# Professionalism in Oral and Written Advocacy, Including with Unrepresented Parties

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Educational Materials

# Professional and Ethical Dilemmas

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# HYPOS

1. While representing a client in civil litigation, you are conducting depositions in a conference room at your office. Opposing counsel asks to use an empty office during a break to return phone calls, and you oblige. After the depositions are finished for the day, you realize that your opposing counsel left a document in the empty office, and after glancing at it, you realize it is a status memorandum to the insurance adjuster on the case.

   - **What do you do?**
   - **What should you do?**

Rule 3.4

ABA Formal Opinion 06-440 (Unsolicited Receipt of Privilege or Confidential Materials: Withdrawal of Formal Opinion 94-382)

ABA Formal Opinion 05-437 (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368)

Work Product

Attorney-Client Privilege

# HYPOS

2. During the course of litigation, you feel that your opposing counsel has engaged in various ethical violations which have created an unfair advantage for the opposing side. The perceived ethical violations are: destroying documents, lying about witness whereabouts and coaching witnesses at depositions.

- **When you become entirely fed up, may you threaten a bar complaint to gain leverage in settlement negotiations?**
- **Must you report any of the above conduct to the State Bar?**

Rule 8.3 (Reporting Professional Misconduct)

Rule 9.2 (Settlement of Claims)

ABA Formal Opinion 04-433 (A lawyer having knowledge of the professional misconduct of another licensed lawyer, including a non-practicing lawyer, is obligated under Model Rule 8.3 to report such misconduct if it raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer. The professional misconduct must be reported even if it involves activity completely removed from the practice of law. If the report would require revealing the confidential information of a client, the lawyer must obtain the client's informed consent before making the report.)

# DUTY TO REPORT

- 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.

# Challenges

- RULE 9.2 SETTLEMENT OF CLAIMS
- In connection with the settlement of a controversy or suit involving misuse of funds held in a fiduciary capacity, a lawyer shall not enter into an agreement that the person bringing the claim will be prohibited or restricted from filing a disciplinary complaint, or will be required to request the dismissal of a pending disciplinary complaint concerning that conduct.

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

  Comment

  [1] The disciplinary system provides protection to the general public from those lawyers who are not morally fit to practice law. One problem in the past has been the lawyer who settles the civil claim/disciplinary complaint with the injured party on the basis that the injured party not bring a disciplinary complaint or request the dismissal of a pending disciplinary complaint. The lawyer is then is free to injure other members of the general public.

  [2] To prevent such abuses in settlements, this rule prohibits a lawyer from settling any controversy or suit involving misuse of funds on any basis which prevents the person bringing the claim from pursuing a disciplinary complaint.

# HYPOS

3. A lawyer at a firm has decided to leave the firm and start his own practice. He wants to take his existing clients with him. Consider the following:

- **May the lawyer call his clients, tell them he is leaving and ask the clients to hire his new firm?**
- **Must the lawyer let the law firm handle the communication with the client?**
- **May the lawyer or the firm insist that the communication be made jointly?**
- **What if there is a pressing deadline in one of the client's cases. Should that disclosure be handled differently than with a client in which there are no deadlines pending?**
- **Are any of the answers different if the lawyer is a partner at the law firm?**

Rule 1.3 (Diligence)

Rule 1.16 (d) (Declining or Terminating Representation)

Rule 8.4 (a) (4) (Misconduct)

Rule 7.1 (a) (Communications Concerning a Lawyer's Service)

Rule 7.3 (b) (Direct Contact with Prospective Clients)

GEORGIA FORMAL ADVISORY OPINION NO. 97-3

# Challenges

- **Formal Advisory Opinion No. 97-3**
- **<u>QUESTION PRESENTED:</u>**
- **Whether it is ethically permissible for a departing attorney to send a communication to clients of the former law firm?**
- **<u>OPINION:</u>**
- **No Standard prohibits a departing attorney from contacting those clients with whom the attorney personally worked while at the law firm. A client is not the property of a certain attorney. The main consideration underlying our Canon of Ethics is the best interest and protection of the client.**
- **……**

# HYPOS

4. Your opposing counsel calls you a day after his interrogatory responses are due, and he asks for an extension.

   - **What should you do?**
   - **What if the discovery responses which are overdue are Requests to Admit which may be dispositive of the liability issue in your case?**

Rule 1.3 (Diligence)

Rule 1.4 (Communication)

   - **What if YOU are the attorney who has failed to respond to Interrogatories or Requests to Admit.**
   - **What must you tell your client?**
   - **When must you tell your client that you have missed a deadline?**
   - **Can you tell your errors and omissions carrier before you tell your client?**

