



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

January 11, 2019

Macon, Georgia

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<u>II. Approval of Minutes from October 17, 2018 meeting</u>	(Haubenreich) 2-4
<u>III. Action Items</u>	(Frederick)
A. Rule 4-204.1	5
<i>a. (The Rule should be amended 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.)</i>	
<i>i. Proposed revisions to GRPC 4-204.1</i>	
B. Matters Referred from Executive Committee	6-39
<i>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>i. Mandatory Disclosure of Professional Liability Insurance (pgs.6-19)</i>	
<i>ii. Trade Name (pgs. 20-25)</i>	
<i>iii. Mandatory Written Fee Agreements (pgs.26-27)</i>	
<i>iv. Proposed revisions to Rule 1.15(III) to eliminate the 3-day grace period (pgs. 28-32)</i>	
<i>v. GRPC 8.3 (pg. 33)</i>	
<i>vi. ABA Rule 8.3 (pg. 34-35)</i>	

vii. *Registration of in-house counsel* (pgs. 36-39)

C. Rule 8.4

40-45

- a. *(The Committee has previously discussed revising Rule 8.4(b)(1) so that it includes the same definition of "conviction" as Rule 1.0(e). Although the committee rejected the proposed changes you asked bar counsel to provide you with additional information about First Offender Status as a "conviction.")*
 - i. *Memo*
 - ii. *Proposed revisions to Rule 8.4*
 - iii. *List of disciplinary cases following imposition of first offender probation*

D. Rule 1.1

46-65

- i. *Memo*
- ii. *Proposed revisions to GRPC 1.1*
- iii. *ABA opinion 483*

E. Rule 4-228 Receiverships

(NeSmith) 66-80

- a. *(The Committee asked Bar Counsel to provide information about the effect of bond coverage for receivers, and to investigate the cost of the Bar providing E&O insurance to Receivers. Bill Nesmith will report on his findings.)*
 - i. *Proposed revisions to GRPC 4-228 (redline)*
 - ii. *Proposed revisions to GRPC 4-228 (clean)*

IV. 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
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Vice Chairperson

David S. Lipscomb	2019
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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
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
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Disciplinary Rules and Procedures Committee
Meeting of October 17, 2018
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, R. Keegan Federal, Laverne L. Gaskins (phone), Charles B. Hess, R. Javoyne Hicks (phone), William D. James, William James Keogh, III (phone), Seth D. Kirschenbaum, Edward B. Krugman, David N. Lefkowitz, Jonathan B. Pannell (video), Jabu M. Sengova (phone), R. Gary Spencer, and Honorable Paige Reese Whitaker.

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

Guest: Bar President Kenneth B. Hodges, III

The Committee approved the Minutes from the July 18, 2018 meeting.

Action Items:

Rule 4-219 (a):

The Committee voted to amend the first sentence in section (a) so that it reads: "In cases in which a lawyer is publicly reprimanded, suspended, disbarred, or voluntarily surrenders his license, with the exception of interim suspensions issued pursuant to Bar Rule 4.204.3(d), the Office of the General Counsel shall publish notice of the discipline in a local newspaper or newspapers."

Rule 9.4:

The Committee voted to amend the last sentence in Comment (3) so that it reads: "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."

The Committee also voted to remove the last sentence in Comment (4).

Rule 8.4:

The motion to change the definition of Conviction so that it is consistent with Rule 1.0(e) failed.

Formal Advisory Opinion Board Request, ABA Rule 1.18, and Rule 1.6

The Committee declined to make any additional changes to Rule 1.6.

Rule 1.6

The Committee voted to amend the last sentence of the proposed Comment 20 so that it reads: "The lawyer must comply with the orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client."

Rule 4-228

The Committee discussed the proposed revisions. Bar Counsel will provide the Committee with a revised draft of the rule and additional information regarding bond coverage.

Revisions approved at this meeting:

Rule 4-219. Publication and Protective Orders

- a. In cases in which a lawyer is publicly reprimanded, suspended, disbarred, or voluntarily surrenders his license, with the exception of interim suspensions issued pursuant to Bar Rule 4.204.3(d), the Office of the General Counsel shall publish notice of the discipline in a local newspaper or newspapers. The Office of the General Counsel shall publish notice of all public discipline on the official State Bar of Georgia website, including the respondent's full name and business address, the nature of the discipline imposed and the effective dates.

...

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 ~~on the basis of public discipline imposed by~~ when a lawyer is suspended or disbarred in a jurisdiction in which the respondent 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. ~~This Rule applies whether or not the respondent is admitted to practice in the foreign jurisdiction. See also Rule 8.5, Comment [1].~~

...

Rule 1.6. Confidentiality of Information (proposed)

...

Comment

...

[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.

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.



MEMORANDUM

To: Members, Board of Governors

From: Paula Frederick

Date: October 11, 2018

Re: Disclosure of Professional Liability Insurance

At its September retreat the Executive Committee discussed the idea of mandatory malpractice insurance disclosure for Georgia lawyers. The Executive Committee voted to explore the concept and asked that I provide the Board of Governors with information for discussion at the November Board meeting. Twenty-three jurisdictions currently require lawyers to disclose whether they have malpractice insurance. Most gather the information through the annual dues or registration statement with a checkoff similar to this one (used in Nevada):

SCR 79 PROFESSIONAL LIABILITY INSURANCE DISCLOSURE		
All members, active or inactive, MUST complete this section. Please select ONE option.		
<input type="checkbox"/>	I am not currently representing clients; or I am engaged as a full-time government lawyer or judge; or I am employed by an organizational client and do not represent clients outside that capacity. <i>If you check this box, you are done, please sign and date at the bottom of this page.</i>	
<input type="checkbox"/>	I am engaged in the private practice of law and do not maintain professional liability insurance. <i>If you check this box, you are done, please sign and date at the bottom of this page.</i>	
<input type="checkbox"/>	I am engaged in the private practice of law and, I or my firm, maintain professional liability insurance with the carrier listed below. This includes insurance from ANY state. If you check this box, you MUST disclose the following:	
Firm Name (if you are reporting insurance):		
Names of Insurance Carrier (not broker):		
Insurance Carrier Address:		
City:	State:	Zip:

I certify all of the above disclosures required by NRS 7.034, NRS 425.520 and SCR 79 are true and complete.

Signature

Date

Please return to: State Bar of Nevada
3100 W. Charleston Blvd., Suite 100
Las Vegas, NV 89102



The information is most often provided to the public for the benefit of potential clients; in fact, seven jurisdictions require the lawyer to disclose the information directly to the potential client. Many clients are not aware that lawyers are not required to have insurance. A chart indicating which jurisdictions have a malpractice disclosure rule is attached to this memo.

Our Executive Committee was in favor of gathering data through a voluntary pilot program and reviewing the results before making any recommendation about possible uses of the information. The information would be gathered by the Administrative part of the Bar and not by the Office of the General Counsel. The one-year voluntary pilot project would give the Bar's leadership some idea of how many lawyers are covered by malpractice insurance, and would allow the Bar to explore how it can help more lawyers find affordable coverage.

As conceived by the Executive Committee, there would not be any consequence if a lawyer failed to report during the pilot project. If the Board approves the concept as a rules change, it could consider whether failure to report should result in an administrative suspension of license, similar to failure to pay dues, to complete CLE requirements, or to pay court-ordered child support.

You may have read that the State Bar of California is currently debating whether to require all California lawyers to carry malpractice insurance coverage. Our proposal would not require coverage but would require disclosure by all lawyers of whether they have insurance.

Attached to this memo is a draft rule for the Board's discussion. I have also attached a chart indicating which jurisdictions require disclosure of malpractice insurance, and a brief chart outlining average costs for professional liability insurance in Georgia provided by Jacob Healy of Gallagher Affinity, one of the Bar's recommended brokers.

Thank you, and please let me know if I can provide you with other information.

pjf

DRAFT RULE ON INSURANCE DISCLOSURE:

Disclosure of Professional Liability Insurance

1) On or before July 1 of each year, every member of the State Bar of Georgia shall certify:

a) Whether the member is engaged in the private practice of law, and

b) Whether the member is currently covered by a policy of professional liability insurance.

2) Each member who has previously reported being covered by professional liability insurance as set forth in paragraph 1(b) of this Rule shall notify the State Bar of Georgia in writing in such form and manner as the Board may designate within 30 days if the insurance policy providing coverage lapses, terminates, or is no longer in effect for any reason.

3) The information obtained pursuant to this Rule may be disclosed under such circumstances and by such means as the Board may designate.

4) The following members are exempt from the disclosure provisions of this Rule:

a) Members who are employed by a governmental entity and who do not represent clients outside of that capacity; and

b) Members who are employed by an organizational client and who do not represent clients outside of that capacity; and

c) Members who are not actively engaged in the practice of law.

