
10 There is no disciplinary penalty for a violation of this Rule.

11
12 **Comment**

13
14 [1] Self-regulation of the legal profession requires that members of the profession initiate
15 disciplinary investigations when they know of a violation of the Georgia Rules of Professional
16 Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently
17 isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can
18 uncover. Reporting a violation is especially important where the victim is unlikely to discover
19 the offense.

1 **ABA Rule 8.3: Reporting Professional Misconduct**

2 *Maintaining The Integrity of The Profession*

3 (a) A lawyer who knows that another lawyer has committed a violation of the Rules of
4 Professional Conduct that raises a substantial question as to that lawyer's honesty,
5 trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional
6 authority.

7 (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial
8 conduct that raises a substantial question as to the judge's fitness for office shall inform the
9 appropriate authority.

10 (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or
11 information gained by a lawyer or judge while participating in an approved lawyers assistance
12 program.

13 **Comment**

14 [1] Self-regulation of the legal profession requires that members of the profession initiate
15 disciplinary investigation when they know of a violation of the Rules of Professional Conduct.
16 Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated
17 violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.
18 Reporting a violation is especially important where the victim is unlikely to discover the offense.

19 [2] A report about misconduct is not required where it would involve violation of Rule 1.6.
20 However, a lawyer should encourage a client to consent to disclosure where prosecution would
21 not substantially prejudice the client's interests.

22 [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any
23 violation would itself be a professional offense. Such a requirement existed in many jurisdictions
24 but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a
25 self-regulating profession must vigorously endeavor to prevent. A measure of judgment is,
26 therefore, required in complying with the provisions of this Rule. The term "substantial" refers to
27 the seriousness of the possible offense and not the quantum of evidence of which the lawyer is
28 aware. A report should be made to the bar disciplinary agency unless some other agency, such as
29 a peer review agency, is more appropriate in the circumstances. Similar considerations apply to
30 the reporting of judicial misconduct.

31 [4] The duty to report professional misconduct does not apply to a lawyer retained to represent a
32 lawyer whose professional conduct is in question. Such a situation is governed by the Rules
33 applicable to the client-lawyer relationship.

34 [5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in
35 the course of that lawyer's participation in an approved lawyers or judges assistance program. In
36 that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and
37 (b) of this Rule encourages lawyers and judges to seek treatment through such a program.

38 Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from
39 these programs, which may then result in additional harm to their professional careers and
40 additional injury to the welfare of clients and the public. These Rules do not otherwise address
41 the confidentiality of information received by a lawyer or judge participating in an approved
42 lawyers assistance program; such an obligation, however, may be imposed by the rules of the
43 program or other law.

From: "Charles Huddleston" <charles.huddleston@nelsonmullins.com>
Date: May 27, 2019 at 3:01:17 PM EDT
To: "Ken Hodges" <hodgesk@gaappeals.us>
Subject: FW: Self-Regulation

Dear Ken,

I hope you are enjoying the long weekend!

As part of your leadership to demonstrate to the public the State Bar's commitment to be proactive in self-regulating attorneys, I agree with your effort to study the possibility of either requiring malpractice insurance for Georgia's attorneys, or, at a minimum, requiring the disclosure to their clients and/or the public of whether a Georgia attorney has such insurance.

I was on the Formal Advisory Opinion Board for a number of years, and we considered re-writes of certain of the Georgia Rules of Professional Conduct, so I was well aware of the difference in our Rule 8.3 and the ABA Model Rules version.

As you know, we have the same Rule 8.3 ("Reporting Professional Misconduct") as the ABA, except for two major differences:

First, the ABA Rule says that a lawyer "shall inform the appropriate authority," whereas our Georgia version of that Rule only says that a lawyer "should inform the appropriate authority,"

Second, this Georgia Rule is one of the few, and maybe the only Georgia Rule (I did not take the time to check all of them) that states: "There is no disciplinary penalty for a violation of this Rule." Some would argue why have the Rule if there is no discipline that can be imposed for violating it.

But, as a suggestion for the future, if you think adopting the ABA version is possibly a good idea in order to demonstrate to the public that the Bar is taking seriously its duty to self-regulate, (by making the reporting of a "substantial question" of another lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects," mandatory, and adding at least some level of discipline for a violation even if it is only a private reprimand), I would suggest that you not refer to it as "*the rat rule*." ☺ For example, I have heard it called the "Honor Code Rule," like the one imposed on the cadets at West Point and on other

students/officers-in-training at our other federal military academies. That certainly puts it in a much more positive light. Or, I have also heard it called the “tattle-tale rule,” but that moniker, like your referring to it as the “rat rule,” certainly puts the proposed adoption of the ABA version of the Rule in a negative light.

Just some food for thought.

Warmly,
Charles



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