Rule 1.1 (Competence)

Rule 1.3 (Diligence)

Rule 1.4 (Communication)

Rule 1.7 (Conflict of Interest)

# HYPOS

**5. May your firm place the following language on its invoices or other communications with clients:**

- *If you disagree with anything set forth in this communication or the way we have represented you to date, please notify us by certified mail at the address set forth herein immediately. If we do not hear from you, it shall be an acknowledgment by you per our agreement that you are satisfied with my representation of you to date and you agree with my statements in this communication.*

**May your firm place the following language in its retainer agreement:**

- *The statements you receive from the firm will describe the services rendered and will summarize the expense charges. You agree to raise any question or objection to any statement in writing within twenty (20) days of the date of each invoice. If you do not raise an objection within that time period, you agree to pay the statement* according *to its terms.*

Rule 1.8 (h) (Conflict of Interest: Prohibited Transactions)

GEORGIA FORMAL ADVISORY OPINION NO. 05-8

Loveless v. Sun Steel, Inc., 206 Ga. App. 247, 424 S.E.2d 887 (1992)

# Challenges

- Formal Advisory Opinion 05-8

- QUESTION PRESENTED:
- The question presented is whether an attorney may stamp client correspondence with a notice stating that the client has a particular period of time to notify the lawyer if he /she is dissatisfied with the lawyer and that if the client did not notify the lawyer of his /her dissatisfaction within that period of time, the client would waive any claim for malpractice.
- SUMMARY ANSWER:
- A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Therefore, in the absence of independent representation of the client, the lawyer should not condition the representation of a client upon the waiver of any claim for malpractice and should not attempt to cause the waiver of any claim for malpractice by the inclusion of language amounting to such a waiver in correspondence with a client.

# HYPOS

**6. Halfway through a case, your client fires you and accuses you of procrastinating, not returning phone calls and being rude. You feel you have provided excellent legal services to the client. The client owes you significant attorney's fees.**

**May you:**

- Refuse to provide the file to the client until he pays the outstanding fees?
- Keep the original file and send a copy to the client?
- Disclose the basis for the disagreement with your client to opposing counsel when she asks you why you were fired?
- Disclose privileged attorney-client information to an attorney-friend of yours who handles bar matters?

**What if you realize that your procrastination might have affected your client's case, and you think that subsequent counsel might recognize that and discuss it with your former client.?**

**May you:**

- Disclose privileged attorney-client information to an attorney with whom you are consulting regarding a potential legal malpractice claim or the bar complaint?
- What if a bar complaint or civil claim is, in fact, filed. Would the answers be different?

O.C.G.A. §15-19-14 (a). (Lien on client's file)

Formal Advisory Opinion of the State Bar of Georgia No. 87-5

Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 571 (2003)

Adams v. Putnam County, 290 Ga. App. 20 (2008)

Rule 1.6 (b) (iii) (Fees)

Rule 1.7 (Conflict of Interest)

# HYPOS

7. As a lawyer, you have earned a juris doctor degree.

**-As a sole practitioner, can you name your firm "Ogier & Associates?"**

**-What if you are a two-person firm (with one partner and one associate)?**

**-Can a sole practitioner name his firm "The Ogier Law Group?"**

**-How about "The Ogier Law Firm?"**

**-Can Tamara have a firm named "Pitbull Lawyers, LLC?"**

**-How about Ogier Pitbull Lawyers, LLC?"**

**-How about Ogier Better Than The Rest, LLC?"**

**-Can Tamara identify herself as a specialist in a particular practice area?**

**-Can three friends who share office space and facilities call themselves Smith, Jones & Johnson if they are not in any type of actual partnership relationship?**

Rule 7.1 (Communications Concerning a Lawyer's Services)

Rule 7.4 (Communication of Fields of Practice)

Rule 7.5 (Firm Names and Letterheads)

# "SPECIALIST"

- **RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE**
- **A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.**

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

  **Comment**

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

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

# HYPOS

8. One of your recent legal engagements involved incorporating a small business. After the business is incorporated, the sole proprietor calls you up and asks you out for a date. Assuming the personal interest is mutual:

- **May you enter into a dating relationship with the client?**
- **What if your legal work is not complete?**
- **What if the incorporation is complete, but you would like to continue representing the client?**
- **Does it matter if the relationship is sexual?**

Rule 1.9

ABA Rule 1.8(j) (prohibits sexual relationships between lawyer and client "unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.")