Average Lawyers Professional Liability Insurance

	Atlanta Metro Area	Rest of State
Criminal Law with \$100,000/\$300,000 Limits	Approximately \$500 for the year	Approximately \$300 for the year
Criminal Law with \$1,000,000/\$1,000,000 Limits	Approximately \$900 for the year	Approximately \$600 for the year
Real Estate Law with \$100,000/\$300,000 Limits	Approximately \$1,800 for the year	Approximately \$1,300 for the year
Real Estate Law with \$1,000,000/\$1,000,000 Limits	Approximately \$3,200 for the year	Approximately \$2,300 for the year

Premiums for the Georgia Bar

Please note that the above rates are for illustration purposes for new, solo practitioners. Each attorney and law firm is individually underwritten based on their risk profile.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF
ABA MODEL COURT RULE ON INSURANCE DISCLOSURE

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
AL					
AK	Alaska Rules of Professional Conduct, Rule 1.4			N/A	
AZ Effective 1/1/07		Supreme Court Rule 32(c)(12), effective January 1, 2007.		Yes. State Bar of Arizona website.	
AR					On January 21, 2006, the House of Delegates of the Arkansas Bar Association voted not to adopt a disclosure rule.
CA Effective 1/1/2010	Rule 3-410. Disclosure of Professional Liability Insurance. California Rules of Professional Conduct.			N/A	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
CO Effective 1/1/09		Colorado Rules of Civil procedure, Rule 227		C.R.C.P. 227: (c) Availability of Information. The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.	
CT					At its February 23, 2009 meeting, the Connecticut Superior Court Rules Committee voted unanimously to deny a proposal to adopt an insurance disclosure rule.
DE Beginning with 2007 Annual Registration Form.		Annual Registration Form			
DC					

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
FL					Declined to adopt. <i>See, In Re: Amendments to The Rules Regulating The Florida Bar (Biannual Report) Florida Supreme Court No. SC10-1967 dated April 12, 2012.</i>
GA					
HI Effective 12/1/07		RSCH 2.17(d)		N/A	
ID				Available to the public upon request.	Effective January 1, 2018, all Idaho licensed lawyers representing private clients must show proof of malpractice insurance. Idaho Bar Commission Rule 302(a)(5)
IL Effective 10/1/04		Amended Illinois Supreme Court Rule 756		Yes	
KS Effective 9/6/05		Supreme Court Rule 208A		Yes, by means designated by the Court.	
KY					On or about November 14, 2006 the KY Sup. Ct. declined to adopt a disclosure rule.
LA					

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA, and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA, and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
ME		Maine Board of Bar Overseers Rule 4			
MD					
MA Effective 9/1/06		Supreme Judicial Court Rule 4:02		Yes.	
MI Beginning with the notice issued for fiscal year 2003-2004		Administrative Order No. 2003-5, dated August 6, 2003		No.	
MN Effective 10/1/06		Rule 6 of the Rules of the Supreme Court on Lawyer Registration. Annual Reporting of Professional Liability Insurance Coverage (Effective October 1, 2006)		Yes. Rule 7. Access to Lawyer Registration Records	
MO					Not currently being considered.
NE		Supreme Court Rules CHAPTER 3: ATTORNEYS AND THE PRACTICE OF		Shall be made available to the public.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
		LAW · Article 8: State Bar Association; Creation; Control; and Regulation. § 3-803. Membership.			
NV Adopted 9/13/05 and effective 11/13/05		Amended Supreme Court Rule 79 (Adopted September 13, 2005 and effective November 13, 2005)		Yes. It will be part of the lawyer's public record available by phone or email inquiry.	
NH Effective 3/1/03	New Hampshire Rules of Professional Conduct, Rule 1.19. (Disclosure of Information to the Client)			N/A	
NJ			X		Supreme Court Committee studying. Chair: Robert Fall
NM Effective 11/2/09	Rule 16-104 Rules of Professional Conduct (Current Rule not available online)				
NY			Under consideration.		
NC					Effective January 1, 2010, North Carolina lawyers are no longer required to

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
					inform the State Bar as to whether they maintain legal malpractice insurance.
ND Effective 8/1/09		Amended Rule 1.15 of the North Dakota Rules of Professional Conduct		Yes	
OH Effective 7/1/01	Ohio Rules of Professional Conduct, Rule 1.4(c)			N/A	Lawyers who hire themselves out to do research and writing for other lawyers need not comply. (Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Op. 2005-1, 2/4/05).
OK					No action taken to adopt a rule.
OR					All lawyers required to maintain professional liability insurance. For information on Oregon Professional Liability Fund
PA Effective 7/1/06	Pennsylvania adopted RPC 1.4(c), effective 7/1/2006.			N/A	As part of attorney registration, Pennsylvania attorneys must state whether they have malpractice insurance. Whether they do or not is public information that appears on the Disciplinary Board's website.

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
RI Effective 4/15/07		Rule 1(b) of Article IV "Periodic Registration of Attorneys". (Effective April 15, 2007)			
SC			X		<p>1) Beginning in 2012, each lawyer seeking license renewal or a new license will be asked to disclose voluntarily whether the lawyer maintained legal malpractice insurance coverage with a minimum amount of \$100,000, and then:</p> <p>2) Based on the information gathered in 2012 showing the percentage of uninsured lawyers, either</p> <p>a) Presenting to the South Carolina Supreme Court a potential proposed Rule of Professional Conduct possibly modeled, in part, on the ABA Model Court Rule;</p> <p>b) Adopting an internal South Carolina Bar rule that authorizes disclosure to the public of each lawyer's insurance information through the</p>

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
					Bar and on the Bar's website, or c) Taking no action.
SD Effective 1/1/99	South Dakota Model Rules of Professional Conduct, Rule 1.4 (Communication) (SDBAR links currently unavailable)	(SD also requires lawyers to disclose on their annual registration statements.)		N/A	SD has 7 years of certification to the Supreme Court - 97% have at least \$100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year. RPC 7.5 concerning letterhead requires the RPC 1.4(c) disclosure to be in black ink with type no smaller than the type used for the lawyer's names.

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule, NC withdrew its rule.)
TX					By letter dated April 14, 2010 to the President of the State Bar of Texas, the Supreme Court of Texas declined to adopt an insurance disclosure rule.
UT			Rule 1.4 Proposed Amendment - Disclosure of Malpractice Insurance Rule 1.4. Communication.		Required to disclose on registration statement but no Rule enacted. Bar will collect date on coverage for a 2-year period (2009-2011).
VT			On December 28, 2006 the Civil Rules Committee proposed that the Vermont Supreme Court consider adoption of a rule requiring insurance disclosure, not in the Vermont Rules of Professional Conduct, but as part of the Rules for Licensing of Attorneys. In adopting the rule, consideration should be given to requiring disclosure of the liability limits and deductibles of the coverage.		
VA Amended effective 7/1/89; 1/1/90; 4/1/90.		Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility /		Yes, on Bar's website: (See, www.vsb.org , under the headings Public Information, Attorney Records Search, Attorneys without	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement ¹ (16) (AZ, CO, DE, HI, IL, KS, ME, MA, MI, MN, NE, NV, ND, RI, VA, WA and WV)	Considering Adoption (6) (NJ, NY, SC, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon and Idaho: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule. NC withdrew its rule.)
				Malpractice Insurance).	
WA Effective 7/1/07		Admission to Practice Rule 26 - Insurance Disclosure. (Effective July 1, 2007)		Yes.	
WV Effective 5/6/05		State Bar By-Laws – Article III (A) - Financial Responsibility Disclosure Form		Yes. ... shall be made available to the public by such means as may be designated by the West Virginia State Bar.	
WI					
WY					

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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.

Red-lined version of GRPC and ABA Rule 7.5 Firm Names and Letterheads

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

~~b.~~ (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation 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.~~ (c) The name of a lawyer holding a 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.~~ (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~~ A firm may be designated by the names and letterheads are subject to the general requirement of all advertising or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC

28 Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or
29 comparable professional designation. Although the United States Supreme Court has held that
30 the communication must legislation may prohibit the use of trade names in professional practice,
31 use of such names in law practice is acceptable so long as it is not be false, fraudulent, deceptive or
32 misleading. Therefore, If a private firm uses a trade name that includes a geographical name such
33 as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be
34 required to avoid a misleading implication. It may be observed that any firm name including the
35 name of a deceased partner is, strictly speaking, a trade name. The use of such names to
36 designate law firms has proven a useful means of identification. However, it is misleading to use
37 the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a
38 nonlawyer.

39 [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact
40 partners associated with each other in a law firm, may not denominate themselves as, for
41 example, "Smith and Jones," for that title suggests partnership in the practice of law that they are
42 practicing law together in a firm.

43 [2] Trade names may be used so long as the name includes the name of at least one or more of the
44 lawyers actively practicing with the firm. Firm names consisting entirely of the names of deceased or
45 retired partners have traditionally been permitted and have proven a useful means of identification.
46 Sub-paragraph (e)(1) permits their continued use as an exception to the requirement that a firm name
47 include the name of at least one active member.