*Flashdance*

# HYPOS

9. During the course of your handling a case, you have a telephone conversation with an important witness:
   - **May you tape record the phone call?**
   - **Does it matter where the witness is located?**
   - **If the witness changes his story at deposition or trial, may you use the tape recording at a deposition or trial to cross examine the witness?**
   - **Must you provide a copy of the tape to opposing counsel?**
   - **Must you provide a copy of the tape to the witness?**
   - **What if you did not record the call, but instead took detailed notes of the conversation:**
   - **Must you produce your notes to the witness?**
   - **Must you produce your notes to opposing counsel?**
   - **May you use your notes to cross examine the witness at deposition or trial?**

Rule 3.7 (Lawyer as Witness)

Rule 4.3 (Dealing with Unrepresented Person)

O.C.G.A. §16-11-66 (Consent to record a telephone call)

ABA Formal Opinion 01-422 (A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. ABA Formal Opinion 337 (1974) is withdrawn. A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded.


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# Hypo No 1.

**RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

**A lawyer shall not:**

**(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;**

**(b) (1) falsify evidence;**

**(2) counsel or assist a witness to testify falsely;**

**(3) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:**

**(i) expenses reasonably incurred by a witness in preparation, attending or testifying;**

**(ii) reasonable compensation to a witness for the loss of time in preparing, attending or testifying;**

**(iii) a reasonable fee for the professional services of an expert witness;**

**(c) Reserved.;**

**(d) Reserved.;**

**(e) Reserved.;**

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

**(1) the person is a relative or an employee or other agent of a client; or**

**(2) the information is subject to the assertion of a privilege by the client; and**

**(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and the request is not otherwise prohibited by law;**

**(g) use methods of obtaining evidence that violate the legal rights of**

**the opposing party or counsel; or**

**(h) present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.**

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

**Comment**

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Reserved.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2: Communication with Persons Represented by Counsel.

[5] As to paragraph (g), the responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of the opposing party or counsel. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence.

# Hypo No. 2.

**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.

**RULE 9.2 SETTLEMENT OF CLAIMS**

**In connection with the settlement of a controversy or suit involving misuse of funds held in a fiduciary capacity, a lawyer shall not enter into an agreement that the person bringing the claim will be prohibited or restricted from filing a disciplinary complaint, or will be required to request the dismissal of a pending disciplinary complaint concerning that conduct.**

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

**Comment**

[1] The disciplinary system provides protection to the general public from those lawyers who are not morally fit to practice law. One problem in the past has been the lawyer who settles the civil claim/disciplinary complaint with the injured party on the basis that the injured party not bring a disciplinary complaint or request the dismissal of a pending disciplinary complaint. The lawyer is then is free to injure other members of the general public.

[2] To prevent such abuses in settlements, this rule prohibits a lawyer from

settling any controversy or suit involving misuse of funds on any basis which prevents the person bringing the claim from pursuing a disciplinary complaint.

# Hypo No. 3

**RULE 1.16 DECLINING OR TERMINATING REPRESENTATION**

**(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:**

**(1) the representation will result in violation of the Georgia Rules of Professional Conduct or other law;**

**(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**

**(3) the lawyer is discharged.**

**(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:**

**(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;**

**(2) the client has used the lawyer's services to perpetrate a crime or fraud;**

**(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;**

**(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**

**(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or**

**(6) other good cause for withdrawal exists.**

**(c) When a lawyer withdraws it shall be done in compliance with applicable laws and rules. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.**

**(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee**

**that has not been earned.**

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

**Comment**

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. But see Rule 1.2(c): Scope of Representation.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Georgia Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2: Accepting Appointments. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. To the extent possible, the lawyer should give the client an explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to be self-represented.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14: Client under a Disability.

Optional Withdrawal

[7] The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

**RULE 8.4 MISCONDUCT**

**(a) It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to:**

**(1) violate or 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 (10) days after the time appointed in the order or judgment. In such**

**cases the record of the judgment is conclusive evidence unless obtained without valid service of process.**

**(b) (1) For purposes of this Rule, conviction shall include:**

**(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 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 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 Part Six of the Georgia Rules of Professional Conduct.**

**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 Rule 8.4(c) is disbarment.**

**Comment**

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

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

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

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

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

**(1) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;**

**(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;**

**(3) compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;**

**(4) fails to include the name of at least one lawyer responsible for its content; or**

**(5) contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:**

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

**(6) contains the language 'no fee unless you win or collect' or any**

**similar phrase and fails to conspicuously present the following disclaimer:**

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

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

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

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

**Comment**

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

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

Affirmative Disclosure

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

"costs" in an advertisement.

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

Accountability

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

**RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

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

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

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

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

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

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

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

**(1) A lawyer may pay the usual and reasonable fees or dues charged by a bona fide lawyer referral service operated by an organization authorized by law and qualified to do business in this state; provided, however, such organization has filed with the State Disciplinary Board, at least annually, a report showing its terms, its subscription charges, agreements with counsel, the number of lawyers participating, and the names and addresses of lawyers participating in the service;**

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

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

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

**(iii) The combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been**

**involved; and,**

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

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

**(4) A lawyer may pay the usual and reasonable fees charged by a lay public relations or marketing organization provided the activities of such organization on behalf of the lawyer are otherwise in accordance with these Rules.**

**(5) A lawyer may pay for a law practice in accordance with Rule 1.17: Sale of Law Practice.**

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

**(e) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization prohibited under Rules 7.3(c)(1), 7.3(c)(2) or 7.3(d): Direct Contact with Prospective Clients.**

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

**Comment**
*Direct Personal Contact*

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

[2] The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. The potential for abuse inherent in solicitation of prospective clients through personal contact justifies its prohibition, particularly

since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct personal contact through an intermediary and live contact by telephone.

*Direct Mail Solicitation*

[3] Subject to the requirements of Rule 7.1: Communications Concerning a Lawyer's Services and paragraphs (b) and (c) of this Rule 7.3: Direct Contact with Prospective Clients, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

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

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

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

*Paying Others to Recommend a Lawyer*

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs, provided the programs are in compliance with the registration requirements of sub-paragraph (c)(1) or (c)(2)of this Rule 7.3: Direct Contact with Prospective Clients and the communications and practices of the organization are not deceptive or misleading.

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

**Formal Advisory Opinion No. 97-3**

**State Bar of Georgia**
**Issued by the Supreme Court of Georgia**
**On September 4, 1998**
**Formal Advisory Opinion No. 97-3**

**QUESTION PRESENTED:**

Whether it is ethically permissible for a departing attorney to send a communication to clients of the former law firm?

**OPINION:**

No Standard prohibits a departing attorney from contacting those clients with whom the attorney personally worked while at the law firm. A client is not the property of a certain attorney. The main consideration underlying our Canons of Ethics is the best interest and protection of the client.

An attorney has a duty to keep a client informed. This duty flows in part from Standard 22 which provides that a lawyer shall not withdraw from employment until that lawyer has taken reasonable steps to avoid foreseeable prejudice to the client including giving due notice to the client of the lawyer's withdrawal, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Furthermore, Standard 44 prohibits an attorney's willful abandonment or disregard of a legal matter to the client's detriment. Therefore, to the extent that a lawyer's departure from the firm affects the client's legal matters, this client should be informed of the attorney's departure. The fact or circumstances of an attorney's departure from a law firm should not be misrepresented to the firm's clients. See Standard 4 (which prohibits an attorney from engaging in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation); and Standard 45(b) (which prohibits an attorney from knowingly making a false statement of law or fact in his representation of a client).

If the departing attorney either had significant contact with or actively represented a client on the client's legal matters, the attorney may communicate with the client, in either written or oral form, to advise the client of the attorney's departure from the firm. An appropriate communication may advise the client of the fact of the attorney's departure, the attorney's new location, the attorney's willingness to provide legal services to the client, and the client's right to select who handles the client's future legal representation.

Assuming the departing attorney either had significant contact with or actively represented the client, the written communication to the client does not need to comply with the provisions governing advertisements contained in Standard 6, because it would not constitute "a written communication to a prospective client for the purposes of obtaining professional employment" as contemplated by

Standard 6 (i.e. the written communication is not required to be labeled an "advertisement"). Of course, any written communication regarding a lawyer's services must also comply with Standard 5, which prohibits any false, fraudulent, deceptive or misleading communications; and with any other applicable standards of conduct.

A similar analysis should also apply to an oral communication by the departing attorney to a client with whom the attorney had significant contact or active representation on legal matters while at the firm. If the departing attorney contacts such a client orally, that attorney should only provide information that is deemed appropriate in a written communication as set forth above.

With respect to the timing of the disclosure of the attorney's departure to the client, the ultimate consideration is the client's best interest. To the extent practical, a joint notification by the law firm and the departing attorney to the affected clients of the change is the preferred course of action for safeguarding the client's best interests. However, the appropriate timing of a notification to the client is determined on a case by case basis. Depending on the nature of the departing attorney's work for the client, the client may need advance notification of the departure to make a determination as to future representation.