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:

25
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 ER 6.5.
30

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 1.15(III) RECORD KEEPING; TRUST ACCOUNT OVERDRAFT**
2 **NOTIFICATION; EXAMINATION OF RECORDS**

3 a. Required Bank Accounts: Every lawyer who practices law in Georgia and who receives
4 money or other property on behalf of a client or in any other fiduciary capacity shall
5 maintain, in an approved financial institution as defined by this Rule, a trust account or
6 accounts, separate from any business and personal accounts. Funds received by the
7 lawyer on behalf of a client or in any other fiduciary capacity shall be deposited into this
8 account. The financial institution shall be in Georgia or in the state where the lawyer's
9 office is located, or elsewhere with the written consent and at the written request of the
10 client or third person.

11 b. Description of Accounts:

- 12 1. A lawyer shall designate all trust accounts, whether general or specific, as well as
13 all deposit slips and checks drawn thereon, as an "Attorney Trust Account,"
14 "Attorney Escrow Account" "IOLTA Account" or "Attorney Fiduciary Account."
15 The name of the attorney or law firm responsible for the account shall also appear
16 on all deposit slips and checks drawn thereon.
- 17 2. A lawyer shall designate all business accounts, as well as all deposit slips and all
18 checks drawn thereon, as a "Business Account," a "Professional Account," an
19 "Office Account," a "General Account," a "Payroll Account," "Operating
20 Account" or a "Regular Account."
- 21 3. Nothing in this Rule shall prohibit a lawyer from using any additional description
22 or designation for a specific business or trust account including fiduciary accounts
23 maintained by the lawyer as executor, guardian, trustee, receiver, agent or in any
24 other fiduciary capacity.

25 c. Procedure:

26 1. Approved Institutions:

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

30 A. Such institutions shall be located within the State of Georgia,
31 within the state where the lawyer's office is located, or elsewhere

32 with the written consent and at the written request of the client or
33 third-person. The institution shall be authorized by federal or state
34 law to do business in the jurisdiction where located and shall be
35 federally insured. A financial institution shall be approved as a
36 depository for lawyer trust accounts if it abides by an agreement to
37 report to the Office of the General Counsel whenever any properly
38 payable instrument is presented against a lawyer trust account
39 containing insufficient funds, and the instrument is not honored.
40 The agreement shall apply to all branches of the financial
41 institution and shall not be canceled except upon thirty days notice
42 in writing to the Office of the General Counsel. The agreement
43 shall be filed with the Office of General Counsel on a form
44 approved by the Investigative Panel of the State Disciplinary
45 Board. The agreement shall provide that all reports made by the
46 financial institution shall be in writing and shall include the same
47 information customarily forwarded to the depositor when an
48 instrument is presented against insufficient funds. If the financial
49 institution is located outside of the State of Georgia, it shall also
50 agree in writing to honor any properly issued State Bar of Georgia
51 subpoena.

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

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

60 2. Timing of Reports:

61 i. The financial institution shall file a report with the Office of the General
62 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 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.

4. Every lawyer and law firm maintaining a trust account as provided by these Rules is hereby and shall be conclusively deemed to have consented to the reporting and production requirements mandated by this 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 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 Rules at the request of the Investigative Panel of the State Disciplinary Board or the Supreme Court. This obligation shall be in addition to and not in lieu of the procedures contained in Part IV of these 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 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 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. 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.

125 Audits

126 [7] Every lawyer's financial records and trust account records are required records and therefore
127 are properly subject to audit for cause. The audit provisions are intended to uncover errors and
128 omissions before the public is harmed, to deter those lawyers who may be tempted to misuse
129 client's funds and to educate and instruct lawyers as to proper trust accounting methods.

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

134 [8] An audit for cause may be conducted at any time and without advance notice if the Office of
135 the General Counsel receives sufficient evidence that a lawyer poses a threat of harm to clients or
136 the public. The Office of the General Counsel must have the written approval of the Chairman of
137 the Investigative Panel of the State Disciplinary Board and the President-elect of the State Bar of
138 Georgia to conduct an audit for cause.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

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

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

Comment

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

Model Rule for Registration of In-House Counsel

(Amended February 6, 2016)

GENERAL PROVISIONS:

A. A lawyer who is admitted to the practice of law in another United States jurisdiction or is a foreign lawyer, who is employed as a lawyer by an organization, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, and who has a systematic and continuous presence in this jurisdiction as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, shall register as in-house counsel within [180 days] of the commencement of employment as a lawyer or if currently so employed then within [180 days] of the effective date of this Rule, by submitting to the [registration authority] the following:

- 1) A completed application in the form prescribed by the [registration authority];
- 2) A fee in the amount determined by the [registration authority];
- 3) Documents proving admission to practice law and current good standing in all jurisdictions, U.S. and foreign, in which the lawyer is admitted to practice law.- If the jurisdiction is foreign and the documents are not in English, the lawyer shall submit an English translation and satisfactory proof of the accuracy of the translation; and
- 4) An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer's employment by the entity and the capacity in which the lawyer is so employed, and stating that the employment conforms to the requirements of this Rule.

For purposes of this Rule, a "foreign lawyer" is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. For purposes of this Rule, the [state's highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer's legal education, references, and experience.

33

34 **SCOPE OF AUTHORITY OF REGISTERED LAWYER:**

35 B. A lawyer registered under this Rule shall have the rights and privileges otherwise
36 applicable to members of the bar of this jurisdiction with the following restrictions:

37 1) The registered lawyer is authorized to provide legal services to the entity client or
38 its organizational affiliates, including entities that control, are controlled by, or are
39 under common control with the employer, and for employees, officers and directors
40 of such entities, but only on matters directly related to their work for the entity and
41 only to the extent consistent with Rule 1.7 of the Model Rules of Professional
42 Conduct [or jurisdictional equivalent]; and

43 2) The registered lawyer shall not:

44 a. Except as otherwise permitted by the rules of this jurisdiction, appear
45 before a court or any other tribunal as defined in Rule 1.0(m) of the
46 Model Rules of Professional Conduct [or jurisdictional equivalent];

47 b. Offer or provide legal services or advice to any person other than as
48 described in paragraph B.1., or hold himself or herself out as being
49 authorized to practice law in this jurisdiction other than as described in
50 paragraph B.1; and

51 c. If a foreign lawyer, provide advice on the law of this or another U.S.
52 jurisdiction or of the United States except on the basis of advice from a
53 lawyer who is duly licensed and authorized to provide such advice.

54

55 **PRO BONO PRACTICE:**

56 C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this Rule
57 is authorized to provide pro bono legal services through an established not-for-profit bar
58 association, pro bono program or legal services program or through such organization(s)
59 specifically authorized in this jurisdiction.

60

61 **OBLIGATIONS:**

62 D. A lawyer registered under this Rule shall:

63 1) Pay an annual fee in the amount of \$ _____;

64 2) Pay any annual client protection fund assessment;

- 65 3) Fulfill the continuing legal education requirements that are required of active
66 members of the bar in this jurisdiction;
- 67 4) Report within [] days to the jurisdiction the following:
- 68 a. Termination of the lawyer's employment as described in paragraph A.4.;
- 69 b. Whether or not public, any change in the lawyer's license status in another
70 jurisdiction, whether U.S. or foreign, including by the lawyer's
71 resignation;
- 72 c. Whether or not public, any disciplinary charge, finding, or sanction
73 concerning the lawyer by any disciplinary authority, court, or other
74 tribunal in any jurisdiction, U.S. or foreign.
- 75

76 **LOCAL DISCIPLINE:**

- 77 E. A registered lawyer under this Rule shall be subject to the [jurisdiction's Rules of
78 Professional Conduct], [jurisdiction's Rules of Lawyer Disciplinary Enforcement], and all
79 other laws and rules governing lawyers admitted to the active practice of law in this
80 jurisdiction. The [jurisdiction's disciplinary counsel] has and shall retain jurisdiction over
81 the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction
82 to the same extent as it has over lawyers generally admitted in this jurisdiction.
- 83

84 **AUTOMATIC TERMINATION:**

- 85 F. A registered lawyer's rights and privileges under this Rule automatically terminate when:
- 86 1) The lawyer's employment terminates;
- 87 2) The lawyer is suspended or disbarred from practice in any jurisdiction or any court
88 or agency before which the lawyer is admitted, U.S. or foreign; or
- 89
- 90 3) The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.
- 91

92 **REINSTATEMENT:**

- 93 G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be
94 reinstated within [] months of termination upon submission to the [registration authority]
95 of the following:
- 96 1) An application for reinstatement in a form prescribed by the [registration authority];

- 97 2) A reinstatement fee in the amount of \$ _____;
- 98 3) An affidavit from the current employing entity as prescribed in paragraph A.4.
- 99

100 **SANCTIONS:**

101 H. A lawyer under this Rule who fails to register shall be:

- 102 1) Subject to professional discipline in this jurisdiction;
- 103 2) Ineligible for admission on motion in this jurisdiction;
- 104 3) Referred by the [registration authority] to this [jurisdiction's bar admissions
- 105 authority]; and
- 106 4) Referred by the [registration authority] to the disciplinary authority of the
- 107 jurisdictions of licensure, U.S. and/or foreign.