The departing attorney may also owe certain duties to the firm which may require that the departing attorney should advise the firm of the attorney's intention to leave the firm and the attorney's intention to notify clients of his or her impending departure, prior to informing the clients of the situation. Specifically, the departing attorney should not engage in professional conduct which involves "dishonesty, fraud, deceit, or willful misrepresentation" with respect to the attorney's dealings with the firm as set forth in Standard 4.

In conclusion, as long as the departing attorney complies with the Standards governing advertisements, solicitation, and general professional conduct, the attorney may ethically contact those clients with whom the attorney had significant contact or active representation at the former law firm, so as to advise the clients of the attorney's departure as well as the client's right to select his or her legal counsel. Legal issues which may arise from a particular set of facts involving a departing attorney including, but not limited to, contract or tortious interference with contract, are beyond the scope of this formal advisory opinion.

**RULE 1.3 DILIGENCE**

**A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.**

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

**Comment**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2: Scope of Representation. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16: Declining or Terminating Representation, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will serve on a continuing basis. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

**RULE 1.4 COMMUNICATION**

**A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, shall keep the client reasonably informed about the status of matters and shall promptly comply with reasonable requests for information.**

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

**Comment**

[1A] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a): Scope of Representation. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[1B] The timeliness of a lawyer's communication must be judged by all of the controlling factors. "Prompt" communication with the client does not equate to "instant" communication with the client and is sufficient if reasonable under the relevant circumstances.

[2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[3] Ordinarily, the information to be provided is that which is appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14: Client under a Disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13: Organization as Client. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.
Withholding Information

[4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c):

**Fairness to Opposing Party and Counsel directs compliance with such rules or orders.**

**RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**

**(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).**

**(b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:**

**(1) consultation with the lawyer,**

**(2) having received in writing reasonable and adequate information about the material risks of the representation, and**

**(3) having been given the opportunity to consult with independent counsel.**

**(c) Client consent is not permissible if the representation:**

**(1) is prohibited by law or these rules;**

**(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or**

**(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.**

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

**Comment**

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If an impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16: Declining or Terminating Representation. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9: Conflict of Interest: Former Client. See also Rule 2.2(b): Intermediary. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3: Diligence; and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a) with respect to representation directly adverse to a client, and paragraph (b) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. If consent is withdrawn, the lawyer should consult Rule 1.16: Declining or Terminating Representation and Rule 1.9: Conflict of Interest: Former Client.

Lawyer's Interests

[6] The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1: Competence and 1.5: Fees. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2: Intermediary involving intermediation between clients.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government entity is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases while they are pending in different trial courts, but it may be improper to do so should one or more of the cases reach the appellate court.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f): Conflict of Interest:

Prohibited Transactions. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Non-litigation Conflicts

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and extent of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

[12] In a negotiation common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call into question the fair or efficient administration of justice, opposing counsel

may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

# Hypo No. 4

**RULE 1.3 DILIGENCE**

**A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.**

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

**Comment**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2: Scope of Representation. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16: Declining or Terminating Representation, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will serve on a continuing basis. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

**RULE 1.4 COMMUNICATION**

**A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, shall keep the client reasonably informed about the status of matters and shall promptly comply with reasonable requests for information.**

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

**Comment**

[1A] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a): Scope of Representation. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[1B] The timeliness of a lawyer's communication must be judged by all of the controlling factors. "Prompt" communication with the client does not equate to "instant" communication with the client and is sufficient if reasonable under the relevant circumstances.

[2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[3] Ordinarily, the information to be provided is that which is appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14: Client under a Disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13: Organization as Client. Where many routine matters are involved, a system of limited or occasional reporting may be arranged

with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.
Withholding Information

[4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c): **Fairness to Opposing Party and Counsel directs compliance with such rules or orders.**

**RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**

**(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).**

**(b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:**

**(1) consultation with the lawyer,**

**(2) having received in writing reasonable and adequate information about the material risks of the representation, and**

**(3) having been given the opportunity to consult with independent counsel.**

**(c) Client consent is not permissible if the representation:**

**(1) is prohibited by law or these rules;**

**(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or**

**(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.**

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

**Comment**

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If an impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16: Declining or Terminating Representation. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9: Conflict of Interest: Former Client. See also Rule 2.2(b): Intermediary. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3: Diligence; and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a) with respect to representation directly adverse to a client, and paragraph (b) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot

properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. If consent is withdrawn, the lawyer should consult Rule 1.16: Declining or Terminating Representation and Rule 1.9: Conflict of Interest: Former Client.

Lawyer's Interests

[6] The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1: Competence and 1.5: Fees. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2: Intermediary involving intermediation between clients.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government entity is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases while they are pending in different trial courts, but it may be improper to do so should one or more of the cases reach the appellate court.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f): Conflict of Interest: Prohibited Transactions. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Non-litigation Conflicts

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and extent of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

[12] In a negotiation common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If

there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

# Hypo No. 5

**Formal Advisory Opinion 05-8**

**FORMAL ADVISORY OPINION BOARD NO. 05-8**
**Approved And Issued On April 4, 2006 Pursuant To Bar Rule 4-403**
**By Order Of The Supreme Court Of Georgia Thereby Replacing FAO No. 96-2**
**Supreme Court Docket No. S06U0800**

**QUESTION PRESENTED:**

The question presented is whether an attorney may stamp client correspondence with a notice stating that the client has a particular period of time to notify the lawyer if he/she is dissatisfied with the lawyer and that if the client did not notify the lawyer of his/her dissatisfaction within that period of time, the client would waive any claim for malpractice.

**SUMMARY ANSWER:**

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Therefore, in the absence of independent representation of the client, the lawyer should not condition the representation of a client upon the waiver of any claim for malpractice and should not attempt to cause the waiver of any claim for malpractice by the inclusion of language amounting to such a waiver in correspondence with a client.

**OPINION:**

A member of the Investigative Panel of the State Disciplinary Board has brought to the attention of the Formal Advisory Opinion Board a practice by lawyers of adding the following language (by rubber stamp) to correspondence with clients:

Important Message
If you disagree with anything set forth in this communication or the way I have represented you to date, please notify me by certified mail at the address set forth herein immediately. If I do not hear from you, it shall be an acknowledgment by you per our agreement that you are satisfied with my representation of you to date and you agree with my statements in this communication.

The intended effect of this "message" is to create a short period of time within which the client must decide whether he or she is satisfied with the representation, and if not satisfied, the client must notify the lawyer "immediately." If such notification is not provided "immediately," the client will have acknowledged an "agreement" that the client is satisfied with the representation.

It is apparent from reviewing this "message" that the lawyer is attempting to exonerate himself or herself from any claim of malpractice or to cause a waiver of any claim for malpractice by the client against the lawyer. By attempting to limit his or her liability for malpractice or to cause a waiver of any claim for malpractice, the lawyer is putting himself or herself into an adversarial relationship with the client. While providing advice to the client on the one hand, the lawyer is attempting to limit or excuse his or her liability for claims of malpractice resulting from the provision of such advice on the other hand. Such conduct places the lawyer's personal interests ahead of the interests of the client. This conduct is expressly forbidden by Rule 1.8(h), which provides that "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement."

In summary, the use of a message or notice, such as described herein, is a violation of Rule 1.8(h), and subjects an attorney to discipline, including disbarment.

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

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

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

**(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and**

**(3) the client consents in writing thereto.**

**(b) A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client consents after consultation, except as allowed in Rule 1.6.**

**(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.**

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

**information relating to the representation.**

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

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

**(2) a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client.**

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

**(1) the client consents after consultation;**

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

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

**(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.**

**(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.**

**(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer except upon consent by the client after consultation regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.**

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

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

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

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

**Comment**

Transactions Between Client and Lawyer

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

Adverse Use of Information

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

Gifts from Clients

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

Literary Rights

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

Financial Assistance to Clients

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

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

[5] When the client is a class, consent may be obtained on behalf of the class as provided by law.

Settlement of Aggregated Claims

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

Agreements to Limit Liability

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

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

Family Relationships Between Lawyers

[9] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7: Conflict of Interest: General Rule, 1.9: Conflict of Interest: Former Client, and 1.10: Imputed Disqualification: General Rule.

Acquisition of Interest in Litigation

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

# Hypo No. 6

Formal Advisory Opinion No. 87-5

State Bar of Georgia
Issued by the Supreme Court of Georgia
On September 26, 1988
Formal Advisory Opinion No. 87-5

For references to Standard of Conduct 22(b), please see Rule 1.16(d).

For an explanation regarding the addition of headnotes to the opinion, click here.

Assertion of Attorneys' Retaining Liens.

An attorney's ethical obligation not to cause prejudice to his or her client is paramount over rights under the lien statute. Accordingly, an attorney may not to the prejudice of a client withhold the client's papers or properties upon withdrawal as security for unpaid fees.

QUESTION PRESENTED:

What are the ethical duties of a lawyer under Standard 22(b) with respect to the return of a client's papers and property when the lawyer has not been paid in view of the statutory retaining lien authorized by O.C.G.A. § 15-19-14(a) (Conflict between Standard 22(b) and Attorneys' Holding Lien)?