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;
4. a verdict of guilty but mentally ill; or

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

~~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 (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

69 concerning some matters of personal morality, such as adultery and comparable offenses, that
70 have no specific connection to fitness for the practice of law. Although a lawyer is personally
71 answerable to the entire criminal law, a lawyer should be professionally answerable only for
72 offenses that indicate lack of those characteristics relevant to law practice. Offenses involving
73 violence, dishonesty, breach of trust, or serious interference with the administration of justice are
74 in that category. A pattern of repeated offenses, even ones of minor significance when
75 considered separately, can indicate indifference to legal obligation.

76 [4] Reserved.

77 [5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief
78 that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge
79 to the validity, scope, meaning or application of the law apply to challenges of legal regulation of
80 the practice of law.

81 [6] Persons holding public office assume responsibilities going beyond those of other citizens. A
82 lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.
83 The same is true of abuse of positions of private trust such as trustee, executor, administrator,
84 guardian, agent and officer, director or manager of a corporation or other organization.

Partial List of Disciplinary Cases following Imposition of First Offender Probation

In the Matter of Calhoun, 268 Ga. 877, 494 S.E.2d 335 (1998) (First Offender guilty plea to serious injury by vehicle and DUI; six months suspension);

ITMO Caroway, 279 Ga. 381, 613 S.E.2d 610 (2005) (First Offender guilty plea to three felony counts of possession of controlled substances and DUI; 24 months suspension)

ITMO Childers, 297 Ga. 788 (2015)—disbarment after first offender treatment following plea to theft by receiving.

ITMO Csehy, 295 Ga. 853(2014) *“We have reviewed the record and the parties' submissions, and agree with the State Bar that the requested one or two-year suspension is inadequate in light of the crimes for which Csehy was convicted, his prior disciplinary action, see Rule 4–208, evidence that Csehy's problems are continuing, and the fact that his requested suspension is shorter than the imposed probation, see In the Matter of Richbourg, 293 Ga. 576, 748 S.E.2d 460 (2013). Accordingly, we reject Csehy's petition for voluntary discipline.”*

ITMO Davis, 292 Ga. 897 (2013)

ITMO Fry, 302 Ga. 370 (2017)

ITMO Gardner, 286 Ga. 623 (2010) (voluntary surrender of license for mortgage fraud)

ITMO Haugabrook, 278 Ga. 721, 606 S.E.2d 257 (2004) (guilty plea to two counts of filing false tax returns; one year suspension);

ITMO Horn, 269 Ga. 826, 505 S.E.2d 21 (1998); First offender conviction for guilty plea to robbery. *“The appearance of an attorney continuing to practice who has pled guilty to the felony of robbery disrupts public confidence in the legal profession. See In the Matter of Stoner, 246 Ga. 581, 272 S.E.2d 313 (1980). Thus, disbarment is ordinarily appropriate when a lawyer engages in serious criminal conduct in which misappropriation or theft is a necessary element.”*

ITMO Kapoor, 294 Ga. 782 (2014)

ITMO Kitchen, 279 Ga. 820 (2005)

ITMO Lewis, 282 Ga. 649 (2007) (First Offender guilty plea to possession of cocaine; 24 months suspension).

ITMO Ogrey, 272 Ga. 367 (2000)

ITMO Ortman, 289 Ga. 130 (2011)

ITMO Paine, 280 Ga. 208 (2006)

ITMO Patteson, 262 Ga. 591 (1992)

ITMO Reed, 258 Ga. 271 (1988)

ITMO Richbourg, 293 Ga. 576 (2013)

ITMO Sawhill, 262 Ga. 735 (1993)

ITMO Scott, 265 Ga. 339 (1995)

ITMO Skandalakis, 279 Ga. 865, 621 S.E.2d 750 (2005).

ITMO Stoner, 246 Ga. 581, 582, 272 S.E.2d 313 (1980).

ITMO Temple, 299 Ga. 140 (2016)

ITMO Waldrop, 656 S.E.2d 529, 283 Ga. 80 (Ga., 2008)

ITMO Williams, 284 Ga. 96 (2008)

ITMO Witt, 264 Ga. 852 (1995)



MEMORANDUM

To: Members, Disciplinary Rules Committee

From: Paula Frederick

Date: January 3, 2019

Re: Proposed revisions to Comments, Rule 1.1(Competence)

The committee has previously considered and rejected an amendment to Rule 1.1 (Competence) that would add new ABA Comment [8] dealing with technology. A new ABA Ethics Opinion (#483) discusses the obligation of competence in technology in the context of a lawyer's duty after a cyber-breach. The relevant portion of the opinion states:

In the context of a lawyer's post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission's thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer's competency in this regard may be satisfied either through the lawyer's own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.

On another front, Virginia is currently considering amending its Rule to add a comment dealing with Wellness.

I have attached a draft of Georgia's rule with both of these comments included for discussion. The Committee may want to discuss this issue again since it appears that the obligation of competence is expanding.

1 **RULE 1.1 COMPETENCE**

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

8

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

10

11 **Comment**

12

13 *Legal Knowledge and Skill*

14

15 [1A] The purpose of these rules is not to give rise to a cause of action nor to create a presumption
16 that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and
17 to provide a structure for regulating conduct through disciplinary agencies. They are not
18 designed to be a basis for civil liability.

19

20 [1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular
21 matter, relevant factors include the relative complexity and specialized nature of the matter, the
22 lawyer's general experience, the lawyer's training and experience in the field in question, the
23 preparation and study the lawyer is able to give the matter and whether it is feasible to refer the
24 matter to, or associate or consult with, a lawyer of established competence in the field in
25 question. In many instances, the required proficiency is that of a general practitioner. Expertise
26 in a particular field of law may be required in some circumstances.

27

28 [2] A lawyer need not necessarily have special training or prior experience to handle legal
29 problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as
30 competent as a practitioner with long experience. Some important legal skills, such as the
31 analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal

problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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

63 [7] A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to
64 represent clients and to make responsible choices in the practice of law. Maintaining the mental,
65 emotional and physical ability necessary for the representation of a client is an important aspect
66 of maintaining competence to practice law. See also Rule 1.16(a)(2).
67

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 483

October 17, 2018

Lawyers' Obligations After an Electronic Data Breach or Cyberattack

Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

Introduction¹

Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers.² In one highly publicized incident, hackers infiltrated the computer networks at some of the country's most well-known law firms, likely looking for confidential information to exploit through insider trading schemes.³ Indeed, the data security threat is so high that law enforcement officials regularly divide business entities into two categories: those that have been hacked and those that will be.⁴

In Formal Opinion 477R, this Committee explained a lawyer's ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet.⁵ This

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

² See, e.g., Dan Steiner, *Hackers Are Aggressively Targeting Law Firms' Data* (Aug. 3, 2017), <https://www.cio.com> (explaining that "[f]rom patent disputes to employment contracts, law firms have a lot of exposure to sensitive information. Because of their involvement, confidential information is stored on the enterprise systems that law firms use. . . . This makes them a juicy target for hackers that want to steal consumer information and corporate intelligence."); See also *Criminal-Seeking-Hacker' Requests Network Breach for Insider Trading*, Private Industry Notification 160304-01, FBI, CYBER DIVISION (Mar. 4, 2016).

³ Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, WALL ST. J. (Mar. 29, 2016), <https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504>.

⁴ Robert S. Mueller, III, *Combatting Threats in the Cyber World Outsmarting Terrorists, Hackers and Spies*, FBI (Mar. 1, 2012), <https://archives.fbi.gov/archives/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies>.

⁵ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Securing Communication of Protected Client Information").

opinion picks up where Opinion 477R left off, and discusses an attorney's ethical obligations when a data breach exposes client confidential information. This opinion focuses on an attorney's ethical obligations after a data breach,⁶ and it addresses only data breaches that involve information relating to the representation of a client. It does not address other laws that may impose post-breach obligations, such as privacy laws or other statutory schemes that law firm data breaches might also implicate. Each statutory scheme may have different post-breach obligations, including different notice triggers and different response obligations. Both the triggers and obligations in those statutory schemes may overlap with the ethical obligations discussed in this opinion. And, as a matter of best practices, attorneys who have experienced a data breach should review all potentially applicable legal response obligations. However, compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations. Nor does compliance with lawyer regulatory rules *per se* represent compliance with breach response laws. As a matter of best practices, lawyers who have suffered a data breach should analyze compliance separately under every applicable law or rule.

Compliance with the obligations imposed by the Model Rules of Professional Conduct, as set forth in this opinion, depends on the nature of the cyber incident, the ability of the attorney to know about the facts and circumstances surrounding the cyber incident, and the attorney's roles, level of authority, and responsibility in the law firm's operations.⁷

⁶ The Committee recognizes that lawyers provide legal services to clients under a myriad of organizational structures and circumstances. The Model Rules of Professional Conduct refer to the various structures as a "firm." A "firm" is defined in Rule 1.0(c) as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." How a lawyer complies with the obligations discussed in this opinion will vary depending on the size and structure of the firm in which a lawyer is providing client representation and the lawyer's position in the firm. See MODEL RULES OF PROF'L CONDUCT R. 5.1 (2018) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.2 (2018) (Responsibility of a Subordinate Lawyers); and MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018) (Responsibility Regarding Nonlawyer Assistance).