SUMMARY ANSWER:

An attorney's ethical obligation not to cause prejudice to his or her client is paramount over rights under the lien statute. Accordingly, an attorney may not to the prejudice of a client withhold the client's papers or properties upon withdrawal as security for unpaid fees.

OPINION:

Section 15-19-14(a) of the Georgia Code gives attorneys a lien for services rendered on their clients' papers and moneys in their possession. Specifically, that statute provides as follows:

Attorneys at law shall have a lien on all papers and money of their clients in their possession for services rendered to them. They may retain the papers until the claims are satisfied and may apply the money to the satisfaction of the claims.

[T]he lien attaches to the fruits of the labor and skill of the attorney, whether realized by judgment or decree, or by virtue of an award, or in any other way, so long as they are the results of his exertions. Brotherton v. Stone,197 Ga. 74, 74-75(3) (1943) quoting Middleton v. Westmoreland, 164 Ga. 324(1-b),329 (1927).

This definition suggests that anything the attorney prepared or attains for the client can be subject to the statutory lien if the client fails to pay the attorney's fee. By way of illustration and not limitation, the following items are examples of client papers to which a lien may attach: Anything which the client gives to the attorney to use or consider in the representation; Evidence, including demonstrative evidence, photographs, statements of witnesses, affidavits, deposition and hearing transcripts, exhibits and physical evidence; Expert evidence, including tests, opinions and reports; Agreements, contracts, instruments, notes and other documents used or to be used in transactions of any kind; Corporate records, minute books and records of organizations; Wills, trusts and other estate planning documents; and Legal memoranda and analyses.

The power to exercise this statutory right is not without limitation, however, in view of Standard 22(b) of the Standards of Conduct of the Rules of the State Bar of Georgia which mandates as follows:

A lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.
Due to the facial conflict between the grant of power in the lien statute and the limitation that Standard 22(b) imposes on that power, this opinion will address whether and when an attorney ethically may exercise his or her statutory lien rights upon withdrawal of representation.

As a general rule, an attorney cannot exercise statutory lien rights to the foreseeable prejudice of the client. Such ethical considerations maintain preeminence over legislative grants of power to attorneys. For example, First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 302 S.E. 2d 676 (1983), held inapplicable in cases of attorney malpractice the liability shield legislatively afforded by the professional corporate statute. The Supreme Court "has the authority and in fact the duty to regulate the law practice. . . ." Id. at 845, 302 S.E. 2d at 675. Although recognizing the right of the legislature to enact technical rules governing corporations, Zagoria cautioned that the legislature "cannot constitutionally cross the gulf separating the branches of government by imposing regulations upon the practice of law." Id. at 845-46, 302 S.E. 2d at 675.

Despite the existence of the lien statute, and because "[a] lawyer's relationship to his client is a very special one," id. at 846, 302 S.E. 2d at 675, the power of attorneys to exercise their rights under the lien statute must give way to their ethical obligation not to cause their clients prejudice. The majority of jurisdictions that have considered this question are in accord.

Standard 22(b) prohibits attorneys from holding their clients' papers if such an action foreseeably will cause them prejudice. The right to claim a lien in such papers under the statute will not protect the attorney in the case of prejudice to the client. Because it would be only in the rarest of circumstances that a client could be deprived of his or her files without eventually suffering some prejudice, the better practice is for attorneys to forgo retention of client papers in all but the clearest cases. This practice would avoid the necessity of speculating whether an

attorney's action might cause some future harm.

In accord with certain other jurisdictions, however, we limit the duty to turn over client files and papers to those for which the client has been or will be charged, that is, all work products created during "billable time."[1] For matters that are handled under arrangements other than hourly charges, any work product intended for use in the case would be included in those documents that should be returned to the client.[2] For example, because attorneys do not bill clients for the creation of time records and they would not be used in the case (absent a claim for fees), these records would probably be retained.

Despite the obligation to return original documents to their clients, attorneys are entitled to keep copies of their clients' files.[3] Absent a prior agreement that the client will be responsible for copying charges, however, the attorney bears the cost of copying.[4] Notably, even if such an agreement exists, in the event that the client refuses to pay, the attorney must advance the cost and then add the charge to the client's outstanding bill.[5]

We do not endorse the practice of some jurisdictions of allowing the attorney to require the client to post comparable security before releasing the papers.[6] To allow an attorney to require security in a bona fide fee dispute would be unfair to the client because it may require him or her to encumber property without justification. However, if the client offers to post security for the attorneys' fees and expenses pending resolution of a dispute, the attorney must release the papers. Similarly, we do not unequivocably approve the practice of some jurisdictions of holding summary hearings because this is likely to result in duplicative proceedings.[7]

Therefore, we conclude that an attorney's ethical obligation not to cause prejudice to his or her client is paramount over rights under the lien statute. Accordingly, an attorney may not to the prejudice of a client withhold the client's papers or properties upon withdrawal as security for unpaid fees.