⁷ In analyzing how to implement the professional responsibility obligations set forth in this opinion, lawyers may wish to consider obtaining technical advice from cyber experts. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.") See also, e.g., *Cybersecurity Resources*, ABA Task Force on Cybersecurity, <https://www.americanbar.org/groups/cybersecurity/resources.html> (last visited Oct. 5, 2018).

I. Analysis

A. Duty of Competence

Model Rule 1.1 requires that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁸ The scope of this requirement was clarified in 2012, when the ABA recognized the increasing impact of technology on the practice of law and the obligation of lawyers to develop an understanding of that technology. Comment [8] to Rule 1.1 was modified in 2012 to read:

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. (Emphasis added.)⁹

In recommending the change to Rule 1.1’s Comment, the ABA Commission on Ethics 20/20 explained:

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to ‘keep abreast of changes in the law and its practice.’ The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.¹⁰

⁸ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2018).

⁹ A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 43 (Art Garwin ed., 2013).

¹⁰ ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_a_mended_authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer’s substantive duty of competence: “Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase ‘including the benefits and risks associated with relevant technology,’ would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.”

In the context of a lawyer's post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission's thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer's competency in this regard may be satisfied either through the lawyer's own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.¹¹

1. Obligation to Monitor for a Data Breach

Not every cyber episode experienced by a lawyer is a data breach that triggers the obligations described in this opinion. A data breach for the purposes of this opinion means a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.

Many cyber events occur daily in lawyers' offices, but they are not a data breach because they do not result in actual compromise of material client confidential information. Other episodes rise to the level of a data breach, either through exfiltration/theft of client confidential information or through ransomware, where no client information is actually accessed or lost, but where the information is blocked and rendered inaccessible until a ransom is paid. Still other compromises involve an attack on a lawyer's systems, destroying the lawyer's infrastructure on which confidential information resides and incapacitating the attorney's ability to use that infrastructure to perform legal services.

Model Rules 5.1 and 5.3 impose upon lawyers the obligation to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and staff in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2], and Model Rule 5.3 Comment [1] state that lawyers with managerial authority within a firm must make reasonable efforts to establish

¹¹ MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2018); *See also* JILL D. RHODES & ROBERT S. LITT, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 124 (2d ed. 2018) [hereinafter ABA CYBERSECURITY HANDBOOK].

internal policies and procedures designed to provide reasonable assurance that all lawyers and staff in the firm will conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2] further states that “such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.”

Applying this reasoning, and based on lawyers’ obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data¹² and the use of data. Without such a requirement, a lawyer’s recognition of any data breach could be relegated to happenstance --- and the lawyer might not identify whether a breach has occurred,¹³ whether further action is warranted,¹⁴ whether employees are adhering to the law firm’s cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties,¹⁵ and how and when the lawyer must take further action under other regulatory and legal provisions.¹⁶ Thus, just as lawyers must safeguard and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information.¹⁷

While lawyers must make reasonable efforts to monitor their technology resources to detect a breach, an ethical violation does not necessarily occur if a cyber-intrusion or loss of electronic information is not immediately detected, because cyber criminals might successfully hide their

¹² ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008).

¹³ Fredric Greene, *Cybersecurity Detective Controls—Monitoring to Identify and Respond to Threats*, ISACA J., Vol. 5, 1025 (2015), available at <https://www.isaca.org/Journal/archives/2015/Volume-5/Pages/cybersecurity-detective-controls.aspx> (noting that “[d]etective controls are a key component of a cybersecurity program in providing visibility into malicious activity, breaches and attacks on an organization’s IT environment.”).

¹⁴ MODEL RULES OF PROF’L CONDUCT R. 1.6(c) (2018); MODEL RULES OF PROF’L CONDUCT R. 1.15 (2018).

¹⁵ See also MODEL RULES OF PROF’L CONDUCT R. 5.1 & 5.3 (2018).

¹⁶ The importance of monitoring to successful cybersecurity efforts is so critical that in 2015, Congress passed the Cybersecurity Information Sharing Act of 2015 (CISA) to authorize companies to monitor and implement defensive measures on their information systems, and to foreclose liability for such monitoring under CISA. AUTOMATED INDICATOR SHARING, <https://www.us-cert.gov/ais> (last visited Oct. 5, 2018); See also National Cyber Security Centre “Ten Steps to Cyber Security” [Step 8: Monitoring] (Aug. 9, 2016), <https://www.ncsc.gov.uk/guidance/10-steps-cyber-security>.

¹⁷ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 477R (2017).

intrusion despite reasonable or even extraordinary efforts by the lawyer. Thus, as is more fully explained below, the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach.

2. Stopping the Breach and Restoring Systems

When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach.¹⁸ The decision whether to adopt a plan, the content of any plan, and actions taken to train and prepare for implementation of the plan, should be made before a lawyer is swept up in an actual breach. “One of the benefits of having an incident response capability is that it supports responding to incidents systematically (i.e., following a consistent incident handling methodology) so that the appropriate actions are taken. Incident response plans help personnel to minimize loss or theft of information and disruption of services caused by incidents.”¹⁹ While every lawyer’s response plan should be tailored to the lawyer’s or the law firm’s specific practice, as a general matter incident response plans share common features:

The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm’s network.

Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported, and

¹⁸ See ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 202 (explaining the utility of large law firms adopting “an incident response plan that details who has ownership of key decisions and the process to follow in the event of an incident.”).

¹⁹ NIST Computer Security Incident Handling Guide, at 6 (2012), <https://nvlpubs.nist.gov/nistpubs/specialpublications/nist.sp.800-61r2.pdf>.

define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response.²⁰

Whether or not the lawyer impacted by a data breach has an incident response plan in place, after taking prompt action to stop the breach, a competent lawyer must make all reasonable efforts to restore computer operations to be able again to service the needs of the lawyer's clients. The lawyer may do so either on her own, if qualified, or through association with experts. This restoration process provides the lawyer with an opportunity to evaluate what occurred and how to prevent a reoccurrence consistent with the obligation under Model Rule 1.6(c) that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."²¹ These reasonable efforts could include (i) restoring the technology systems as practical, (ii) the implementation of new technology or new systems, or (iii) the use of no technology at all if the task does not require it, depending on the circumstances.

3. Determining What Occurred

The Model Rules do not impose greater or different obligations on a lawyer as a result of a breach involving client information, regardless of whether the breach occurs through electronic or physical means. Just as a lawyer would need to assess which paper files were stolen from the lawyer's office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A competent attorney must make reasonable efforts to determine what occurred during the data breach. A post-breach investigation requires that the lawyer gather sufficient information to ensure the intrusion has been stopped and then, to the extent reasonably possible, evaluate the data lost or accessed. The information gathered in a post-breach investigation is necessary to understand the scope of the intrusion and to allow for accurate disclosure to the client consistent with the lawyer's duty of communication and honesty under

²⁰ Steven M. Puiszis, *Prevention and Response: A Two-Pronged Approach to Cyber Security and Incident Response Planning*, THE PROF'L LAWYER, Vol. 24, No. 3 (Nov. 2017).

²¹ We discuss Model Rule 1.6(c) further below. But in restoring computer operations, lawyers should consider whether the lawyer's computer systems need to be upgraded or otherwise modified to address vulnerabilities, and further, whether some information is too sensitive to continue to be stored electronically.

Model Rules 1.4 and 8.4(c).²² Again, how a lawyer actually makes this determination is beyond the scope of this opinion. Such protocols may be a part of an incident response plan.

B. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the Rule and the commentary about a lawyer's efforts that are required to preserve the confidentiality of information relating to the representation of a client. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.²³ The 2012 modification added a duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."²⁴

Amended Comment [18] explains:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and

²² The rules against dishonesty and deceit may apply, for example, where the lawyer's failure to make an adequate disclosure --- or any disclosure at all --- amounts to deceit by silence. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. [1] (2018) ("Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").

²³ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2018).

²⁴ *Id.* at (c).

- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).²⁵

As this Committee recognized in ABA Formal Opinion 477R:

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.

As discussed above and in Formal Opinion 477R, an attorney's competence in preserving a client's confidentiality is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable.²⁶ Rather, the obligation is one of reasonable efforts. Rule 1.6 is not violated even if data is lost or accessed if the lawyer has made reasonable efforts to prevent the loss or access.²⁷ As noted above, this obligation includes efforts to monitor for breaches of client confidentiality. The nature and scope of this standard is addressed in the ABA Cybersecurity Handbook:

Although security is relative, a legal standard for "reasonable" security is emerging. That standard rejects requirements for specific security measures (such as firewalls, passwords, or the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in response to new developments.²⁸

²⁵ MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2018): "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 9, at 5.

²⁶ ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 122.

²⁷ MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [18] (2018) ("The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.")

²⁸ ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 73.

Finally, Model Rule 1.6 permits a lawyer to reveal information relating to the representation of a client if the disclosure is impliedly authorized in order to carry out the representation. Such disclosures are permitted if the lawyer reasonably believes that disclosure: (1) is impliedly authorized and will advance the interests of the client in the representation, and (2) will not affect a material interest of the client adversely.²⁹ In exercising this discretion to disclose information to law enforcement about the data breach, the lawyer must consider: (i) whether the client would object to the disclosure; (ii) whether the client would be harmed by the disclosure; and (iii) whether reporting the theft would benefit the client by assisting in ending the breach or recovering stolen information. Even then, without consent, the lawyer may disclose only such information as is reasonably necessary to assist in stopping the breach or recovering the stolen information.

C. Lawyer's Obligations to Provide Notice of Data Breach

When a lawyer knows or reasonably should know a data breach has occurred, the lawyer must evaluate notice obligations. Due to record retention requirements of Model Rule 1.15, information compromised by the data breach may belong or relate to the representation of a current client or former client.³⁰ We address each below.

1. Current Client

Communications between a lawyer and current client are addressed generally in Model Rule 1.4. Rule 1.4(a)(3) provides that a lawyer must "keep the client reasonably informed about the status of the matter." Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Under these provisions, an obligation exists for a lawyer to communicate with current clients about a data breach.³¹

²⁹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421(2001) (disclosures to insurer in bills when lawyer representing insured).

³⁰ This opinion addresses only obligations to clients and former clients. Data breach, as used in this opinion, is limited to client confidential information. We do not address ethical duties, if any, to third parties.

³¹ Relying on Rule 1.4 generally, the New York State Bar Committee on Professional Ethics concluded that a lawyer must notify affected clients of information lost through an online data storage provider. N.Y. State Bar Ass'n Op. 842 (2010) (Question 10: "If the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information,

Our conclusion here is consistent with ABA Formal Ethics Opinion 95-398 where this Committee said that notice must be given to clients if a breach of confidentiality was committed by or through a third-party computer vendor or other service provider. There, the Committee concluded notice to the client of the breach may be required under 1.4(b) for a “serious breach.”³² The Committee advised:

Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).³³

A data breach under this opinion involves the misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer's ability to perform the legal services for which the lawyer was hired is significantly impaired by the event. Each of these scenarios is one where a client's interests have a reasonable possibility of being negatively impacted. When a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach. As noted in ABA Formal Opinion 95-398, a data breach requires notice to the client because such notice is an integral part of keeping a “client reasonably informed about the status of the matter” and the lawyer should provide information as would be “reasonably necessary to permit the client to make informed decisions regarding the representation” within the meaning of Model Rule 1.4.³⁴

The strong client protections mandated by Model Rule 1.1, 1.6, 5.1 and 5.3, particularly as they were amended in 2012 to account for risks associated with the use of technology, would be compromised if a lawyer who experiences a data breach that impacts client confidential information is permitted to hide those events from their clients. And in view of the duties imposed by these other Model Rules, Model Rule 1.4's requirement to keep clients “reasonably informed about the status” of a matter would ring hollow if a data breach was somehow excepted from this responsibility to communicate.

notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated.”) (*citations omitted*).

³² ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-398 (1995).

³³ *Id.*

³⁴ MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2018).

Model Rule 1.15(a) provides that a lawyer shall hold “property” of clients “in connection with a representation separate from the lawyer’s own property.” Funds must be kept in a separate account, and “[o]ther property shall be identified as such and appropriately safeguarded.” Model Rule 1.15(a) also provides that, “Complete records of such account funds and other property shall be kept by the lawyer” Comment [1] to Model Rule 1.15 states:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer’s business and personal property.

An open question exists whether Model Rule 1.15’s reference to “property” includes information stored in electronic form. Comment [1] uses as examples “securities” and “property” that should be kept separate from the lawyer’s “business and personal property.” That language suggests Rule 1.15 is limited to tangible property which can be physically segregated. On the other hand, many courts have moved to electronic filing and law firms routinely use email and electronic document formats to image or transfer information. Reading Rule 1.15’s safeguarding obligation to apply to hard copy client files but not electronic client files is not a reasonable reading of the Rule.

Jurisdictions that have addressed the issue are in agreement. For example, Arizona Ethics Opinion 07-02 concluded that client files may be maintained in electronic form, with client consent, but that lawyers must take reasonable precautions to safeguard the data under the duty imposed in Rule 1.15. The District of Columbia Formal Ethics Opinion 357 concluded that, “Lawyers who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained and (2) to guard against the risk of unauthorized disclosure of client information.”

The Committee has engaged in considerable discussion over whether Model Rule 1.15 and, taken together, the technology amendments to Rules 1.1, 1.6, and 5.3 impliedly impose an obligation on a lawyer to notify a current client of a data breach. We do not have to decide that question in the absence of concrete facts. We reiterate, however, the obligation to inform the client does exist under Model Rule 1.4.

2. Former Client

Model Rule 1.9(c) requires that “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.”³⁵ When electronic “information relating to the representation” of a former client is subject to unauthorized access, disclosure, or destruction, the Model Rules provide no direct guidance on a lawyer’s obligation to notify the former client. Rule 1.9(c) provides that a lawyer “shall not . . . reveal” the former client’s information. It does not describe what steps, if any, a lawyer should take if such information is revealed. The Committee is unwilling to require notice to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice.³⁶

Nevertheless, we note that clients can make an informed waiver of the protections in Rule 1.9.³⁷ We also note that Rule 1.16(d) directs that lawyers should return “papers and property” to clients at the conclusion of the representation, which has commonly been understood to include the client’s file, in whatever form it is held. Rule 1.16(d) also has been interpreted as permitting lawyers to establish appropriate data destruction policies to avoid retaining client files and property indefinitely.³⁸ Therefore, as a matter of best practices, lawyers are encouraged to reach agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client’s electronic information that is in the lawyer’s possession.

Absent an agreement with the former client lawyers are encouraged to adopt and follow a paper and electronic document retention schedule, which meets all applicable laws and rules, to reduce the amount of information relating to the representation of former clients that the lawyers retain. In addition, lawyers should recognize that in the event of a data breach involving former client information, data privacy laws, common law duties of care, or contractual arrangements with

³⁵ MODEL RULES OF PROF’L CONDUCT R. 1.9(c)(2) (2018).

³⁶ See *Discipline of Feland*, 2012 ND 174, ¶ 19, 820 N.W.2d 672 (Rejecting respondent’s argument that the court should engraft an additional element of proof in a disciplinary charge because “such a result would go beyond the clear language of the rule and constitute amendatory rulemaking within an ongoing disciplinary proceeding.”).

³⁷ See MODEL RULES OF PROF’L CONDUCT R. 1.9, cmt. [9] (2018).

³⁸ See ABA Ethics Search Materials on Client File Retention, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/piles_of_files_2008.pdf (last visited Oct. 15, 2018).

the former client relating to records retention, may mandate notice to former clients of a data breach. A prudent lawyer will consider such issues in evaluating the response to the data breach in relation to former clients.³⁹

3. Breach Notification Requirements

The nature and extent of the lawyer's communication will depend on the type of breach that occurs and the nature of the data compromised by the breach. Unlike the "safe harbor" provisions of Comment [18] to Model Rule 1.6, if a post-breach obligation to notify is triggered, a lawyer must make the disclosure irrespective of what type of security efforts were implemented prior to the breach. For example, no notification is required if the lawyer's office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach.

The disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything. In a data breach scenario, the minimum disclosure required to all affected clients under Rule 1.4 is that there has been unauthorized access to or disclosure of their information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed. If the lawyer has made reasonable efforts to ascertain the extent of information affected by the breach but cannot do so, the client must be advised of that fact.

In addition, and as a matter of best practices, a lawyer also should inform the client of the lawyer's plan to respond to the data breach, from efforts to recover information (if feasible) to steps being taken to increase data security.

The Committee concludes that lawyers have a continuing duty to keep clients reasonably apprised of material developments in post-breach investigations affecting the clients'

³⁹ Cf. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018), at 8-10 (discussing obligations regarding client files lost or destroyed during disasters like hurricanes, floods, tornadoes, and fires).

information.⁴⁰ Again, specific advice on the nature and extent of follow up communications cannot be provided in this opinion due to the infinite number of variable scenarios.

If personally identifiable information of clients or others is compromised as a result of a data breach, the lawyer should evaluate the lawyer's obligations under state and federal law. All fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have statutory breach notification laws.⁴¹ Those statutes require that private or governmental entities notify individuals of breaches involving loss or disclosure of personally identifiable information.⁴² Most breach notification laws specify who must comply with the law, define "personal information," define what constitutes a breach, and provide requirements for notice.⁴³ Many federal and state agencies also have confidentiality and breach notification requirements.⁴⁴ These regulatory schemes have the potential to cover individuals who meet particular statutory notice triggers, irrespective of the individual's relationship with the lawyer. Thus, beyond a Rule 1.4 obligation, lawyers should evaluate whether they must provide a statutory or regulatory data breach notification to clients or others based upon the nature of the information in the lawyer's possession that was accessed by an unauthorized user.⁴⁵

III. Conclusion

Even lawyers who, (i) under Model Rule 1.6(c), make "reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data

⁴⁰ State Bar of Mich. Op. RI-09 (1991).

⁴¹ National Conference of State Legislatures, *Security Breach Notification Laws* (Sept. 29, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 65.