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[1] See, e.g., San Francisco Comm. Opin. No. 1984-1.

[2] See also Michigan Opin. No. CI-926.

[3] See id. See also New Jersey Sup. Ct. Advis. Comm. Opin. No. 554 (May 23, 1985).

[4] See San Francisco Comm. Opin. No. 1984-1.

[5] See id.

[6] See Foor v. Huntington National Bank, No. 85AP-167, slip op. (Feb. 11, 1986); Michigan Op. No. CI-930 (May 4, 1983).

[7] See Foor v. Huntington National Bank, No. 85AP-167, slip op. (Feb. 11, 1986).

# Hypo No. 7

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

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

**(1) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;**

**(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;**

**(3) compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;**

**(4) fails to include the name of at least one lawyer responsible for its content; or**

**(5) contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:**

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

**(6) contains the language 'no fee unless you win or collect' or any similar phrase and fails to conspicuously present the following disclaimer:**

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

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

**(c) A lawyer retains ultimate responsibility to insure that all**

**communications concerning the lawyer or the lawyer's services comply with the Georgia Rules of Professional Conduct.**

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

Comment

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

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

Affirmative Disclosure

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

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

Accountability

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

**RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE**

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

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

**Comment**

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

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

**RULE 7.5 FIRM NAMES AND LETTERHEADS**

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

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

**(c) The name of a lawyer holding public office shall not be used in the**

**name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.**

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

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

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

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

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

**Comment**

[1] Firm names and letterheads are subject to the general requirement of all advertising that the communication must not be false, fraudulent, deceptive or misleading. Therefore, lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law. Nor may a firm engage in practice in Georgia under more than one name. For example, a firm practicing as A, B and C may not set up a separate office called "ABC Legal Clinic."

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

# Hypo No. 8

**RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT**

**(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.**

**(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:**

**(1) whose interests are materially adverse to that person; and**

**(2) about whom the lawyer had acquired information protected by Rules 1.6: Confidentiality and 1.9(c): Conflict of Interest: Former Client, that is material to the matter; unless the former client consents after consultation.**

**(c) 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:**

**(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6: Confidentiality of Information or Rule 3.3: Candor Towards the Tribunal would permit or require with respect to a client, or when the information has become generally known; or**

**(2) reveal information relating to the representation except as Rule 1.6: Confidentiality of Information or Rule 3.3: Candor Towards the Tribunal would permit or require with respect to a client.**

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

**Comment**

[1] The principles in Rule 1.7: Conflict of Interest determine whether, and to the extent the interests of a present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. A lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter may be one of degree. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a

changing of sides in the matter in question.

Lawyers Moving Between Firms

[3] Reserved.

[4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, one view is that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; yielding an inference that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; yielding an inference that such a lawyer in fact is privy to information about the clients actually served but not that of other clients.

[7] Application of paragraph (b) depends on a situation's particular facts.

[8] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6: Confidentiality and

1.9(b): Conflict of Interest: Former Client. Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b): Imputed Disqualification for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6: Confidentiality and 1.9: Conflict of Interest: Former Client.

Adverse Positions

[10] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a): Conflict of Interest: Former Client. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[12] Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[13] With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7: Conflict of Interest. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10: Imputed Disqualification.

# Hypo No. 9

**RULE 3.7 LAWYER AS WITNESS**

**(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:**

**(1) the testimony relates to an uncontested issue;**

**(2) the testimony relates to the nature and value of legal services rendered in the case; or**

**(3) disqualification of the lawyer would work substantial hardship on the client.**

**(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.**

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

**Comment**

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the

lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10: Imputed Disqualification has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7: Conflict of Interest: General Rule or Rule 1.9: Conflict of Interest: Former Client. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7: Conflict of Interest. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10: Imputed Disqualification disqualifies the firm also.

**RULE 4.3 DEALING WITH UNREPRESENTED PERSON**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding;

(b) give advice other than the advice to secure counsel; and

(c) initiate any contact with a potentially adverse party in a matter concerning personal injury or wrongful death or otherwise related to an accident or disaster involving the person to whom the contact is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the contact.

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

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.

[2] In some circumstances a lawyer must deal with a person who is unrepresented. In such an instance, a lawyer should not undertake to give advice to that person, other than the advice to obtain counsel.