⁴⁵ Given the broad scope of statutory duties to notify, lawyers would be well served to actively manage the amount of confidential and or personally identifiable information they store beyond any ethical, statutory, or other legal obligation to do so: Lawyers should implement, and follow, a document retention policy that comports with Model Rule 1.15 and evaluate ways to limit receipt, possession and/or retention of confidential or personally identifiable information during or after an engagement.

breach under Model Rule 1.4 in sufficient detail to keep clients “reasonably informed” and with an explanation “to the extent necessary to permit the client to make informed decisions regarding the representation.”

**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY**

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Barbara S. Gillers, New York, NY ■ John M. Barkett, Miami, FL ■ Wendy Wen Yun Chang, Los Angeles, CA ■ Hon. Daniel J. Crothers, Bismarck, ND ■ Keith R. Fisher, Arlington, VA ■ Douglas R. Richmond, Chicago, IL ■ Michael H. Rubin, Baton Rouge, LA ■ Lynda Shely, Scottsdale, AZ ■ Elizabeth C. Tarbert, Tallahassee, FL ■ Allison Wood, Chicago, IL

CENTER FOR PROFESSIONAL RESPONSIBILITY: Dennis A. Rendleman, Ethics Counsel

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Rule 4-228. Receiverships

~~(a)~~ (a) Definitions:

Absent ~~Lawyer~~: 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)~~ (b) Appointment of Receiver:

(1) The State Bar of Georgia may petition the Supreme Court of Georgia to appoint a receiver to take charge of an absent 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 pleading filed with the Court shall be served as set forth in Bar Rule 4-203.1.

~~(1) (2) Upon a final determination by the Supreme Court of Georgia, on a petition filed by the State Bar of Georgia, that a lawyer an attorney has become an absent lawyer Absent Attorney, and that no partner, associate, or other appropriate representative is available to notify his or her clients of this fact and to return client files and property, t~~ The Supreme Court of Georgia may enter an order appointing ~~appointing~~ that a member or members of the

28 State Bar of Georgia be appointed as receiver to take charge of the absent lawyer's
29 files and records. Such receiver shall review the files, notify the absent lawyer's clients
30 and take such steps as seem indicated to protect the interests of the clients and the
31 public. A motion for reconsideration may be taken from the issuance or denial of such
32 protective order by the respondent, his partners, associates, or legal representatives or
33 by the State Bar of Georgia as Receiver to take charge of the Absent Attorney's
34 client files and records.

35
36 (3) If the receiver Office of the General Counsel is not able to locate a
37 member who is willing to be appointed as Receiver, the State Bar of Georgia
38 may petition the Supreme Court of Georgia to appoint a lawyer from the
39 Office of the General Counsel as Receiver to take charge of the Absent
40 Attorney's files and records.

41 (4) The Receiver shall take custody of client legal files, records and
42 property. The Receiver shall not be responsible for or take custody of the
43 Absent Attorney's personal or business property unless necessary to return
44 client files and property. If the Receiver determines that the Absent
45 Attorney's personal or business property is commingled with client files,
46 records and property, the Receiver shall make every effort to return such files
47 to the Absent Attorney or his or her estate. Personal files that cannot be
48 returned after reasonable efforts by the Receiver may be destroyed as set forth
49 in subsection (g) below. Personal property that cannot be returned after
50 reasonable efforts by the receiver may be appropriately disposed of.

51 (5) The Receiver shall review the files, and diligently attempt to notify the
52 Absent Attorney's clients and take such reasonable steps as seem indicated to
53 protect the interests of the clients, and the public. The Receiver shall not be
54 required to act as legal counsel for a client in any matter.

55 (2) (6) If the ~~Receiver~~ should encounter, or anticipate, situations or
56 issues not covered by the ~~order~~Order of appointment, including but not limited
57 to, those concerning proper procedure and scope of authority, the
58 ~~receiver~~Receiver may petition the Supreme Court of Georgia or its designee
59 for such further order ~~or orders as may be necessary or appropriate to address~~
60 the situation or issue so encountered or anticipated.

61
62 (3) (7) The ~~receiver~~Receiver shall deliver files, records and property to
63 the appropriate client. ~~be entitled to release to each client the papers, money, or~~
64 ~~other files and property to which the appropriate client is entitled.~~ Before
65 releasing the property, the ~~receiver~~Receiver may require a receipt from the
66 client for the files and property.

67
68 (e) (c) Applicability of ~~Lawyer~~Attorney-Client Rules.

69
70 (4) (1) Confidentiality. - The ~~receiver~~Receiver shall not be permitted to
71 disclose any information contained in the files and records in his or her care
72 without the consent of the client, or the client's, guardian, administrator,
73 executor or lawful representative to whom such file or record relates, except
74 as clearly necessary to carry out the order of the Supreme Court of Georgia
75 or, upon application, by order of the Supreme Court of Georgia.

76
77 (2) ~~Lawyer~~(2) Attorney-Client Relationship; ~~Privilege.~~ - The
78 ~~receiver~~Receiver relationship standing alone does not create a ~~lawyer~~an
79 attorney-client relationship between the ~~receiver~~Receiver and the clients of the
80 ~~absent lawyer.~~Absent Attorney. However, the ~~lawyer~~attorney-client privilege
81 confidentiality in Rule 1.6 shall apply to communications by or between the

82 ~~receiver~~Receiver and the clients of the ~~absent lawyer~~Absent Attorney to the
83 same extent as it would have applied to communications by or to the ~~absent~~
84 ~~lawyer~~Absent Attorney.

85
86 (d) (d) Trust Account.

87
88 (1) (1) If after appointment the ~~receiver~~Receiver should determine that
89 the ~~absent lawyer~~Absent Attorney maintained one or more trust accounts and
90 that there are no provisions ~~extant~~ that would allow the clients, or other
91 appropriate entities, to receive from the accounts the funds to which they are
92 entitled, the ~~receiver~~Receiver may petition the Supreme Court of Georgia or its
93 designee for an order extending the scope of the ~~receivership~~Receivership to
94 include the management of the ~~said~~ trust account or accounts. ~~In the event~~ If the
95 scope of the ~~receivership~~Receivership is extended to include the management
96 of the trust account or accounts, the ~~receiver~~Receiver shall file quarterly with
97 the Supreme Court of Georgia or its designee a report showing the activity in
98 and status of said accounts.

99
100 (2) (2) Service on a bank or financial institution of a copy of the order
101 extending the scope of the ~~receivership~~Receivership to include management of
102 the trust account or accounts shall operate as a modification of any agreement
103 of deposit among such bank or financial institution, the ~~absent lawyer~~Absent
104 Attorney and any other party to the account so as to make the ~~receiver~~Receiver
105 a necessary signatory on any trust account maintained by the ~~absent~~
106 ~~lawyer~~Absent Attorney with such bank or financial institution. The Supreme
107 Court of Georgia or its designee, on application by the ~~receiver~~Receiver, may
108 order that the ~~receiver~~Receiver shall be sole signatory on any such account to

the extent necessary for the purposes of these Rules and may direct the disposition and distribution of client and other funds.

~~(3)~~ (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 (i1) rely on a certification of ownership issued by an auditor employed by the ~~receiver~~ Receiver; or (ii2) interplead any funds of questionable ownership into the appropriate Superior Court; or (iii3) 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 may disburse funds on a pro rata basis.

~~account does not contain sufficient funds to meet known client balances, the receiver may disburse funds on a pro rata basis.~~

~~(e)~~ (e) Payment of Expenses of Receiver.

~~(1)~~ (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

137 be accompanied by an accounting in a form and substance acceptable to the
138 Supreme Court of Georgia or its designee. The amount of reimbursement as
139 determined by the Supreme Court of Georgia or its designee shall be paid to
140 the ~~receiver~~Receiver by the State Bar of Georgia. The State Bar of Georgia
141 may seek from a court of competent jurisdiction a judgment against the ~~absent~~
142 ~~lawyer~~Absent Attorney or his or her estate in an amount equal to the amount
143 paid by the State Bar of Georgia to the ~~receiver~~Receiver. The amount of
144 reimbursement as determined by the Supreme Court of Georgia or its designee
145 shall be considered as prima facie evidence of the fairness of the amount, and
146 the burden of proof shall shift to the ~~absent lawyer~~Absent Attorney or his or her
147 estate to prove otherwise.

148
149 ~~(2)~~ (2) The provision of paragraph ~~(e)~~(1) above shall apply to all
150 ~~receivers~~Receivers serving on the effective date of this Rule and thereafter.

151
152 (f) Receiver-Client Relationship:

153 ~~(f)~~ With full disclosure and the informed consent, as defined in Bar Rule 1.0 (1h),
154 of any client of the ~~absent lawyer~~Absent Attorney, the ~~receiver may, but need~~
155 ~~not,~~Receiver may choose to accept employment to complete any legal matter. Any
156 written consent by the client shall include an acknowledgment that the client is not
157 obligated to use the ~~receiver~~Receiver.

158
159 ~~(g)~~ (g) Unclaimed and Abandoned Files:

160 (1) If upon completion of the ~~receivership~~Receivership there are files
161 belonging to the clients of the ~~absent lawyer~~Absent Attorney that have not been

162 claimed, the ~~receiver~~Receiver shall deliver them to the State Bar of Georgia
163 as custodian of the unclaimed client files.

164 (1) (2) The State Bar of Georgia as custodian or Receiver shall ~~store the~~
165 ~~files~~hold all unclaimed client files until such files have been closed for at least
166 six years, after which time the State Bar of Georgia may exercise its discretion
167 in maintaining or destroying theunclaimed files.

168 (2) (3) If the ~~receiver~~Receiver determines that an unclaimed file contains
169 a Last Will and Testament, the ~~receiver~~Receiver may, but shall not be required
170 to do so, file said Last Will and Testament in the office of the Probate Court
171 in such county as to the ~~receiver~~Receiver may seem appropriate.
172

173 (4) In emergency situations and when necessary to protect the
174 confidentiality of client information or to otherwise protect client interests,
175 the State Bar of Georgia may take custody of client files that have been
176 abandoned by an absent attorney without petitioning the Supreme Court of
177 Georgia for a receivership. If after examination of the files it appears that a
178 receivership is necessary, the State Bar of Georgia may petition the Supreme
179 Court of Georgia for appointment of a receiver. The State Bar of Georgia may
180 maintain or destroy abandoned files as set forth in (g) (2) (ii) of this Rule.
181

182 (h) Professional Liability Insurance

183 ~~Attorneys who maintain errors and omissions insurance, which includes coverage~~
184 ~~for conduct as a Receiver may be appointed to the position of Receiver. Those~~
185 ~~attorneys that do not maintain errors and omissions insurance may serve as Receiver~~
186 ~~upon issuance of a fidelity bond or other form of insurance or guaranty that insures~~
187 ~~losses as a result of improper execution of the duties as a receiver under this Rule.~~

188 In order to serve as a Receiver an attorney must either maintain an Errors &
189 Omissions insurance policy which includes coverage for conduct as a Receiver, or
190 be eligible for coverage under an errors and omissions policy maintained by the State
191 Bar of Georgia.

192
193 (i) Requirement of Bond.

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

199
200 ~~(i)~~ (j) Immunity.

201
202 ~~(i)~~ (1) The Supreme Court of Georgia recognizes the actions of the State
203 Bar of Georgia and the appointed receiver to be within the Court's regulatory
204 function, and being regulatory in nature, the State Bar of Georgia and the
205 receiver are entitled to that immunity customarily afforded to court-appointed
206 receivers.

207
208 ~~(2)~~ (2) The immunity granted in paragraph (j) (1) above shall not
209 apply if the receiver is employed by a client of the absent lawyer to
210 continue the representation.

211
212 ~~(j)~~ Service. Service under this Rule may be perfected under Rule 4-203.1.

Rule 4-228. Receiverships

(a) Definitions

Absent Attorney - a member of the State Bar of Georgia (or a foreign or domestic lawyer authorized to practice law in Georgia) who has disappeared, died, been disbarred, 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.

(b) Appointment of Receiver

(1) The State Bar of Georgia may petition the Supreme Court of Georgia to appoint a receiver to take charge of an absent 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 pleading filed with the Court shall be served as set forth in Bar Rule 4-203.1.

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

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

26 (4) The Receiver shall take custody of client legal files, records and
27 property. The Receiver shall not be responsible for or take custody of the
28 Absent Attorney's personal or business property unless necessary to return
29 client files and property. If the Receiver determines that the Absent
30 Attorney's personal or business property is commingled with client files,
31 records and property, the Receiver shall make every effort to return such files
32 to the Absent Attorney or his or her estate. Personal files that cannot be
33 returned after reasonable efforts by the Receiver may be destroyed as set forth
34 in subsection (g) below. Personal property that cannot be returned after
35 reasonable efforts by the receiver may be appropriately disposed of.

36 (5) The Receiver shall review the files, and diligently attempt to notify the
37 Absent Attorney's clients and take such reasonable steps as seem indicated to
38 protect the interests of the clients, and the public. The Receiver shall not be
39 required to act as legal counsel for a client in any matter.

40 (6) If the Receiver should encounter or anticipate situations or issues not
41 covered by the Order of appointment, including but not limited to those
42 concerning proper procedure and scope of authority, the Receiver may
43 petition the Supreme Court of Georgia or its designee for such further order.

44 (7) The Receiver shall deliver files, records and property to the appropriate
45 client. files and property to the appropriate client. Before releasing the
46 property, the Receiver may require a receipt from the client for the files and
47 property.

48 (c) Applicability of Attorney-Client Rules

49 (1) Confidentiality - The Receiver shall not be permitted to disclose any
50 information contained in the files and records in his or her care without the

consent of the client, or the client's, guardian, administrator, executor or lawful representative to whom such file or record relates, except as clearly necessary to carry out the order of the Supreme Court of Georgia or, upon application, by order of the Supreme Court of Georgia.

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

(d) Trust Account

(1) If after appointment the Receiver should determine that the Absent Attorney maintained one or more trust accounts and that there are no provisions that would allow the clients or other appropriate entities to receive from the accounts the funds to which they are entitled, the Receiver may petition the Supreme Court of Georgia or its designee for an order extending the scope of the Receivership to include the management of the trust account or accounts. If the scope of the Receivership is extended to include the management of the trust account or accounts, the 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 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 Attorney and any

other party to the account so as to make the Receiver a necessary signatory on any trust account maintained by the Absent Attorney with such bank or financial institution. The Supreme Court of Georgia or its designee, on application by the Receiver, may order that the Receiver shall be sole signatory on any such account 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 should act as a reasonably prudent lawyer maintaining a client trust account. The Receiver may (1) rely on a certification of ownership issued by an auditor employed by the Receiver; or (2) interplead any funds of questionable ownership into the appropriate Superior Court; or (3) proceed under the terms of the Disposition of Unclaimed Property Act (OGCA §44-12-190 et seq.). If the Absent Attorney's trust account does not contain sufficient funds to meet known client balances, the Receiver may disburse funds on a pro rata basis.

(e) Payment of Expenses of Receiver

(1) The Receiver shall be entitled to reimbursement for actual and reasonable costs incurred by the Receiver for expenses, including, but not limited to, (i) the actual and reasonable costs associated with the employment of accountants, auditors and bookkeepers necessary to determine the source and ownership of funds held in the 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 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

102 in a form and substance acceptable to the Supreme Court of Georgia or its
103 designee. The amount of reimbursement as determined by the Supreme Court
104 of Georgia or its designee shall be paid to the Receiver by the State Bar of
105 Georgia. The State Bar of Georgia may seek from a court of competent
106 jurisdiction a judgment against the Absent Attorney or his or her estate in an
107 amount equal to the amount paid by the State Bar of Georgia to the Receiver.
108 The amount of reimbursement as determined by the Supreme Court of
109 Georgia or its designee shall be considered as prima facie evidence of the
110 fairness of the amount, and the burden of proof shall shift to the Absent
111 Attorney or his or her estate to prove otherwise.

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

114 (f) Receiver-Client Relationship

115 With full disclosure and the informed consent, as defined in Bar Rule 1.0 (h), of any
116 client of the Absent Attorney, the Receiver may choose to accept employment to
117 complete any legal matter. Any written consent by the client shall include an
118 acknowledgment that the client is not obligated to use the Receiver.

119 (g) Unclaimed and Abandoned Files

120 (1) If upon completion of the Receivership there are files belonging to the
121 clients of the Absent Attorney that have not been claimed, the Receiver shall
122 deliver them to the State Bar of Georgia as custodian of the unclaimed client
123 files.

124 (2) The State Bar of Georgia as custodian or Receiver shall hold all
125 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 unclaimed files.

(3) If the Receiver determines that an unclaimed file contains a Last Will and Testament, the Receiver may, but shall not be required to, file said Last Will and Testament in the office of the Probate Court in such county as to the Receiver may seem 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 client files that have been abandoned by an absent attorney without petitioning the Supreme Court of Georgia for a receivership. If after examination of the files it appears that a receivership is necessary, the State Bar of Georgia may petition the Supreme Court of Georgia for appointment of a receiver. The State Bar of Georgia may maintain or destroy abandoned files as set forth in (g) (2) (ii) of this Rule.

(h) Professional Liability Insurance

In order to serve as a Receiver an attorney must either maintain an Errors & Omissions insurance policy which includes coverage for conduct as a Receiver, or be eligible for coverage under an errors and omissions policy maintained by the State Bar of Georgia.

(i) Requirement of Bond

The Supreme Court of Georgia or its designee may require the Receiver to post a surety bond conditioned upon the faithful performance of his or her duties and in an amount satisfactory to the Supreme Court of Georgia or its designee. The State Bar

149 of Georgia shall reimburse the Receiver for the cost of such bond, subject to
150 reimbursement as set forth in paragraph (e) supra.

151 (j) Immunity

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

157
158 (2) The immunity granted in paragraph (j) (1) above shall not apply if the
159 receiver is employed by a client of the absent lawyer to continue the
160 representation.